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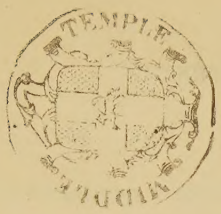

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MORTGAGE.

HOWARD *v.* HARRIS.

1683. 1 Vern. 190 (*a*).

Restrictions on Redemption of Mortgage Discountenanced in Equity. Mortgage cannot be made Irredeemable.

No agreement in a mortgage can make it irredeemable, either after the death of the mortgagor or upon failure of issue male of his body.

Mr. Howard settles a jointure on plaintiff, his lady, before marriage, which, proving defective, and not of value according to the marriage agreement, he therefore afterwards makes her an additional jointure of other lands; and afterwards, Mr. Howard, in 1673, makes a mortgage to the defendant Harris, for securing £1,000 with interest, in which (amongst others) part of the lands belonging to the additional jointure was comprised; and in the mortgage there is a special clause of redemption, *viz.*, that if Mr. Howard, *or the heirs males of his body,* should in June, 1686, pay the principal sum of £1,000 and £60 per annum interest in the meantime, then Mr. Howard, or *the heirs males of his body,* might re-enter; and Mr. Howard covenants *that no one but he or the heirs males of his body should be admitted to redeem this mortgage,* and likewise covenants to pay the £1,000 on the —— day of —— in the year 1686, and £60 per annum interest in the meantime, by half-yearly payments, from the date of the mortgage.

Mr. Howard dies without issue.

The plaintiff being a jointress of part of the mortgaged lands, and so entitled to redeem the whole, in 1677 exhibits her bill to redeem this mortgage.

The defendant, by answer, insists the lands are now become irredeemable.

This cause was heard before the Lord Chancellor Nottingham,

(*a*) *S. C.*, 1 Eq. Ca. Abr. 312, pl. 11, 2 Ch. Ca. 147.

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and now, upon the defendant's petition, came to be reheard before the Lord Keeper North (*b*), and was by them both decreed for the plaintiff.

For the plaintiff it was insisted,

1st. That restrictions of redemption in mortgages have been always discountenanced in this Court, and it would be a thing of mischievous consequence, should they prevail; for then it would become a common practice and a trade amongst the scriveners, so to fetter the mortgagors as to make it impracticable for them to redeem according to the precise letter of the agreement.

* * * * *

2ndly. It was argued, that it was a maxim here, that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed; and a mortgage can no more be irredeemable, than a distress for a rent-charge can be irrepleviable. The law itself will control that express agreement of the party; and by the same reason, equity will let a man loose from his agreement, and will, against his agreement, admit him to redeem a mortgage.

3rdly. It is another standing rule, that a mortgage cannot be a mortgage of one side only (*c*). And here it is plain, Mr. Harris may make it a mortgage; for he has a covenant for the repayment of his mortgage-money.

For the defendant it was insisted, that this express agreement of the parties ought to be pursued.

Then it was insisted, that this additional jointure was voluntary, and the plaintiff ought not to take the estate out of the hands of a purchaser. But it was answered, he was a purchaser for no more than his mortgage-money; and one that comes in by a voluntary conveyance may redeem a mortgage.

* * * * *

Lord Keeper North, after long debate, decreed the mortgage should be redeemed; the rather, for that the defendant had a covenant for repayment of his mortgage-moneys; but said, if the case had been, that a man had borrowed money of his

(*b*) Afterwards Earl of Guildford. (*c*) *Exton* v. *Greaves*, 1 Vern. 138.

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brother, and had agreed to make him a mortgage, and that, if he had no issue male, his brother should have the land, such an agreement made out by proof might well be decreed in equity (*d*).

But then, for the defendant, the mortgagee, it was insisted, that this mortgage having been made ten years since, and of a reversion, where £7 per annum rent was only reserved; in this case, the defendant ought to have interest upon interest, otherwise he would be a great loser in this case.

* * * * *

It was decreed, that, after a deduction of the yearly rents of the mortgaged premises out of the £60 a year, payable for the interest, the defendant should be allowed interest for the residue of the said £60 a year, for which the defendant might have sued at law and recovered damages.

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1. The Right to Redeem.

(a) **Generally.** (b) **Once a Mortgage, always a Mortgage.** (c) **Clog on the Equity of Redemption.** (d) **Collateral Advantages to Mortgagee.**

(a) Generally.

The ancient form of mortgage was by conveyance to the mortgagee defeasible on condition subsequent, the condition being

(*d*) That is to say, that it might be supported as a family arrangement. See *Stapilton* v. *S.*, and note, vol. i.

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the repayment by the mortgagor of the money lent on a certain day at a certain place. On the failure of the mortgagor to repay in strict accordance with the condition, the mortgagee's estate became absolute, and the mortgagor's interest was extinguished.

This form of mortgage was superseded by the form which up to the time when the Law of Property Act, 1925, came into operation, had been for many generations in use, the essential elements of such form being : (α) a conveyance of the legal estate in the property mortgaged, (β) a covenant for payment of the sum advanced on a day named with interest thereon, and (γ) a proviso for reconveyance of the legal estate on repayment being made in accordance with the covenant.

Under this form the mortgagor had a legal right to redeem on payment of the money on the date named, but if he failed his interest at law in the mortgaged property was extinguished. The Courts of equity, however, regarded a mortgage as essentially a security for the payment of a debt or the discharge of some other obligation (*e*); and accordingly, disregarding the legal form, gave the mortgagor the right to redeem, though at law the estate of the mortgagee had become absolute (*f*).

The Law of Property Act, 1925, has made very considerable alterations as to the mode in which mortgages are created. Section 85, sub-section 1, provides that a mortgage of an estate in fee-simple shall only be capable of being effected at law *either* by a demise for a term of years, subject to a proviso for cesser on redemption, *or* by a charge by deed expressed to be by way of legal mortgage. By sub-section 2 any purported conveyance of an estate in fee-simple by way of mortgage made after the commencement of the Act will operate only as a demise for a term of years, without impeachment for waste, but subject to cesser on redemption, a first mortgagee taking a term of 3,000 years from the date of the mortgage, and a subsequent mortgagee taking a term one day longer than the term vested in the mortgagee whose security ranks immediately before that of such subsequent mortgagee. Section 86, sub-section 1, provides that a mortgage of a term of years shall only be capable of being effected at law either by a sub-demise or by a

(*e*) *Per* Lindley, M.R., *Santley* v. *Wilde*, [1899] 2 Ch. 474.

(*f*) For early instances, see *Langford* v. *Barnard*, Tothill, 134; *Emmanuel College* v. *Evans*, 1 Ch. R. 18.

charge by deed expressed to be by way of legal mortgage. By section 87, sub-section 1, where a mortgage is created by a charge expressed to be by way of legal mortgage, the mortgagee is to have the same powers and remedies as if (a) where the mortgage is of an estate in fee-simple, a mortgage term of 3,000 years had been created, and (b) where the mortgage is of a term of years, a sub-term less by one day than the term vested in the mortgagee had been created.

Parts 7 and 8 of the First Schedule to the Law of Property Act, 1925, contain provisions relating to mortgages which were in existence at the date when the Act came into operation. Land which at that date was vested in a first mortgagee for an estate in fee-simple in possession (legal or equitable) is made to vest in such mortgagee for a term of 3,000 years, without impeachment of waste, but subject to a provision for cesser corresponding to the right of redemption subsisting, and land which at the date when the Act came into operation was vested in a subsequent mortgagee in fee-simple in possession is to vest in such mortgagee for a term one day longer than the term vested in the mortgagee ranking immediately before him, but subject to the term vested in the prior mortgagee and subject to a provision for cesser. The estate in fee-simple which at the commencement of the Act was vested in the mortgagee is to vest in the mortgagor or tenant for life, statutory owner or other person, who if the money owing on any mortgages had been discharged would have been entitled to have the fee-simple conveyed to him, but subject to any mortgage term created by Part 7 of the First Schedule or otherwise and to the money thereby secured. Part 8 of the Schedule contains corresponding provisions for the conversion of leasehold mortgages in existence at the commencement of the Act into mortgages by sub-demise. The land is to vest in the first or only mortgagee by a term less by ten days than the term assigned by the mortgage; and in the case of a subsequent mortgagee the land is to vest in him for one day longer than the mortgage immediately in front of him.

The right of redemption being established contrary to the agreement as expressed in the mortgage (in the old form), it became necessary to guard against the restriction or limitation of that right by any arrangement between the parties made *at the date of the mortgage*. The attitude taken up by the Courts of equity—which

is not affected by the alterations in the form of mortgages made by the Law of Property Act, 1925—was thus expressed by Lord Macnaghten in *Noakes & Co.* v. *Rice* (*g*): "Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security." The main principle thus stated by Lord Macnaghten is expressed compendiously in the maxim, "Once a mortgage, always a mortgage"; with the further "corollary" as stated by Lord Davey (*h*), namely: "Once a mortgage, always a mortgage, and *nothing but a mortgage*." This corollary is more commonly expressed by the saying, "There must be no clog upon the equity of redemption." But the restriction upon the freedom of contract between an intending mortgagor and mortgagee, referred to in these passages, has been considerably qualified by later authorities (*i*).

During the period that the fundamental principles relating to the equity of redemption were enunciated, statutes against usury were in force fixing maximum rates of interest upon loans. The Court of Chancery had, therefore, not only to preserve the full right of the mortgagor to redeem, but also to prevent the evasion of the usury laws by collateral agreements which would make the total remuneration of the mortgagee exceed the legal rate of interest.

The repeal of the usury laws has led to a relaxation of these rules, and a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee which would render it void or voidable according to the general principles of equity (*k*).

(*g*) [1902] A. C. 24, at p. 30.

(*h*) *Noakes & Co.* v. *Rice*, *supra*, at p. 33; and see *per* Lord Davey in *Bradley* v. *Carritt*, [1903] A. C. 266.

(*i*) See *infra*, pp. 12—16.

(*k*) *Bradley* v. *Carritt*, [1903] A. C. 279; *Kreglinger* v. *New Patagonia, etc., Co.*, [1914] A. C. 28. Cf. *Re Cuban Land Co., Ltd.*, [1921] 2 Ch. 147.

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(b) Once a Mortgage, always a Mortgage.

It must, in the first place be observed, that the principle so expressed does not affect the validity of an agreement or arrangement made between the mortgagor and the mortgagee *subsequently to, and independently of*, the mortgage, though that agreement may modify, limit, or extinguish the right of redemption. There is no rule of equity which prevents a mortgagee from purchasing or accepting a release of the equity of redemption from the mortgagor (*l*), though such an agreement may be voidable if oppressive or unfair. In *Reeve* v. *Lisle* (*m*) a separate independent agreement made subsequently to a mortgage of a ship gave the mortgagee the option, exercisable within five years, of entering into partnership with the mortgagor on certain terms, and provided that on the option being exercised the mortgagee should release the mortgagor from liability to pay the sum lent, and should transfer the ship to the partnership. It was held that the option was valid and enforceable. On the other hand, the operation of the principle is well illustrated in *Samuel* v. *Jarrah, etc., Co.* (*n*), where a company borrowed on the security of its debenture stock, and in the mortgage itself gave the mortgagee the option, exercisable within twelve months, of purchasing the stock at 40 per cent. The mortgagee sought to exercise the option during the continuance of the loan, but it was held that the option was void.

The chief difficulty in applying the general principle as above stated in Lord Macnaghten's words (*o*) lies in determining the true nature of the transaction between the parties; when once the Court is satisfied that the transaction was in essence a mortgage, then its form is immaterial, and the principle is strictly applied (*p*). The principal case shows that the right to redeem cannot be limited to the mortgagor and certain defined persons representing him, *e.g.*, the heirs male of his body, thereby attempting to cut down the number of persons entitled to redeem. The right, again,

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(*l*) *Ensworth* v. *Griffiths*, 5 Bro. P. C. 184; 15 Vin. Abr. 468; *Gossip* v. *Wright*, 32 L. J. Ch. 648, affirmed in House of Lords, 17 W. R. 1137; cf. *Vernon* v. *Bethell*, 2 Eden, 110; and see *Knight* v. *Marjoribanks*, 2 Mac. & G. 10.

(*m*) [1902] 1 Ch. 53, 70; [1902] A. C. 461.

(*n*) [1904] A. C. 323.

(*o*) *Supra*, p. 6.

(*p*) *Salt* v. *Marquis of Northampton*, [1892] A. C. 1; and see *Goodman* v. *Grierson*, 2 Ball. & B. 274; 12 R. R. 82 (transaction held to be conditional sale).

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cannot be limited to the life of the mortgagor (*q*) or some other time.

So in *Salt* v. *Northampton* (*r*) a transaction between B, a tenant for life in remainder, and certain lenders of moneys, contained an agreement whereby certain policies to be effected upon the life of B against the life of A, the tenant for life in possession, were, in the event of B predeceasing A, to belong to the lenders. B predeceased A. The Court, holding that the transaction was in reality a mortgage, decided that the agreement, which in effect limited the right of redemption to the life of B, was invalid, and that B's representatives were entitled to redeem.

An agreement, at the date of the mortgage, to sell to the mortgagee at a fixed price if the mortgage money is not paid, is invalid (*s*), as is also an option to purchase taken by the mortgagee in the mortgage deed (*t*).

A mortgage deed may contain a provision that the property mortgaged shall not be redeemed for a fixed period of time, such as five or seven years (*u*). It is not clear how far this exception extends. It was recently held inoperative to prevent the mortgagor from redeeming where he was precluded from redeeming for twenty-eight years from the date of the mortgage, but no restriction of time was placed on the mortgagee's right to require payment (*v*).

A security can only be redeemed where the party redeeming is able to do the thing intended to be secured, and so where the object of the mortgage is to secure the performance of some obligation of indefinite duration, such as the payment of an annuity for life, or " is to indemnify against contingent charges or for any other object not capable of immediate pecuniary valuation," redemption is impossible (*x*).

(c) Clog on the Equity of Redemption.

In the last edition of this work it is stated that " No covenant or provision in a contract of mortgage, which imposes any liability

(*q*) *Spurgeon* v. *Collier*, 1 Eden. 55; *Manlove* v. *Bale*, 2 Vern. 84; *Newcomb* v *Bonham*, 1 Vern. 7, 214. (*r*) *Supra.*

(*s*) *Re Edward's Estate*, 11 Ir. Ch. R. 367; and see *Price* v. *Perrie*, Freem. Ch. R. 258; *Willett* v. *Winnell*, 1 Vern. 488; *Bowen* v. *Edwards*, 1 Ch. R. 222.

(*t*) *Samuel* v. *Jarrah, etc., Co., supra.*

(*u*) *Per* Jessel, M.R., *Teevan* v. *Smith*, 20 Ch. D., at p. 729, approved by Romer, J., in *Biggs* v. *Hoddinott*, [1898] 2 Ch., at p. 311. See also *per* Lord Macnaghten in *Bradley* v. *Carritt*, [1903] A. C., at p. 259.

(*v*) *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620.

(*x*) See *per* Lord Cranworth, *Fleming* v. *Self*, 3 De G. M. & G., at p. 1024. Cf. *Santley* v. *Wilde*, [1899] 2 Ch. 474.

upon the mortgagor, either by limiting the user of the mortgaged premises, or by rendering him personally liable in damages, remains operative so that any liability under it can arise by reason of any act or omission of the mortgagor occurring after payment of the principal moneys due under the mortgage, together with interest, costs, and any bonus which has been properly stipulated for and has become payable. It is immaterial whether the fetter or clog operates directly by preventing the mortgagor after redemption from dealing freely with the subject-matter of the mortgage, or indirectly by exposing him after redemption to an action for damages for breach of some covenant."

This statement appears to express the result of the decisions in *Noakes & Co.* v. *Rice* (*y*) and *Bradley* v. *Carritt* (*z*), but must be taken as considerably qualified by more recent decisions. In *Noakes & Co.* v. *Rice* a mortgage of a lease of a public-house contained a covenant purporting to bind the mortgagor, and all those deriving title under him during the continuance of the term, from using or selling on the mortgaged premises any malt liquors save such as should be purchased from the mortgagees. It was held that the mortgagor on repayment of the loan was entitled to a reconveyance of the mortgaged property free from any liability under the covenant (*a*).

Here the covenant was regarded by the Courts below as "an equity attached to the property" within the principle of *Tulk* v. *Moxhay* (*b*), and accordingly invalid, since the property itself would be bound after redemption. Lord Macnaghten (*c*) and Lord Davey (*d*), whilst holding the covenant unenforceable, expressly dissented from the view that the covenant in question could be operative under the principle of *Tulk* v. *Moxhay* (*b*).

In *Bradley* v. *Carritt* (*z*), X, a shareholder in a tea company, mortgaged his shares to a tea broker. The mortgage contained a covenant which (*inter alia*) provided, in the event of the company's teas being sold otherwise than through Y, that X should pay Y

(*y*) [1902] A. C. 24.

(*z*) [1903] A. C. 253.

(*a*) Cf. *White* v. *City of London Brewery Co.*, 39 Ch. D. 559; 42 Ch. D. 237, for the position of brewer mortgagees in possession letting the mortgaged premises with a "tie" upon their lessee.

(*b*) 2 Ph. 774; cf. *John Brothers Abergarw Brewery Co.* v. *Holmes*, [1900] 1 Ch. 188.

(*c*) *Noakes & Co.* v. *Rice*, [1902] A. C., at p. 32.

(*d*) *Ibid.*, at p. 35.

the amount of the commission he would have earned if the teas had been sold through him. X paid off the mortgage; the company afterwards ceased to sell through Y, who thereupon brought an action against X. It was held by the House of Lords (Lords Shand and Lindley dissenting) that the agreement was not operative after redemption, and that the action could not be maintained (*e*).

If a covenant similar to the covenant in question in *Noakes & Co.* v. *Rice* (*f*) is confined in its operations *to the duration of the security*, its validity is unimpeachable (*g*).

In *Santley* v. *Wilde* (*h*), W., in 1895, agreed to advance £2,000 to S. to enable her to obtain the unexpired residue (nine years) of the lease of a theatre, upon the terms that S. should execute a legal mortgage of the lease, when obtained, containing a covenant for repayment of the loan by instalments with interest, and a covenant for payment by S. of one-third of the net profit rental of the theatre. The lease was obtained and a mortgage executed which, *inter alia*, contained a proviso making the mortgaged property redeemable on payment of the £2,000 and interest, and also a covenant by S. to pay W. one-third of the profit rental during the whole of the residue of the term, although all principal moneys and interest had been paid. In 1897, after W. had required payment of the mortgage moneys, S. tendered the balance then due and demanded a reconveyance. The Court of Appeal, reversing Byrne, J. (*i*), held the covenant valid and S. bound thereby for the residue of the term.

In *Bradley* v. *Carritt* (*i*), Lord Davey stated the principle here discussed as follows :—"The principle is that on payment of principal, interest, and costs, with anything in the nature of a bonus which has been properly stipulated for, the mortgage contract comes to an end, and the mortgagor is entitled to get his property back, *unaltered in character, condition, and incidents, and is henceforth relieved from the burden imposed upon him by the contract.*" And in the same case Lord Macnaghten used language

(*e*) And see *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620; *Hopkinson* v. *Mortimer*, [1917] 1 Ch. 646.
(*f*) *Supra.*
(*g*) *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307.
(*h*) [1899] 2 Ch. 474.
(*i*) [1903] A. C. p. 253.

to the like effect. Lord Lindley, on the other hand, said (*k*), "When the usury laws were in force and every device for evading them had to be defeated, the above language ('once a mortgage, always a mortgage and nothing but a mortgage') was convenient and as free from objection as most concise statements are. . . . But now that the usury laws are abolished such language is much too wide. . . . I cannot bring myself to believe that it is part of the law that mortgagors and mortgagees cannot make what bargains they like with each other, so long as such bargains are not inconsistent with the right of the mortgagor to redeem the property by discharging the debt or obligation to secure which the mortgage was effected."

The words of Lord Davey set out above in italics are not consistent with the more recent authorities. In both *Noakes & Co.* v. *Rice* (*l*) and *Bradley* v. *Carritt* (*l*), Lords Macnaghten and Davey expressed disapproval of the decision in *Santley* v. *Wilde* (*l*); but the statement of the law made by Lindley, L.J., in *Santley* v. *Wilde* appears to have met with general approval. "A mortgage," said the Lord Justice, "is a conveyance or assignment as security for the payment of a debt or the discharge of some other obligation . . . and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. A provision inserted to prevent redemption . . . is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this that 'once a mortgage always a mortgage,' but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation the payment or performance of which is to be secured is a clog or fetter within the rule." This passage was cited by Lord Halsbury, L.C., in *Noakes & Co.* v. *Rice* (*m*). "I do not know," said Lord Halsbury, "that there has been a more authoritative exposition of the rule which arises now than what my noble and learned friend there laid down."

The principle in question arose again in the important case of *Krelinger* v. *New Patagonia, etc., Co.* (*n*). The facts were these: By an agreement made in 1910, the plaintiffs agreed to lend to the

(*k*) Page 278.
(*l*) *Supra.*
(*m*) [1902] A. C. p. 28.
(*n*) [1914] A. C. 25; *Re Cuban Land Co.*, [1921] 2 Ch. 147; and see *De Beers Consolidated Mines* v. *B. S. A. Co.*, [1912] A. C. 52.

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defendant company £10,000 at 6 per cent. The loan, which was secured by a floating charge on the defendants' undertaking, was not to be called in (if interest was duly paid) until September, 1915, but the defendants might pay off at any time on giving one month's notice. The agreement provided that for five years the defendants should not sell sheep-skins to any person other than the plaintiffs, so long as the plaintiffs were willing to buy at the best price offered by any other person and that the defendants should pay to the plaintiffs a commission on all sheep-skins sold by the defendants to any other person. The loan was paid off in January, 1913, but the plaintiffs claimed, notwithstanding such payment off, to exercise their option of pre-emption in reference to the sheep-skins. It was held by the House of Lords (Viscount Haldane, L.C., Earl Halsbury, Lords Atkinson, Mersey, and Parker of Waddington) that the option was not part of the mortgage transaction or repugnant to the right to redeem, and that the plaintiffs were entitled to an injunction to restrain the defendants from selling sheep-skins to any person other than the plaintiffs in breach of the agreement. The House of Lords laid it down that "there is now no rule in equity that a mortgagee cannot stipulate in the mortgage deed for a collateral advantage to endure beyond redemption, provided that it is not (1) unfair or unconscionable, *or* (2) in the nature of a penalty clogging the equity of redemption, *or* (3) inconsistent with or repugnant to the contractual or equitable right to redeem (*nn*); and they expressed a preference for the *dicta* of Lord Lindley in *Bradley* v. *Carritt* (*o*) over the *dicta* in the same case of Lords Macnaghten and Davey.

The English equitable rule against clogging the equity of redemption of a mortgage applies to an English contract for an issue of mortgage debentures to secure a loan, and will be enforced by the English Courts against a contracting party in the jurisdiction, although the floating security to be created by the debentures comprises foreign land, situate in a state in which the clog doctrine is possibly not recognised (*p*). On appeal to the House of Lords, however, the decision of the Court of Appeal was reversed on the facts; and the question whether the doctrine of "the clog" applies to the case of a floating charge, was left open (*q*).

(*nn*) *Per* Lord Parker, [1914] A. C. p. 61. (*o*) [1903] A. C. 266.

(*p*) *British S. Africa Co.* v. *De Beers Consolidated, etc.*, [1910] 1 Ch. 354: [1910] 2 Ch. 502.

(*q*) [1912] A. C. 52.

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(d) Collateral Advantages to Mortgagee.

In *Jennings* v. *Ward* (*r*), W. lent N. £10,000 at 6 per cent. on mortgage of land. By a separate deed executed at the same time as the mortgage N. covenanted, if W. should so require, to convey ground rents to him to the value of £16,000 at the rate of twenty years' purchase. On N.'s representatives seeking to redeem, W. insisted on the covenant. Sir J. Trevor, M.R., decreed redemption on the payment of principal, interest and costs, and set the covenant aside as unconscionable. The Master of the Rolls is reported to have said: "A man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by agreement." This statement (not necessary for the decision of the case) became current in text-books, and was acted upon in certain decisions, but it clearly cannot be regarded as law at the present time (*s*).

The question was exhaustively discussed in *Biggs* v. *Hoddinott* (*t*), and the Court of Appeal, affirming the judgment of Romer, J., held that the general rule laid down by the Master of the Rolls in *Jennings* v. *Ward* was not, and never had been law. As stated by Viscount Haldane, L.C., in *Kreglinger* v. *New Patagonia, etc., Co.* (*u*), "It is no longer true that, as was said in *Jennings* v. *Ward*, 'a man shall not have interest for his money and a collateral advantage besides for the loan of it.' Unless such a bargain is unconscionable, it is now good" (*x*).

Interest.—An agreement stipulating for a higher rate of interest on the mortgagee's making default in punctual payment of the rate agreed upon is invalid (*y*) as being *nomine pœnæ*, though an agreement reducing the rate on punctual payment is good. It was always lawful by a subsequent agreement to agree that interest then accrued due should be converted into principal (*z*). It was

(*r*) 2 Vern. 520.
(*s*) See [1914] A. C. p. 38.
(*t*) [1898] 2 Ch. 307.
(*u*) [1914] A. C. p. 38.
(*x*) And see *Re Cuban Land, etc., Co.*, [1921] 2 Ch. 147.
(*y*) *Holles* v. *Wyse*, 2 Vern. 289; *Strode* v. *Parker*, 2 Vern. 316; *Wallingford* v. *Mutual Society*, 5 A. C. 685, at p. 702; and see notes to *Peachey* v. *Somerset* and *Sloman* v. *Walter*, *infra*. See as to validity of a *subsequent* independent agreement increasing the rate of interest, but not charging the increased interest on the land, *Maxwell* v. *Tipping*, [1903] 1 Ir. R. 498.
(*z*) *Ossulston* v. *Yarmouth*, 2 Salk. 449; *Chambers* v. *Goldwin*, 9 V. 271; *Thornhill* v. *Evans*, 2 Atk. 330.

also held lawful to have a mortgage to secure an account which, according to the usual custom of trade, was periodically settled on the footing of compound interest (*a*). But while the usury laws were in force the older cases indicate that stipulations for compound interest were illegal as tending to usury (*b*). Since the Act 17 & 18 Vict. c. 90, stipulations for compound interest are valid (*c*), but such a stipulation will be invalid if oppressive in the circumstances of the case (*d*).

Fines secured by a covenant in a building society mortgage form part of the principal in taking the account in a foreclosure action, and are payable with interest (*e*).

Bonus.—In certain modern cases it has been held that a contract to pay a bonus, or larger sum than that advanced, was under the circumstances valid. Thus, in *Mainland* v. *Upjohn* (*f*), it was decided that where advances have been made by a mortgagee upon security of a speculative character, such as a building estate, the Court will, in taking the account in a redemption action, allow to the mortgagee sums actually deducted by him for commission or bonus at the time of making the advances, provided the deductions were made as part of the mortgage contract, under a bargain deliberately entered into by the parties while on equal terms and knowing perfectly well what they were doing, and without any improper pressure, unfair dealing, or undue influence on the part of the mortgagee. So in an earlier case (also subsequent to the repeal of the usury laws), it was held that an agreement was good for payment of £1,000 in consideration of an advance of £700 (*g*). A mortgage to secure the repayment of the principal moneys by instalments, on certain specified dates, contained a

(*a*) *Rufford* v. *Bishop*, 5 Russ. 346; *Crosskill* v. *Bower*, 32 B. 86.

(*b*) *Chambers* v. *Goldwin*, 9 V. 271; and see *Ossulston* v. *Yarmouth*, *supra*; *Sir Thos. Meer's Case*, cited For. 40; *Broadway* v. *Morecraft*, Mosely, 247; *Blackburn* v. *Warwick*, 2 Y. & C. Ex. 92, *per* Alderson, B., at p. 99; *Moss* v. *Bainbridge*, 6 De G. M. & G. 292, at pp. 310, 311; Fisher on Mortgages (1910 ed.), p. 919; Davidson (1881 ed.), vol. ii, pt. 2, p. 360; Coote (9th ed.), pp. 1186 *et seq.*

(*c*) *Clarkson* v. *Henderson*, 14 Ch. D. 348; *Mainland* v. *Upjohn*, 41 Ch. D. 126; and see *Re Morris*, [1921] 1 Ch. 172; [1922] 1 Ch. 126.

(*d*) *Eyre* v. *Hughes*, 2 Ch. D. 148: mortgage to solicitor; stipulation for commission and compound interest.

(*e*) *Provident Permanent Building Society* v. *Greenhill*, 9 Ch. D. 122; and see *Blackford* v. *Davis*, L. R. 4 Ch. 304.

(*f*) 41 Ch. D. 126, approved in *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307; and see *Kreglinger* v. *New Patagonia, etc., Co.*, [1914] A. C. 25; *Re Cuban Land, etc., Co.*, [1921] 2 Ch. 147.

(*g*) *Potter* v. *Edwards*, 26 L. J. Ch. 468; 5 W. R. 407.

provision that if the borrower did not pay each instalment punctually he would pay 1 per cent. "commission" on what he ought to have paid until he did pay. It was held that this was not a provision for a penalty, and that it was valid (*h*).

Commission, etc.—In taking accounts between a mortgagee and a mortgagor, the mortgagee in possession is not under the general law of mortgage entitled to any allowance for *personal trouble* in receiving rents, or in managing or selling the property, or for any labour of his own in connection with the mortgage transaction (*i*). To this general rule a statutory exception in favour of solicitor mortgagees has been created by the Mortgagees' Legal Costs Act, 1895 (*k*).

Before the repeal of the usury laws it was clear that this general rule could not be modified in favour of the mortgagee by an express agreement contained in the mortgage contract. Thus in 1804 Lord Eldon, in *Chambers* v. *Goldwin* (*l*), says: "A mortgagee cannot stipulate to be receiver of the rents and profits with a commission; this Court considers it as tending to usury and oppression and a *collateral advantage*." The rule was greatly relaxed in mortgages of West Indian estates; mortgagees were at first allowed to stipulate in those mortgages for the consignment of the produce of those estates to themselves to be sold for a commission, and subsequently to charge for expenses of management when in possession (*m*).

Whether a fair and reasonable provision modifying the operation of the general rule disallowing remuneration for the mortgagee's personal labour and trouble is now invalid may well be doubted. The earlier view is illustrated by *Barrett* v. *Hartley* (*n*), in which case Stuart, V.-C., disallowed a bonus claimed for expenses of

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(*h*) *General Credit, etc., Co.* v. *Glegg*, 22 Ch. D. 549.

(*i*) See, *e.g.*, *Matthison* v. *Clarke*, 3 Drew. 3 (commission on sale); *Furber* v. *Cobb*, 18 Q. B. D. 494, *per* Fry, L.J., at p. 509 (commission on sale); and see *Re Wallis*, 25 Q. B. D. 176; *Re Doody*, [1893] 1 Ch. 129; *Eyre* v. *Wynn-Mackenzie*, [1894] 1 Ch. 218; which were cases on solicitor mortgagees' profit costs before the Mortgagees' Legal Costs Act, 1895, and *Cheese* v. *Keen*, [1908] 1 Ch. 245.

(*k*) See note "Mortgages to Solicitors," *infra*, p. 16.

(*l*) 9 V., at pp. 271, 272; see *Bonithon* v. *Hockmore*, 1 Vern. 316; *French* v. *Baron*, 2 Atk. 120; *Comyns* v. *C.*, Ir. R. 5 Eq. 583; *Scott* v. *Brest*, 2 T. R. 238.

(*m*) See the cases on West Indian mortgages reviewed by Brougham, C., in *Leeth* v. *Irvine*, 1 My. & K. 277.

(*n*) 2 Eq. 789.

management by a mortgagee under an alleged agreement (*o*). The greater freedom now allowed in arrangements between an intended mortgagor and an intended mortgagee is shown by such cases as *Briggs* v. *Hoddinott* (*p*), *Kreglinger* v. *New Patagonia, etc., Co.* (*q*); *Re Cuban Land, etc., Co.* (*r*).

2. Mortgages to Solicitors, and Law of Property Act, 1925, s. 69.

Mortgages to solicitors by their clients are subject to certain special rules in equity. A solicitor taking a security or conveyance from his own client cannot rely on any statement in the instrument as to the amount advanced or paid by him to the client, but must prove it by independent evidence (*s*). If the transaction be impeached on the ground of unfairness, then the burden is thrown upon the solicitor of proving that he took no advantage of his position (*t*). If the mortgage contains any special or unusual provisions, the solicitor must fully explain to the mortgagor his position under the instrument. In *Cockburn* v. *Edwards* (*u*) (a solicitor-mortgagee case), Jessel, M.R., said : "If a man acts in a fiduciary position towards another in a matter in which he himself has a personal interest, he is liable to be called upon to account as to the discharge of his fiduciary duties. The defendant, therefore, in the present case, is bound to show that he explained to his client, the plaintiff, the nature of the power of sale, supposing it to be in an unusual form. He was bound to take care that his client had the same protection as if he had employed an independent solicitor. A solicitor who lends money on mortgage to his client on any but strictly usual terms would be wise if he always required the intervention of another solicitor (*x*). If that is not done, he must preserve evidence that the circumstances were explained to the client." In this case the power of sale was absolute, the usual

(*o*) See also *Broad* v. *Selfe*, 11 W. R. 1036; *James* v. *Kerr*, 40 Ch. D. 449, in which case there were special considerations, the case being that of a mortgage transaction between a solicitor and an impoverished client.

(*p*) [1898] 2 Ch. 307.

(*q*) [1914] A. C. 25.

(*r*) [1921] 2 Ch. 147.

(*s*) *Per* Stirling, L.J., in *Bateman* v. *Hunt*, [1904] 2 K. B., at pp. 538, 539.

(*t*) See the notes to *Huguenin* v. *Baseley*, vol. i.

(*u*) 18 Ch. D., at p. 455; and see *Cradock* v. *Rogers*, [1885] W. N. 134; 53 L. J. Ch. 968; 51 L. T. 191; *Lyddon* v. *Moss*, 5 Jur. (N.S.) 637; 7 W. R. 433; *Cheese* v. *Keen*, [1908] 1 Ch. 245; cf. *Pooley's Trustee* v. *Whetham*, 33 Ch. D. 111.

(*x*) As to the duties of such separate solicitors, see *Powell* v. *P.*, [1900] 1 Ch. 243; *Wright* v. *Carter*, [1903] 1 Ch. 27.

qualifying clause being absent, and it was held by the Court of Appeal affirming Fry, J., that the omission of this clause was a breach of duty, and the solicitor-mortgagee not being able to prove that he had explained it to the mortgagor, was held liable in damages for an improper sale.

Costs of Solicitor-Mortgagee.—As to a solicitor-mortgagee charging costs. First, under express agreement in the mortgage deed.

In *Jones* v. *Linton* (*y*) (decided before the Mortgagees' Legal Costs Act, 1895 (*z*), but after the Attorneys and Solicitors Act, 1870) Bacon, V.-C., allowed an agreement for a solicitor-mortgagee to take profit costs, saying that it was a hard bargain, but proved to have been explained to the mortgagor. In *Re Roberts* (*a*), Kay, J., held that an agreement to charge for business done did not authorise the solicitor to charge for the preparation of the mortgage deed by himself, on the ground that having done the work himself there were no costs existing to be charged. In *Field* v. *Hopkins* (*b*), Kay, J., held that a provision that a solicitor-mortgagee should charge profit costs was void, as obnoxious to the rule against collateral advantages clogging the equity of redemption. The decision was affirmed by the Court of Appeal, but only on the ground that the clause in question did not cover the costs claimed. *Field* v. *Hopkins* was approved by Kekewich, J., in *Eyre* v. *Wynn-Mackenzie* (*c*), which was affirmed by the Court of Appeal on a different point, *viz.*, that a provision for payment "of all moneys to be advanced or become owing" was not wide enough to cover moneys to become owing for costs.

Apart from special agreement as to costs, it has been held that a solicitor-mortgagee could not claim profit costs (*d*). The decision did not proceed on the ground of unfairness, as the solicitor-mortgagee's partner might take the whole of the profit costs, if he was to receive them exclusively, or in the absence of any agreement to that effect with his partner might take such share as was proportionate to his share in the business (*e*).

(*y*) 44 L. T. 601; and see *Re Donaldson*, 27 Ch. D. 544.

(*z*) 58 & 59 Vict. c. 25.

(*a*) 43 Ch. D. 52; approved by Lopes, L.J., in *Re Wallis*, 25 Q. B. D., at p. 182.

(*b*) 44 Ch. D. 524.

(*c*) [1894] 1 Ch. 218; [1896] 1 Ch. 135.

(*d*) See *Re Wallis*, 25 Q. B. D. 176.

(*e*) See *Re Doody*, [1893] 1 Ch. 129; *Re Rollit & Sons*, [1893] W. N. 195;

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The decisions or *dicta* of Kay, J., and Kekewich, J., in *Field* v. *Hopkins* and *Eyre* v. *Wynn-Mackenzie*, *supra*, may be material hereafter in case of any right reserved by a solicitor-mortgagee to charge costs other than "usual professional charges and remuneration," but questions as to such "charges and remuneration" are set at rest by the Mortgagees' Legal Costs Act, 1895 (*f*), which authorises a solicitor-mortgagee to charge "usual professional charges and remuneration with reference to the mortgage," and to charge these against the security, and applies to mortgages and business before the Act. The Act is, therefore, retrospective, but an attempt on account of it to get leave to appeal from a judgment made before it came into operation was unsuccessful (*g*).

It was held in cases not within the Act that the exception established as to a solicitor-trustee in *Cradock* v. *Piper* (*h*), that he might charge profit costs for acting as solicitor in actual litigation, did not apply to a solicitor-mortgagee (*i*).

Upon the question what costs a solicitor-mortgagee is entitled to charge against a mortgagor in the absence of special agreement, and subject to the alterations made by the Mortgagees' Legal Costs Act, 1895, see *Re Doody* (*k*).

Effect of receipt clause in deed or indorsed.—Formerly the fact that a solicitor was in possession of a mortgage deed executed by the mortgagor, with signed receipt in the body thereof or indorsed, did not authorise the solicitor to receive the money (*l*); an express authority to pay to the solicitor was necessary. As against third parties, however, the person has been held bound who has executed, and handed a deed so executed to solicitors, and enabled them thereby to mortgage the property fraudulently to persons without notice (*m*).

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and *Clack* v. *Carlon*, 30 L. J. Ch. 639, 7 Jur. (N.S.) 441; cf. *Re Harman & Sons*, [1912] W. N. 111.

(*f*) 58 & 59 Vict. c. 25.

(*g*) *Eyre* v. *Wynn-Mackenzie*, [1896] 1 Ch. 135; cf. *Day* v. *Kelland*, [1900] 2 Ch. 745.

(*h*) 1 Mac. & G. 664.

(*i*) *Sclater* v. *Cottam*, 5 W. R. 744; 3 Jur. (N.S.) 630; *Re Roberts*, 43 Ch. D 52; *Re Wallis*, *supra*; *Stone* v. *Lickorish*, [1891] 2 Ch. 363.

(*k*) [1893] 1 Ch. 129.

(*l*) *Viney* v. *Chaplin*, 2 De G. & J. 468; *Ex p. Swinbanks*, 11 Ch. D. 525; and see *Withington* v. *Tate*, L. R. 4 Ch. 288.

(*m*) *Gordon* v. *James*, 30 Ch. D. 249; and see *Re Vernon*, *Ewens & Co.*, 32 Ch. D. 165; *National, etc., Bank of England* v. *Jackson*, 33 Ch. D. 6; and see old cases where deeds were treated as wholly void when obtained by fraud, *Vorley* v. *Cooke*, 1 Gif. 230; *Ogilvie* v. *Jeaffreson*, 2 Giff. 353; and cf. *Onward Building Society* v. *Smithson*, [1893] 1 Ch. 1; *Hunter* v. *Walters*, L. R. 7

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Now, by section 69 of the Law of Property Act, 1925 (re-enacting section 56 of the Conveyancing Act, 1881), payment to a solicitor *producing* (*n*) such a deed with a receipt for consideration money (*o*) or other consideration in the body thereof or indorsed thereon and signed by the person entitled to give a receipt for that consideration is an authorised payment to the solicitor. It was held that the provision in the Conveyancing Act, 1881, did not apply to the case of trustee-vendors unless they had power to authorise payment to their solicitors (*p*). But by section 23, sub-section 3 of the Trustee Act, 1925 (replacing section 17, sub-section 1 of the Trustee Act, 1893), a trustee may appoint a solicitor to receive money under a deed containing such receipt.

3. Sales with Option of Repurchase distinguished from Mortgages.

The validity of a sale with a contemporaneous agreement giving the vendor an option of repurchase is recognised by Lord Nottingham in *Thornbrough* v. *Baker* (*q*). And not only was the validity of such a sale recognised, but the person having the option was not assisted by equity. The general rule that an option must be strictly followed was held applicable, and if it were not exercised in accordance with the terms of the bargain, the donee lost the benefit of the option (*r*).

A difficulty often arises in distinguishing between a mortgage and a sale with power to repurchase (*s*). The question in each case is, What is the meaning of the transaction? (*t*) and a conveyance in form absolute would be held a mortgage if the intention

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Ch. 75, 84, 1 Ch. Ca. 217; *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192; *Re Lord Southampton's Estate*, 16 Ch. D. 178; *Dixon* v. *Winch*, [1900] 1 Ch. 736; *Carlisle, etc., Bank* v. *Bragg*, [1911] 1 K. B. 489.

(*n*) *Day* v. *Woolwich Equitable Society*, 40 Ch. D. 491; *Re Hetling and Merton*, [1893] 3 Ch. 269; *King* v. *Smith*, [1900) 2 Ch. 425.

(*o*) *Quære* whether payment by cheque is within the section. See *Blumberg* v. *Life Interests, etc., Corporation*, [1897] 1 Ch. 171; [1898] 1 Ch. 27.

(*p*) *Re Bellamy and Met. Board of Works*, 24 Ch. D. 387; *Re Flower and Met. Board of Works*, 27 Ch. D. 592.

(*q*) 1 Ch. Ca. 283; 3 Sw. 628.

(*r*) *Mellor* v. *Lees*, 2 Atk. 494; *Barrell* v. *Sabine*, 1 Vern. 268; *Davis* v. *Thomas*, 1 R. & M. 506; *Perry* v. *Meddowcroft*, 4 B. 197; *Gossip* v. *Wright*, 1 W. R. 632; 9 Jur. (N.S.) 592; *Joy* v. *Birch*, 4 Cl. & Fin. 57; 10 Bli. (N.S.) 201; *Alderson* v. *White*, 2 De G. & J. 97; *Williams* v. *Owen*, 5 My. & C. 303; and see *Cotterell* v. *Purchase*, Cas. t. Talbot, 61; *Brooke* v. *Garrod*, 3 K. & J. 608; 2 De G. & J. 62; *Ward* v. *Wolverhampton Waterworks Co.*, 13 Eq. 243.

(*s*) *Waters* v. *Mynn*, 14 Jur. 341; *Ogden* v. *Battams*, 1 Jur. (N.S.) 791; *Fee* v. *Cobine*, 11 Ir. Eq. R. 406.

(*t*) *Alderson* v. *White*, *supra*; *Shaw* v. *Jeffery*, 13 Moo. P. C. 432.

were that it should be a security for a loan (*u*). So a conveyance has been held to be a mortgage notwithstanding the Statute of Frauds, on the ground of a verbal agreement which would make it fraudulent to insist that the property was not redeemable (*x*).

A deed in form a settlement, providing that on payment of a sum the limitations were to cease, has been held a security and redeemable after the date specified (*y*).

So also, where the intention was that the estate should be a security for money, an absolute conveyance will be converted into a mortgage (*z*), even in the absence of a proviso for redemption (*a*). And the payment of interest will be evidence of such an intention (*b*).

Where difficulty arises in determining whether a conveyance is intended to be a mortgage or not, extrinsic evidence will be admitted to show that, what appears on the face of it to be an absolute conveyance, was intended to be a conveyance by way of mortgage only (*c*).

It has been decided that a security taken in the old form of a trust for sale without a proviso for redemption, is a mere mortgage (*d*).

The tendency of the Courts in the eighteenth century is stated by Lord Hardwicke, in *Longuet* v. *Scawen* (*e*), as follows : " The Court leans extremely against contracts of this kind, where the liberty of repurchasing is made at the same time and concomitant with the grant." And his Lordship, while admitting the distinction

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(*u*) *Douglas* v. *Culverwell*, 4 De G. F. & J. 20; and see *Barnhart* v. *Greenshields*, 9 Moo. P. C. 18; *Holmes* v. *Mathews*, *ibid.* 413.

(*x*) *Lincoln* v. *Wright*, 4 De G. & J. 16; *Irnham* v. *Child*, 1 Bro. Ch. 92; *Cripps* v. *Jee*, 4 Bro. Ch. 471; *Re Duke of Marlborough*, [1894] 2 Ch. 133; and cf. *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*y*) *Frederick* v. *Aynscombe*, 1 Atk. 392; 2 Eq. Ca. Abr. 594; *Earl of Winchelsea* v. *Wentworth*, 1 Vern. 402; *Earl of Winchelsea* v. *Norcliffe*, *ibid.* 430.

(*z*) *Douglas* v. *Culverwell*, 4 De G. F. & J. 20, varying 3 Giff. 251. And see *Barnhart* v. *Greenshields*, 9 Moo. P. C. C. 18; *Holmes* v. *Mathews*, *ibid.* 413.

(*a*) *Bell* v. *Carter*, 17 B. 11.

(*b*) *Allenby* v. *Dalton*, 5 L. J. K. B. 312.

(*c*) *Barton* v. *Bank of New South Wales*, 15 A. C. 379; *Maas* v. *Pepper*, [1905] A. C. 102; *Lincoln* v. *Wright*, 4 De G. & J. 16; *Re Duke of Marlborough*, [1894] 2 Ch. 133; cf. *Haigh* v. *Kaye*, L. R. 7 Ch. 469; and see the cases cited *infra* on the mortgage of chattels and the Bills of Sale Act, 1882.

(*d*) *Bell* v. *Carter*, 17 B. 11; *Locking* v. *Parker*, L. R. 8 Ch. 30; *Re Alison*, 11 Ch. D. 284; *Re Metropolis and Counties, etc.*, [1911] 1 Ch. 698.

(*e*) 1 V. sen. 404; *Floyer* v. *Sherard*, Amb. 18; but see *Cotterell* v. *Purchase*, Cas. t. Talbot, 61.

" in the nature of the transaction between a power of redeeming and of repurchasing," adds that, " where the stipulation for the liberty of repurchasing is a part of the same transaction, the Court goes very unwillingly into that distinction, and endeavours, if possible, to bring them to be cases of redemption " (*f*).

The absence from the deed of a covenant to repay the money is not conclusive to show the transaction is not a mortgage, for such covenant is not essential to the existence of a mortgage, all Welsh mortgages being without the covenant, as well as most copyhold mortgages (*g*).

The modern attitude of the Courts is expressed by Lord Cranworth in *Alderson* v. *White* (*h*), " The rule of law on this subject is one dictated by common sense; that *prima facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an actual conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." This is quoted with approval in *Manchester, Sheffield, etc., Ry. Co.* v. *North-Central Wagon Co.* (*i*), where Lord Macnaghten says : " In all these cases the question is what was the real intention of the parties."

In *Secretary of State for India* v. *British Empire, etc., Co.* (*k*), there was a covenant by A for payment of an annuity after his father's death during his own life, and a conveyance of reversionary interests by way of security for the annuity. By clause 4, A was empowered to repurchase the annuity and obtain a reconveyance of the property. A assigned his rights to B. It was held that the deed was a mortgage, and redeemable, and that the right of repurchase was assignable to B. Lindley, L.J., said (*l*) : " It is the grant of an annuity in consideration of a sum of cash. That annuity is charged upon certain property. Pausing here for a moment, I doubt whether in these modern days there would have been any right to redeem that at all. In Lord Hardwicke's time,

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(*f*) And see *Lawley* v. *Hooper*, 3 Atk. 278; *Secretary of State for India* v. *British Empire, etc., Co.*, 67 L. T. 434, 439; *Verner* v. *Winstanley*, 2 Sch. & L. 393; *Bulwer* v. *Astley*, 1 Ph. 422; *Preston* v. *Neele*, 12 Ch. D. 760.

(*g*) *Lawley* v. *Hooper, supra; Longuet* v. *Scawen*, 1 V. sen. 402; see the decrees for redemption in these cases.

(*h*) 2 De G. & J., at p. 105.

(*i*) 13 A. C., at p. 568.

(*k*) 67 L. T. 434.

(*l*) *Ibid.*, at p. 439.

as I explained during the argument, it would have been redeemable, and redeemable on the terms of paying £2,000, and interest at 4 or 5 per cent. That is plain from the case of *Lawley* v. *Hooper* (*m*), which will be found commented upon by Bacon, V.-C., in *Preston* v. *Neele* (*n*). I will not pledge myself to it, but I suspect that the time for that very rough and ready mode of dealing with charges on annuities is somewhat antiquated. And I doubt, therefore, whether, if it were not for clause 4, there would be any method of freeing this property from the annuity" (*o*).

The effect of an agreement for sale with right of repurchase in the case of chattels or of a sale of furniture with a contemporaneous hire and purchase agreement has been frequently before the Courts in modern times in consequence of the provisions of section 8 of the Bills of Sale Act, 1882 (*p*), which enacts that unless the conditions therein specified are satisfied, every "bill of sale to which that Act applies," *i.e.*, given as security, shall be void in respect of the personal chattels comprised therein.

In such cases a *bona fide* sale with an option of repurchase is good, but the substance and not the form of the transaction must be regarded whether it be carried out by one document or two, and whether it be in form a sale or not (*q*).

Annuities and Policies of Assurance.

The laws against usury were, and the rules against restrictions on the right of redemption were and still are, sometimes evaded by sales of annuities with option of repurchase (*r*)—common in the case of life tenants—or by conveyances, absolute in form, of the interest or estate of the grantor—common in the case of reversionary interests in real or personal estate. Parties are entitled to evade an Act of Parliament or rule of law, in the sense of avoiding infringement whilst doing something else which produces the same advantage. "There is always an ambiguity about the expression

(*m*) 3 Atk. 278.

(*n*) 12 Ch. D. 760; 40 L. T. 303.

(*o*) And see *Shaw* v. *Jeffery*, 13 Moo. P. C. 432; *O'Reilly* v. *O'Donoghue*, 10 Ir. R. Eq. 73.

(*p*) 45 & 46 Vict. c. 43.

(*q*) See the cases summarised by Cave, J., in *Beckett* v. *Tower Assets Co.*, [1891] 1 Q. B. 8—22. And see also *Madell* v. *Thomas*, [1891] 1 Q. B. 231; *Mellor's Trustee* v. *Maas & Co.*, [1902] 1 K. B. 137; [1903] 1 K. B. 226; [1905] A. C. 102; *Stammers* v. *Margrett*, 21 T. L. R. 342.

(*r*) See *e.g.*, *Floyer* v. *Lavington*, 1 P. W. 268; *Joy* v. *Birch*, 10 Bligh. (N.S.) 201.

'evading an Act of Parliament.' In one sense you cannot evade an Act of Parliament; that is to say, the Court is bound so to construe every Act of Parliament as to take care that that which is really prohibited may be held void. On the other hand, you may avoid doing that which is prohibited by the Act of Parliament and you may do something else equally advantageous to you which is not prohibited by the Act of Parliament" (*s*). And in *Salt* v. *Northampton* (*t*), Lord Bramwell observed: "The rules of equity may be evaded, but must not be infringed."

It is obvious that the mere fact that the grantee of an annuity for a life chose for his own protection and out of his own moneys to insure the life, would not give the grantor of the annuity any interest in the policy. Whilst the usury laws were in force, it was a common practice for life tenants and others desirous of raising money to grant the lender an annuity for the life of the grantor in satisfaction of the advance and interest thereon. The deed of grant usually contained a stipulation that the grantor should do what might be necessary to enable the grantee to insure the grantor's life. Where insurance was so provided for, the amount of the premium was usually included in the calculation of the annuity, and it was also common form to provide, if the premiums payable under the policy should be increased by the grantor going abroad, that then the amount of the annuity should be proportionately increased. The annuity payable under the grant was in effect determined on the basis, that the payment of the annuity during the life of the grantor would return to the grantee the principal moneys advanced together with interest and the amount expended in premiums (*u*). The grant usually reserved to the grantor the power to repurchase the annuity.

It is clear that in effect, in such a case, the policy was provided by moneys furnished by the grantor, but as, under the usual provisions of such deeds, it was entirely within the discretion of the grantee either to maintain the policy or abandon it and become his own insurer, the Court of Chancery treated the premiums as though they were moneys paid out of the pocket of the grantee of the

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(*s*) *Per* Lindley, L.J., in *Yorkshire Ry. Wagon Co.* v. *Maclure*, 21 Ch. D., at p. 318.

(*t*) [1892] A. C., at p. 21.

(*u*) See the system explained *per* Bacon, V.-C., in *Preston* v. *Neele*, 12 Ch. D. 767, and *per* Lindley, L.J., in *Secretary of State for India* v. *British Empire, etc.*, *supra*, p. 21.

annuity. In consequence, in a series of decisions (*x*), it was held that, in the absence of special circumstances, neither the grantor nor his estate had any interest in the policy or policy moneys, whether the option of repurchase was or was not exercised by the grantor.

This rule, however, only applied where the relation of the parties was simply that of grantor and grantee of an annuity, and where the grantor was in no way either directly or indirectly chargeable with the upkeep of the policy. Thus where it was clear that the relation of the parties under the transaction was in essence that of creditor and debtor, that the policy was effected by the creditor as a security or indemnity, and that the debtor was by agreement, express or implied, charged with the payment of the premiums, the Court gave the debtor the full equitable rights of a mortgagor in the policy and policy moneys (*y*).

4. Nature of Equity of Redemption.

As to the nature of an equity of redemption.—In an early case, it was said that an equity of redemption was a mere *right*; and that a right to a bill in equity ought not to be entailed, and was not such an inheritance as could be entailed by the statute *De donis* (*z*). In the leading case of *Casborne* v. *Scarfe* (*a*), Lord Hardwicke held that the husband was tenant by the curtesy, as an equity of redemption was an *estate* in the land. "For," said his Lordship, "it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an *estate* whereof there may be a seisin; the person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered personal assets. . . . The interest in the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagor. A devises his estate, and afterwards makes a mortgage in fee. Though this is a total revocation in law, yet in this Court it is a revocation *pro tanto* only." This passage

(*x*) *Gottlieb* v. *Cranch*, 4 De G. M. & G. 440; *Bashford* v. *Cann*, 33 B. 109; *Knox* v. *Turner*, L. R. 5 Ch. 515; *Preston* v. *Neele*, 12 Ch. D. 760; and see *Secretary of State for India* v. *British Empire, etc.*, 67 L. T. 434.

(*y*) *Lea* v. *Hinton*, 5 De G. M. & G. 823; *Drysdale* v. *Piggott*, 8 De G. M. & G. 546; *Courtenay* v. *Wright*, 2 Giff. 337.

(*z*) *Roscarrick* v. *Barton*, 1 Ch. Ca. 217.

(*a*) 1 Atk. 603.

is quoted with approval by Lord Selborne in *Heath* v. *Pugh* (*b*), as showing that on a foreclosure the mortgagee obtained a fresh title, "vesting the ownership of, and the beneficial title to, the land for the first time in the person who previously was a mere incumbrancer," so that the Statute of Limitations would then only run from the date of the decree. It must be remembered that under the Law of Property Act, 1925, in the case of all mortgages of land created by a mortgagor having the legal estate, such legal estate remains vested in the mortgagor, subject, where a legal mortgage is created, to a legal term vested in the mortgagee (*c*).

The person entitled to the equity of redemption being considered as the owner of the land, he may not only devise or settle, but in other respects deal with it as land. He may, for instance, mortgage it; but formerly all incumbrancers subsequent to the first, if he had the legal estate, having merely equitable claims, would, according to the maxim *Qui prior est tempore potior est jure*, be entitled to satisfaction out of the estate, according to priority, though an equitable incumbrancer, where the legal estate was outstanding, or in a former mortgagee, might, if he advanced his money without notice of a former incumbrance, obtain priority by getting in the legal estate, or taking a conveyance from the legal mortgagee; in which last case he might tack his own to the legal mortgage, and thus obtain priority over all intermediate incumbrances (*d*). But subject to the statutory provisions in regard to the making of further advances, the right to tack has been abolished (*e*).

The mortgagor of an advowson has a right to nominate to the living on a vacancy; and the mortgagee will be obliged to accept the nominee, even, it seems, although there was a covenant in the mortgage, that the mortgagee should present on every avoidance (*f*).

In *Thornbrough* v. *Baker* (*g*), Lord Nottingham pointed out a distinction (which was of importance before 1926), resulting from the difference between a mortgage and an absolute conveyance with

(*b*) 6 Q. B. D. 360; see also *Jennings* v. *Jordan*, 6 A. C. 698.

(*c*) *Supra*, at p. 4; and see Wolstenholme and Cherry (11th ed.), vol. 1, pp. lxxvii, *et seq.*

(*d*) See *Marsh* v. *Lee*, and *Basset* v. *Nosworthy*, *post*; *Jennings* v. *Jordan*, 6 A. C., at p. 714.

(*e*) L. P. Act, 1925, s. 94. Priorities acquired before the Act are preserved by sub-section 3.

(*f*) *Jory* v. *Cox*, Pr. Ch. 71; *Amhurst* v. *Dawling*, 2 Vern. 401; *Galley* v. *Selby*, Stra. 403; and see *Mackensie* v. *Robinson*, 3 Atk. 559.

(*g*) 1 Ch. Ca. 283.

a collateral agreement for a repurchase; in the latter case, if the purchaser died, and the person who conveyed to him exercised his option to repurchase, on repayment of the purchase-money, the heir, and not the executor, of the purchaser would be entitled to the money, whereas, in case it had been a mortgage, the money would have belonged to the executors (*h*).

When a mortgage is paid off, that is to say, the principal, interest and costs, the mortgaged estate might formerly either be reconveyed to the mortgagor or his representatives, or it might be transferred by the mortgagee either with or without the concurrence of the mortgagor. By section 115 of the Law of Property Act, 1925, however, a receipt complying with the provisions of that section is to operate, without any conveyance, surrender, or release, as a discharge of the mortgaged property from all principal money and interest, and from all claims due under the mortgage. In the case of a mortgage by demise or sub-demise, such a receipt operates as a surrender of the term so as to determine it or merge it in the reversion expectant thereon. In the case of any other kind of mortgage (*e.g.*, a charge by way of legal mortgage) the receipt operates as a reconveyance, to the extent of the interest which is the subject-matter of the mortgage, to the person who immediately before the execution of the receipt was entitled to the equity of redemption. A form of statutory receipt is given in the Third Schedule to the Act. But the method of discharging a mortgage by mere receipt is not compulsory, it being provided by section 115, sub-section 4, that the section does not affect the right of any person to require a re-assignment, surrender, release, or transfer to be executed in lieu of a release.

Section 116 of the Law of Property Act, 1925, provides that (without prejudice to the right of a tenant for life or other person having only a limited interest in the equity of redemption to require a mortgage to be kept alive by transfer or otherwise) a mortgage term, when the mortgage has been discharged, is to become a satisfied term and cease. By section 95 (which takes the place of section 15 of the Conveyancing Act, 1881), it is provided that where a mortgagor is entitled to redeem, then, subject to the terms on compliance with which he would be entitled to require a reconveyance or surrender, he is entitled to require the

(*h*) See *Saint John* v. *Wareham*, cited 3 Swans. 631; cf. *Re Isaacs*, [1894] 3 Ch. 506.

mortgagee, instead of reconveying or surrendering, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs, and the mortgagee is bound to assign and convey accordingly. By sub-section 2 the rights conferred by the section belong to and are capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer is to prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer is to prevail over that of a subsequent incumbrancer. The above provisions do not apply (sub-section 31) to the case of a mortgagee who is or has been in possession. Nothing in the Act is to affect (sub-section 4) the right of a mortgagee to take possession, but the taking of possession by a mortgagee does not convert any legal estate of the mortgagor into an equitable interest. The section applies (sub-section 5) to mortgages, whether made before or after the commencement of the Act, and is to take effect notwithstanding any stipulation to the contrary.

If there are successive mortgagees of the same estate, the mortgagor could not require the first mortgagee to assign the debt and property to a nominee of his own, under the section, without the consent of the puisne mortgagee (*i*). The "mortgagor entitled to redeem" in the section means a mortgagor or person claiming under the mortgagor, who has a right to require a reconveyance (or now a statutory receipt) from the mortgagee (*j*). A lien of a company on shares for a debt due from the holder being a charge, the debtor is entitled to the benefit of this provision, and could require the company, on payment of the sum due, to assign the debt and the lien for the same to his nominee (*k*).

It has also been held that a tenant for life of mortgaged premises who has failed to keep down the interest, and has obtained the usual order permitting him to redeem, is not of right entitled to require the mortgagee to transfer the mortgage (*l*).

5. Assignment of Mortgages.

A mortgage may be assigned at any time by the mortgagee alone, but the assignee should always obtain the concurrence of the

(*i*) *Teevan* v. *Smith*, 20 Ch. D. 724; decided under section 15 of the Conveyancing Act, 1881; and see *Re Magneta Time Co., Ltd.*, 84 L. J. Ch. 814.
(*j*) *Teevan* v. *Smith*, *supra*.
(*k*) *Everitt* v. *Automatic Weighing Machine Co.*, [1892] 3 Ch. 506.
(*l*) *Alderson* v. *Elgey*, 26 Ch. D. 567.

mortgagor; for as a mortgage debt is a chose in action the transferee of a mortgage takes, as any other assignee of a chose in action, subject to the account between mortgagee and mortgagor, notwithstanding that he gets the legal estate (*m*), and he takes subject to all equities affecting the chose in action in the hands of the mortgagee (*n*).

In some cases, however, the transferee may get a better title than the transferor, *e.g.*, the mortgagor may be bound by estoppel by an incorrect acknowledgment of receipt which would not have been binding between mortgagor and mortgagee but which enabled the mortgagee to commit a fraud (*o*). And a company having power to issue legally transferable debentures cannot set up any irregularity against a *bona fide* transferee without notice (*p*).

Where a mortgage is transferred, and the transferee fails to give notice of the transfer to the mortgagor, payments subsequently made by him to the original mortgagee are valid as against the transferee (*q*).

Where a mortgage is assigned without the privity or consent of the mortgagor, the assignee, who takes it only upon the same terms as the mortgagee, cannot add to what is due, settle the account, or turn interest into principal (*r*).

But Lord Hardwicke says "the general rule is where a man makes a security on mortgage, and there is an arrear of interest thereon, if the incumbrancer assigns the same, with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal, and carry interest" (*s*).

Interest, however, cannot, even with the consent of the mort-

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(*m*) See *Mangles* v. *Dixon*, 3 H. L. Cas. 702, at pp. 736, 737.

(*n*) *Cockell* v. *Taylor*, 15 B. 103, 117; *Smith* v. *Parkes*, 16 B. 115; and see notes to *Ryall* v. *Rowles*, *ante*, vol. 1, and *Dixon* v. *Winch*, [1900] 1 Ch. 736; *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632; *Walker* v. *Linom*, [1907] 2 Ch. 104.

(*o*) *Bickerton* v. *Walker*, 31 Ch. D. 151; *Rimmer* v. *Webster*, [1902] 2 Ch. 163, 174; *Bateman* v. *Hunt*, [1904] 2 K. B. 530; *De Lisle* v. *Union Bank of Scotland*, [1914] 1 Ch. 22.

(*p*) *Re Romford Canal Co.*, 24 Ch. D. 85; *Davies* v. *Bolton*, [1894] 3 Ch. 684; *Robinson* v. *Montgomeryshire Brewery*, [1896] 2 Ch. 841; *Buckley* (10th ed.), pp. 45, 478; cf. *Re Natal Investment Co.*, L. R. 3 Ch. 355.

(*q*) *Matthews* v. *Wallwyn*, 4 V. 118, 126. And see *Williams* v. *Sorrell*, 4 V. 389; *Norrish* v. *Marshall*, 5 Madd. 475; *Stocks* v. *Dobson*, 4 De G. M. & G. 11; *Re Lord Southampton's Estate*, 16 Ch. D. 178; *Dixon* v. *Winch*, [1900] 1 Ch. 736; *Turner* v. *Smith*, [1901] 1 Ch. 213.

(*r*) *Earl of Macclesfield* v. *Fitton*, 1 Vern. 169; *Ashenhurst* v. *James*, 3 Atk. 271; *Matthews* v. *Wallwyn*, 4 V. 128.

(*s*) *Ashenhurst* v. *James*, 3 Atk. 271; see *Agnew* v. *King* (1902), 1 Ir. R. 471; Fisher (6th ed.), p. 918.

gagor, be turned into principal as against subsequent incumbrancers of whom there is notice (*t*).

Moreover, if a mortgagee *in possession* assigns over his mortgage without the assent of the mortgagor, the mortgagee is bound to answer the profits both before and *after* the assignment (*u*). But this rule does not hold where a transfer is made by direction of the Court in a redemption suit (*x*).

When the interest has been regularly paid, and the mortgagor has never been called on to discharge the principal, the costs of a transfer, made by the mortgagee without any communication with the mortgagor, are not properly chargeable against him (*y*).

By the assignment of the mortgage security the debt passes as incident to it (*z*). The debt, being a *chose in action*, the assignment thereof formerly did not pass it at law, and a power of attorney was generally given by the mortgagee to the transferee to receive it. Under the Law of Property Act, 1925 (which takes the place of the Judicature Act, 1873, s. 25, sub-s. 6), the debt is assignable at law (*a*).

On the assignment of an equity of redemption, though the assignee does not become personally liable to the mortgagee, he is bound to indemnify the mortgagor (*b*). This liability—sometimes called the doctrine in *Waring* v. *Ward*—may be excluded by the terms of the assignment (*c*). The view was expressed by Eve, J., that the rule does not apply in the case of the assignment of an equity of redemption in a contingent interest unless and until the assignee becomes entitled in possession (*d*); but this opinion was not approved of by the Court of Appeal, although it became unnecessary to decide the point (*e*).

Section 104, sub-section 2, and section 107 of the Law of Property Act, 1925 (which take the place of section 21, sub-

(*t*) *Digby* v. *Craggs*, Amb. 612; 2 Eden, 200; and see *Walker* v. *Jones*, L. R. 1 P. C. 50.

(*u*) *Venables* v. *Foyle*, 1 Ch. Ca. 2; and see *National Bank of Australasia* v. *United, etc., Co.*, 4 A. C. 391; *Hall* v. *Heward*, 32 Ch. D. 430, 435; Fisher (6th ed.), p. 886.

(*x*) *Hall* v. *Heward*, *supra*.

(*y*) *Re Radcliffe*, 22 B. 201.

(*z*) *Jones* v. *Gibbons*, 9 V., at p. 411.

(*a*) See notes to *Ryall* v. *Rowles*, *ante*, vol. 1.

(*b*) *Re Errington*, [1894] 1 Q. B. 11; *Waring* v. *Ward*, 7 V. 332; *Bridgman* v. *Daw*, 40 W. R. 253; and see *Dodson* v. *Downey*, [1901] 2 Ch. 620.

(*c*) *Mills* v. *United Counties Bank, Ltd.*, [1911] 1 Ch. 669; [1912] 1 Ch. 231.

(*d*) [1911] 1 Ch., at p. 676.

(*e*) [1912] 1 Ch., at pp. 237 and 243.

section 2, and section 22 of the Conveyancing Act, 1881), add to the statutory power of sale the common form in use for protection of purchasers in case of sales by mortgagees and receipts by them. "Mortgagee" by the interpretation clauses includes a person deriving title through an original mortgagee. The provision does not apply until the conveyance has been obtained, and so it does not preclude a person who has contracted to purchase from a mortgagee purporting to sell under his statutory power of sale from inquiring whether the vendor was in a position to exercise the power, nor from proving *aliunde*, in answer to an action for specific performance, that the power was improperly exercised (*f*). In *Bailey* v. *Barnes* (*g*), X, who was the purchaser of an equitable interest in land, derived his title through a sale improperly made by the transferees of a first legal mortgage. The sale was set aside. X had, when he purchased, no notice of any irregularity in the sale, and, having got in the legal estate, he was held entitled to the property as against the persons who had become entitled to the original equity of redemption. But a purchaser is not protected when he had notice that the sale was not in accordance with the power, *e.g.*, as to notice required (*h*), unless the mortgagor and the other mortgagees waive the notice (*i*).

Under section 68 of the Law of Property Act, 1925, re-enacting section 55 of the Conveyancing Act, 1881, either a receipt in the body of a deed or a receipt endorsed on the deed is sufficient evidence in favour of a purchaser without notice. In *Lloyds Bank* v. *Bullock* (*k*), a trustee for sale under a will, in exercise of his power, sold an equity of redemption; the conveyance contained a receipt for the purchase-money, which in fact was not paid. The deed was deposited by way of equitable mortgage with the plaintiffs. It was held that the equity of the plaintiffs was better than the equity of the beneficiaries under the will, the sale having been made in exercise of the trust for sale.

In the case of transfers of mortgages made after the commencement of the Law of Property Act, 1925, section 114 of that Act provides (in effect) that a deed executed by a mortgagee purporting

(*f*) *Life Interest, etc., Corporation* v. *Hand-in-Hand, etc., Society*, [1898] 2 Ch. 230; and see *King* v. *Smith*, [1900] 2 Ch. 425; *Bateman* v. *Hunt*, [1904] 2 K. B. 530.

(*g*) [1894] 1 Ch. 25.

(*h*) *Selwyn* v. *Garfit*, 38 Ch. D. 273; cf. *Barker* v. *Illingworth*, [1908] 2 Ch. 20.

(*i*) *Re Thompson & Holt*, 44 Ch. D. 492.

(*k*) [1896] 2 Ch. 192. Cf. *Capell* v. *Winter*, [1907] 2 Ch. 376.

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to transfer his mortgage or the benefit thereof shall (unless a contrary intention appears) operate to transfer to the transferee—

(a) the right to demand, sue for, recover, and give receipts for, the mortgage money or the unpaid part thereof, and any interest due or to become due;

(b) the benefit of all securities for the same, including the right to exercise all powers of the mortgagee;

(c) the estate and interest in the mortgaged property then vested in the mortgagee, but subject to the right of redemption subsisting.

The term "transferee" in this section includes the personal representatives of a transferee. The section only applies to transfers made after the commencement of the Act, and it does not extend to a mortgage of chattels made by a bill of sale.

By section 115 of the Law of Property Act, 1925, where there is such a receipt as provided for by sub-section 1, then, by sub-section 2, if by the receipt the money appears to have been paid by a person not entitled to the immediate equity of redemption, the receipt is to operate as if the benefit of the mortgage had by deed been transferred to him, except in the events therein mentioned. By sub-section 3 nothing in the section is to confer on a mortgagor a right to keep alive a mortgage so as to affect prejudicially a subsequent incumbrancer, and where there is no right to keep the mortgage alive, the receipt does not operate as a transfer.

Notice of Assignments.—Apart from the question what notice is necessary in a mortgage of a chose in action, it was advisable, prior to the recent legislation, that in every case, not only of a transfer of a mortgage, but of an original equitable mortgage, whether subsequent to a legal mortgage or to any equitable interest, notice should be given to the prior mortgagee or other holders of the legal estate. Otherwise the equitable mortgage might be defeated by a conveyance of the legal estate for value without notice, either on a sale or to a puisne mortgagee, or by further advances by the first mortgagee without notice (*l*). But priorities between different mortgagees of the same land are now determined, in the main by their dates of registration under the Land Charges Act, 1925 (*m*).

(*l*) See notes to *Marsh* v. *Lee*, *infra*. (*m*) See *infra*, pp. 94 *et seq.*

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The rule in *Dearle* v. *Hall* (*n*), as to priority between successive assignees of choses in action, did not before 1926 apply to mortgages of estates in land, legal or equitable, of freehold or leasehold (*o*). Grant, M.R., observed in *Jones* v. *Gibbons* (*p*), that "it is not necessary to give notice to the mortgagor that the mortgage has been assigned in order to make it valid and effectual . . . . Therefore, by the assignment of the mortgage, the debt necessarily passes as incident to it, and it is clear that to constitute a valid assignment notice to the mortgagor is not necessary," and he held the title of an assignee who had not given notice to the mortgagor good as against the assignees in bankruptcy of the mortgagor. The rule in *Dearle* v. *Hall* (*q*), however, applied to an interest in the proceeds of real estate directed to be converted (*r*); to a share in trust money vested in trustees and secured on land (*s*); and to a legacy charged on land (*t*).

In the last edition of this work it was stated that: "Consideration of the cases suggests the doubt whether it would not have been better, in order to prevent fraud, if, when the point was open, Sir Wm. Grant had decided, in *Jones* v. *Gibbons* (*supra*), the other way, and if equity Judges, in making rules, had applied the doctrine of notice to all equitable interests in land. Now, among the other risks of taking a second mortgage, it is impossible to say how many mortgages may have been previously made." This difficulty has been to a large extent removed by the system of registration of mortgages introduced by the Law of Property Act, 1925, and the Land Charges Act, 1925 (*u*). The law on this subject has been altered by the Law of Property Act, 1925, s. 137; but nothing in the section affects any priority acquired before the commencement of the Act (sub-section 7). Sub-section 1 provides that: "The law applicable to dealings with equitable things in action which regulates the priority of competing interests therein, shall, as respects dealings with equitable interests in land, capital money, and securities representing capital money effected after the

(*n*) 3 Russ. 1, notes to *Ryall* v. *Rowles*, *ante*, vol. 1.

(*o*) See the notes to *Ryall* v. *Rowles*, *ante*, vol. 1; and see *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231; *Wiltshire* v. *Rabbitts*, 14 Si. 76; *Union Bank of London* v. *Kent*, 39 Ch. D. 238.

(*p*) 9 V. 407, 410; and see *Re Richards*, 45 Ch. D. 589.

(*q*) 3 Russ. 1.

(*r*) *Re Wyatt*, [1892] 1 Ch. 188.

(*s*) *Daniel* v. *Freeman*, 11 Ir. R. Eq. 233.

(*t*) *Arden* v. *A.*, 29 Ch. D. 702.

(*u*) See *post*, pp. 94 *et seq.*

commencement of this Act, apply to and regulate the priority of competing interests therein" (*x*).

6. Purchase of Mortgage for less than is due.

Where a stranger gets an assignment of a mortgage for less than is due he will be entitled, at any rate as against the mortgagor and his representatives, to the whole sum due upon the mortgage (*y*).

In *Williams* v. *Springfield* (*z*), it was said by Jeffreys, L.C., that "where there are subsequent incumbrancers or creditors, a man who buys in a prior incumbrance shall be allowed only what he paid" (*a*); but this, as a general rule of law, has long ceased to hold good (*b*). An incumbrancer or other creditor purchasing a mortgage debt for less than what is owing will be entitled to what is due upon it as against subsequent incumbrancers (*c*).

But if a person stands in any fiduciary relation towards the owner of the estate, he will, in account, be allowed only what he paid for an incumbrance (*d*), and that even though the fiduciary relation has ceased (*e*). The rule has been applied to a solicitor or clerk of a solicitor to the mortgagor (*f*), to the heir-at-law of the mortgagor, in favour of purchasers (*g*) or general creditors, even without notice of their debts (*h*). So also it has been said that a tenant for life purchasing a mortgage on the inheritance can only claim the amount which he has paid as against the remainderman (*i*). The rule has been applied in taking an account between joint purchasers. So where A and B bought an estate subject to incumbrances to be discharged out of the purchase-

(*x*) See further, the notes to *Ryall* v. *Rowles*, *ante*, vol. 1.

(*y*) *Phillips* v. *Vaughan*, 1 Vern. 336; *Williams* v. *Springfield*, 1 Vern. 476; *Anon.*, 1 Salk. 155.

(*z*) 1 Vern. 476.

(*a*) See *Long* v. *Clopton*, 1 Vern. 464; Gilbert's Lex Præt. 282, 283.

(*b*) *Braithwaite* v. *B.*, 1 Vern. 334; *Morret* v. *Paske*, 2 Atk. 53, 54; *Davis* v. *Barrett*, 14 B. 542, at p. 554.

(*c*) *Morret* v. *Paske*, 2 Atk., at p. 54; *Darcy* v. *Hall*, 1 Vern. 49; *Bromley* v. *Holland*, 5 V. 620 (n.); and see *Shaw* v. *Bunny*, 2 De G. J. & S. 472; *Dobson* v. *Land*, 8 Ha. 220; *Kirkwood* v. *Thompson*, 2 H. & M. 400.

(*d*) *Morret* v. *Paske*, 2 Atk. 54; *Powell* v. *Glover*, 3 P. W. 251 (n.); *Anon.*, 1 Salk. 155.

(*e*) *Carter* v. *Palmer*, 8 Cl. & Fin. 657.

(*f*) *Nelson* v. *Booth*, 3 Jur. (N.S.) 951; *Hobday* v. *Peters*, 28 B. 349; *Carter* v. *Palmer*, 8 Cl. & Fin. 657.

(*g*) *Long* v. *Clopton*, 1 Vern. 464.

(*h*) *Lancaster* v. *Evors*, 10 B. 154; 1 Ph. 354; see also *Darcy* v. *Hall*, 1 Vern. 49; *Braithwaite* v. *B.*, 1 Vern. 334; *Long* v. *Clopton*, 1 Vern. 464; *Morret* v. *Paske*, 2 Atk. 54.

(*i*) *Hill* v. *Browne*, Dr. 426, 433.

money, on some of the incumbrancers making abatements of claims for interest in favour of A, he was compelled to account for them to B (*k*). But there is no fiduciary relation between co-tenants of real estate (*l*). Nor does the rule apply to a subsequent incumbrancer who, having advanced his money without notice, buys in a prior incumbrance for protection, though he may stand in a fiduciary position to the mortgagor (*m*).

7. Keeping alive Charges.

In cases where, unless the charge were kept up, the purchaser could not get what he bargained for—*i.e.*, an estate free from incumbrances—the doctrine of *Toulmin* v. *Steere* (*n*) has been sometimes adversely commented on (*o*), and the Courts have gone a long way in presuming an intention to keep alive a mortgage in order to prevent a second or third incumbrancer whom it was not intended to benefit from obtaining priority by a mere accident at the expense of other people (*p*).

It was laid down in *Otter* v. *Lord Vaux* (*q*) that if an owner of an estate creates two mortgages he cannot, if he pays off the first mortgage, keep that mortgage alive against the second incumbrancer by taking an assignment of the first mortgage debt to a trustee. Until the passing of the Companies Act, 1907, the rule in *Otter* v. *Lord Vaux* was applicable to debentures. A company having power to borrow upon debentures may issue debentures as collateral security, and the holder of debentures so issued may prove against the assets of the company subject to the debentures, *pari passu* with the holders of other debentures of the same series issued by the

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(*k*) *Carter* v. *Horne*, 1 Eq. Cas. Abr. 7.

(*l*) *Kennedy* v. *De Trafford*, [1896] 1 Ch. 762; [1897] A. C. 180; cf. *Re Biss*, [1903] 2 Ch. 40 (as to the absence of fiduciary relations between tenants in common of leaseholds on a renewal of the lease).

(*m*) *Darcy* v. *Hall*, 1 Vern. 49; *Davis* v. *Barrett*, 14 B. 542.

(*n*) 3 Mer. 210.

(*o*) See, however, *Manks* v. *Whiteley*, [1912] 1 Ch., at pp. 744 and 768. See this case on appeal [1914] A. C. 132.

(*p*) *Phillips* v. *Guttridge*, 4 De G. & J. 531; *Anderson* v. *Pignet*, L. R. 8 Ch. 180; *Adams* v. *Angell*, 5 Ch. D. 634, see p. 645; *Thorne* v. *Cann*, [1895] A. C., at p. 11; and see *Re Pride*, [1891] 2 Ch. 135; *Minter* v. *Carr*, [1894] 3 Ch. 498; *Capital and Counties Bank, Ltd.* v. *Rhodes*, [1903] 1 Ch. 631; *Re Gibbon*, [1909] 1 Ch. 367; cf. *Manks* v. *Whiteley*, [1911] 2 Ch. 448; [1912] 1 Ch. 735; [1914] A. C. 132.

(*q*) 2 K. & J. 650, 657; 6 De G. M. & G. 638; and see *Manks* v. *Whiteley*, [1912] 1 Ch. 743, 744.

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company, until the whole of his debt has been repaid (*r*). But where a company, having issued debentures either by way of collateral security or in the ordinary course of business, redeemed or purchased such debentures, it was held that the rule in *Otter* v. *Lord Vaux* applied, that the redemption or purchase *ipso facto* extinguished the debt, and that the company could not transfer the debentures so as to confer upon the transferees the right to rank *pari passu* with the ordinary debentures of the series (*s*). The rule was applied whether the debentures upon redemption or purchase were registered in the name of the company and retransferred by it to the subsequent purchaser (*t*), or the company took a blank transfer and filled in the name of the subsequent purchaser (*u*). And where a company issued debentures in blank as security for a loan, and the debentures were handed back to the company upon the loan being paid off, the company could not subsequently reissue the debentures (*x*). The law on this subject was altered by section 15 of the Companies Act, 1907, which has been repealed and replaced by section 104 of the Companies (Consolidation) Act, 1908. This provides that in the absence of express provision to the contrary in the articles or conditions of issue, or unless the debentures have been redeemed in pursuance of any obligation of the company (not being an obligation enforceable only by the person to whom the debentures redeemed were originally issued or his assigns), a company shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of reissue (*y*).

And now by the Law of Property Act, 1925, s. 115 (which relates to receipts in connection with mortgages), it is provided (subsection 3), " Nothing in this section confers on a mortgagor a right to keep alive a mortgage paid off by him, so as to affect prejudicially any subsequent incumbrances; and where there is no right to keep the mortgage alive, the receipt does not operate as a transfer " (*z*). See also, as to satisfied mortgage terms, the Law of Property Act, 1925, s. 116 (*a*)

(*r*) *Re Regent's Canal Ironworks*, 3 Ch. D. 43.
(*s*) *Re George Routledge & Sons*, [1904] 2 Ch. 474.
(*t*) *Ibid.*
(*u*) *Re Tasker & Sons*, [1905] 2 Ch. 587; *Re Russian Petroleum Co.*, [1907] 2 Ch. 540.
(*x*) *Re Perth Electric Tramways*, [1906] 2 Ch. 216.
(*y*) See *Re New London and Suburban Omnibus Co.*, [1908] 1 Ch. 621.
(*z*) *Supra*, p. 26.
(*a*) *Supra*, p. 26; and see section 5 of L. P. Act, 1925.

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8. Parties to Foreclosure and Redemption Actions.

As a general rule all persons interested in the equity of redemption, and therefore in the proper taking of the account, either primarily, as the mortgagor, or derivately, as the trustee in bankruptcy of the mortgagor, the assignees of the equity of redemption (*b*), the devisee and the personal representative (*c*) of the mortgagor, and also all persons interested in the security primarily, as the mortgagee, or derivatively, as his personal representative or assignee, or the specific legatee of the mortgage debt, are necessary parties to foreclosure and redemption actions (*d*).

The alteration in the form of mortgages made by the Law of Property Act, 1925, does not appear to affect, in ordinary cases, the parties to foreclosure or redemption actions (*e*).

A mortgagee who brings an action for foreclosure or sale, whether he is a first (*ee*) or any subsequent (*f*) incumbrancer, and whether of a legal (*g*) or equitable (*h*) estate, must make every incumbrancer subsequent to himself a party to his action (*i*). And if, being a second or subsequent mortgagee, he desires also to redeem the mortgagees prior to him, he must make them parties and offer to redeem.

The mortgagor of another estate charged as a collateral security is a necessary party to an action for foreclosure (*j*). But it seems that a surety bound by a personal covenant only is not a necessary party unless he has paid off part of the debt (*k*).

So, too, partners of a mortgagor who have a right of redemption over his mortgaged share are necessary parties (*l*).

(*b*) *Secretary of State, etc.* v. *British, etc.*, 67 L. T. 434.

(*c*) An administrator *pendente lite* does not sufficiently represent the mortgagor's estate; see *Ellis* v. *Deane*, Beat. 5; *Cave* v. *Cork*, 2 Y. & C. C. C. 130.

(*d*) Seton (7th ed.), pp. 1858-9; R. S. C., O. XVI.; Fisher on Mortgages (6th ed.), pp. 841 *et seq.*; *Mills* v. *Jennings*, 13 Ch. D. 639; *Moore* v. *Morton* [1886] W. N. 196; *Francis* v. *Harrison*, 43 Ch. D. 183; *Griffith* v. *Pound*, 45 Ch. D. 567; 59 L. J. Ch. 522; *Re Booth, etc.*, 62 L. J. Ch. 40; *Re Mitchell*, 65 L. T. 851.

(*e*) See [1928] A. P., p. 214, notes to Ord. XVI, r. 1.

(*ee*) *Adams* v. *Paynter*, 1 Coll. 530.

(*f*) *Johnson* v. *Holdsworth*, 1 Si. (N.S.) 109.

(*g*) *Adams* v. *Paynter*, *supra*.

(*h*) *Tylee* v. *Webb*, 6 B. 552.

(*i*) Coote on Mortgages (8th ed.), p. 748; and see *Re Hill*, 88 L. J. Ch. 136

(*j*) *Stokes* v. *Clendon*, 3 Swans. 158; cf. *Gee* v. *Liddell*, [1913] 2 Ch. 62.

(*k*) *Newton* v. *Egmont*, 4 Si. 574; *Gedye* v. *Matson*, 25 B. 310.

(*l*) *Redmayne* v. *Forster*, 2 Eq. 467.

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If there are several joint mortgagees, all must be parties (*m*). Also all judgment creditors who have a lien on the land are necessary parties (*n*).

By R. S. C., 1883, Order XVI, r. 8, trustees, executors and administrators may be plaintiffs or defendants to actions for foreclosure or redemption without joining their *cestuis que trust* (*o*).

9. Remedies of the Mortgagee.

General.

After a mortgage had become forfeited at law by non-payment of the principal or interest at the time fixed for payment (*p*), the mortgagee might pursue his remedies in different Courts at the same time; that is to say, he might proceed at common law against the mortgagor *personally*, for the debt, or by ejectment; and also in equity, where his remedy was *in rem* against the mortgaged property, either by seeking foreclosure or sale.

Since the Judicature Act, 1873, a fusion of law and equity has taken place, and a mortgagee can now obtain, in an action commenced by writ, the following relief :—If at the hearing the amount due is proved, agreed, or admitted, an order for immediate payment, unless the Judge think fit to postpone such payment, of the principal sum and interest thereon, with so much of the costs of the action as would have been incurred if it had been brought for payment only. If the amount is not so proved, agreed, or admitted, the judgment will be for an account of what is due to the mortgagee and for payment of the amount immediately on the certificate, unless the Judge postpones payment (*q*). If the defendant does not appear, the plaintiff, if the writ be indorsed for a specific sum and foreclosure, may have an order to sign final judgment for the

(*m*) *Lowe* v. *Morgan*, 1 Bro. Ch. 368; *Vickers* v. *Cowell*, 1 B. 529; *Bolton* v. *Salmon*, [1891] 2 Ch. 48.

(*n*) *Adams* v. *Paynter*, 1 Coll. 530; *Harrison* v. *Pennell*, 4 Jur. (N.S.) 682.

(*o*) As to redemption actions, see *Jennings* v. *Jordan*, 6 A. C. 698; as to foreclosure actions, before the alteration made in the rule in November, 1893, see *Francis* v. *Harrison*, 43 Ch. D. 183; and see also *Re De Leeuw*, [1922] 2 Ch. 540, 550.

(*p*) *Bonham* v. *Newcomb*, 1 Vern. 232, distinguished in *Re Carshalton Park, etc.*, [1908] 2 Ch. 62; *Gladwyn* v. *Hitchman*, 2 Vern. 134; *Burrowes* v. *Molloy*, 2 Jo. & Lat. 521; *Roddy* v. *Williams*, 3 Jo. & Lat. 1; *Edwards* v. *Martin*, 25 L. J. Ch. 284; *Langridge* v. *Payne*, 2 J. & H. 423; *Keene* v. *Biscoe*, 8 Ch. D. 201; *Williams* v. *Morgan*, [1906] 1 Ch. 804.

(*q*) *Farrer* v. *Lacy, Hartland & Co.*, 31 Ch. D. 42; Seton (7th ed.), p. 1828; *Instone* v. *Elmslie*, 54 L. T. 730.

amount indorsed and subsequent judgment for foreclosure (*r*). Since after the Judicature Act a personal order for payment can be made in a foreclosure action (commenced by writ) in the Chancery Division, the bringing of a second action for payment of moneys due on the mortgage is improper, and will be stayed (*s*).

A mortgagee may sue on the covenant under Order XIV, although a receiver has been appointed, if he has received nothing (*t*), but the writ must comply with the terms of R. S. C., Order III, r. 6 (*u*).

Judgment for an account and foreclosure can be obtained, either in chambers or in Court, on originating summons under Order LV, r. 5a. But a personal order for payment cannot be obtained upon originating summons; and accordingly an action on the covenant will not be stayed by reason of the pendency of a foreclosure summons (*x*).

Although Order LV, r. 8, provides that upon such summons the Court or Judge may "pronounce such judgment as the nature of the case may require," a personal order for payment cannot, it seems, be made unless proceedings are commenced by writ (*y*). Nor can a question of priority between mortgagees be decided thereunder (*z*).

In a case in which a foreclosure order was obtained against the mortgagor and a purchaser from him, and personal judgment for payment against the mortgagor, the purchaser was given liberty, on payment off, to have the personal judgment transferred to him (*a*).

If the mortgagee be not fully paid after judgment on his covenant, he may foreclose (*b*), or exercise his power of sale. Even after judgment for foreclosure he may sue on the covenant, provided he can reconvey the property, but not otherwise, as he gives a new right of redemption (*c*).

(*r*) *Bissett* v. *Jones*, 32 Ch. D. 635; and see *Simmons* v. *Blandy*, [1897] 1 Ch. 19.

(*s*) *Poulett* v. *Hill*, [1893] 1 Ch. 277; *Williams* v. *Hunt*, [1905] 1 K. B. 512; Seton, 7th ed., p. 1836.

(*t*) *Lynde* v. *Waithman*, [1895] 2 Q. B. 180; *Bourke* v. *Donoghue*, 20 L. R. Ir. 324. (*u*) *Imbert Terry* v. *Carver*, 34 Ch. D. 506.

(*x*) *Bradshaw* v. *McMullan*, [1915] 2 Ir. R. 187.

(*y*) See *Brooking* v. *Skewis*, 58 L. T. 73; *Barr* v. *Harding*, 36 W. R. 216; *O'Kelly* v. *Culverhouse*, [1887] W. N. 36; [1927] A. P., p. 1081.

(*z*) *Re Giles*, 43 Ch. D. 391. (*a*) *Greenough* v. *Littler*, 15 Ch. D. 93.

(*b*) *Palmer* v. *Hendrie*, 27 B. 349.

(*c*) *Palmer* v. *Hendrie*, *supra*; *Lockhart* v. *Hardy*, 9 B. 349; *Haynes* v. *H.*, 3 Jur. (N.S.) 504.

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As the covenant gives or acknowledges the right of redemption the mortgagee can only sue when he can reconvey the whole property (*d*), including any collateral securities (*e*), and restore the title deeds (*f*), unless he has parted with the property under his power of sale, and is suing for the balance owing (*g*). And where the mortgagor has assigned his equity of redemption and is then sued on his covenant, he can still redeem, and on redeeming becomes entitled to hold the mortgaged property for the amount paid by him against his assignee (*h*). It may, it is thought, be taken as settled law that the exercise of the power of sale will not take away the mortgagee's right to sue afterwards on the covenant (*i*). And a mortgagee who has obtained an order for sale and, bidding with leave of the Court, has purchased the mortgaged property, is not precluded from suing the mortgagor upon his personal covenant in the mortgage for payment of the difference between the amount due under the mortgage and the sum realised by the sale (*j*). In such a case, it is immaterial that the mortgagee has re-sold the property at a profit (*k*).

If the mortgagee claims administration as well as foreclosure, he will be entitled, so far as administration has been necessary, to add his costs to his security, and to be paid them in priority to the administration costs of the executor of the mortgage (*l*).

Foreclosure.

A foreclosure may be either absolute or *nisi*.

An immediate foreclosure judgment might be made absolute in the first instance against an infant, if it appeared to the Court to be for his benefit, and the property was insufficient to pay principal, interest and costs, the defendant not claiming redemption or an

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(*d*) *Palmer* v. *Hendrie, supra;* Fisher, 6th ed., pp. 379, 985, cf. *Worthington & Co., Ltd.* v. *Abbott,* [1910] 1 Ch. 588; *Ellis & Co.'s Trustee* v. *Dixon Johnson,* [1924] 1 Ch. 342; [1924] 2 Ch. 452; [1925] A. C. 489.

(*e*) *Walker* v. *Jones,* L. R. 1 P. C. 50.

(*f*) *Schoole* v. *Sall,* 1 Sch. & L. 176; *Bentinck* v. *Willink,* 2 Ha. 1; *Rourke* v. *Robinson,* [1911] 1 Ch. 480.

(*g*) See *Re Hoyles,* [1911] 1 Ch. p. 184.

(*h*) *Kinnaird* v. *Trollope,* 39 Ch. D. 636.

(*i*) *Rudge* v. *Richens,* L. R. 8 C. P. 358; *Re Hoyles,* [1911] 1 Ch. p. 184; *Re Oxford and Canterbury Hall Co.,* 8 Eq. 691; L. R. 5 Ch. 433; Fisher (6th ed.), p. 986; Coote (8th ed.), pp. 895, 992-3.

(*j*) *Gordon Grant & Co.* v. *Boos,* [1926] A. C. 781.

(*k*) *Ibid.*

(*l*) *Re Banks,* 45 W. R. 206.

account, and the plaintiff offering to pay the defendant's costs of the action as between solicitor and client (*m*).

Under the new law, a legal estate in land cannot be vested in an infant (*n*); and, accordingly, an infant will seldom be a party to a foreclosure action, although this may still arise in cases where the mortgage comprises personal estate (*o*). Where an infant is a party to foreclosure proceedings, he is entitled (unless it would not be for his benefit (*p*)) to a day to show cause against the decree after he attains twenty-one (*q*); but where an infant is party plaintiff in a redemption action, he is not entitled to a day to show cause against the foreclosure which operates from dismissal of the suit (*r*).

Where the time and place for payment of the money found due are appointed under a foreclosure decree, if no one appears on behalf of the defendant to pay the money, the usual order for making the foreclosure absolute will be made, although the solicitor's clerk attending for the plaintiff at the time and place appointed had no authority or power of attorney to receive the money (*s*).

It is sufficient for counsel to hand to the Registrar his brief duly indorsed, unless there are special circumstances to be mentioned to the Court (*t*). But if a summons for foreclosure does not ask for possession, an order for foreclosure absolute will not be made *ex parte* (*u*). But after foreclosure absolute in such a case, possession may be applied for *ex parte* (*x*).

Before drawing up the order the Registrar requires the production of an affidavit by the plaintiff that he has not between the day of attendance and the date of the order for foreclosure absolute been paid the money found due (*y*).

If a party to a foreclosure action has assigned his interest *after* decree, the assignee may be made a party to the action even after

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(*m*) *Wolverhampton, etc., Co.* v. *George*, 24 Ch. D. 707; *Croxon* v. *Lever*, 12 W. R. 237; *Bennett* v. *Harfoot*, 19 W. R. 428.

(*n*) See L. P. Act, 1925, ss. 19—21, First Schedule, part III; S. L. Act, 1925, Second Schedule, par. 3.

(*o*) [1927] A. P., p. 255.

(*p*) See the cases in note (*c*).

(*q*) *Mellor* v. *Porter*, 25 Ch. D. 158; Fisher (6th ed.), pp. 1008, 1021.

(*r*) *Prout* v. *Cock*, 40 Sol. Jo. 114.

(*s*) *Cox* v. *Watson*, 7 Ch. D. 196.

(*t*) Seton (7th ed.), p. 1920.

(*u*) *Le Bas* v. *Grant*, 64 L. J. Ch. 368; [1927] A. P., p. 1079.

(*x*) *Jenkins* v. *Ridgley*, 68 L. T. 671.

(*y*) Seton (7th ed.), p. 1919; *Barrow* v. *Smith*, [1855] W. N. 136; [1927] A. P., 1077; *Frith* v. *Cooke*, 33 W. R. 688, must be regarded as no longer law.

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the order for foreclosure absolute (*z*). A judgment creditor who has obtained equitable execution against the mortgagor's equity of redemption is entitled to be joined as a party, but without extension of the time of redemption (*a*).

As a general rule, where a defendant, although having an interest in the property in respect of which a foreclosure action is brought, can show that he disclaimed, or offered to disclaim before the institution of proceedings, he will be entitled to his costs from the plaintiff (*b*).

A debenture-holder of a railway company is not entitled to a decree either for a foreclosure or sale, as such companies have public duties to perform, from which nothing but an Act of Parliament can release them (*c*); but *secus* in the case of an ordinary limited company (*d*).

An action for foreclosure is an action for recovery of land (*e*), but the proviso to Order XVIII, r. 2, declares that an action for a foreclosure or redemption shall not be deemed to be an action for the recovery of land within the meaning of the rule which prevents a cause of action being joined (except by leave) with an action for the recovery of land. The better course appears to be to ask for possession in the original application (*f*).

When the mortgagee commences an action to foreclose the equity of redemption, making prior incumbrancers parties, he must offer to redeem them (*g*).

The dismissal of a bill for redemption of a legal mortgage otherwise than for want of prosecution (*h*) operates as a foreclosure (*i*),

(*z*) *Campbell* v. *Holyland*, 7 Ch. D. 166; and see *Pennington* v. *Cayley*, [1912] 2 Ch. 236.

(*a*) *Re Parbola*, [1909] 2 Ch. 437.

(*b*) *Ford* v. *Chesterfield*, 16 B. 516; see also *Benbow* v. *Davies*, 11 B. 369; *Davis* v. *Whitmore*, 28 B. 617; *Talbot* v. *Kemshead*, 4 K. & J. 93; *Greene* v. *Foster*, 22 Ch. D. 566, 569.

(*c*) *Furness* v. *Caterham Railway Company*, 25 B. 614.

(*d*) *Sadler* v. *Worley*, [1894] 2 Ch. 170, in which case it was held that debenture-holders are entitled to foreclosure. See also *Re Continental, etc., Co.*, [1897] 1 Ch. 511; *Wallace* v. *Evershed*, [1899] 1 Ch. 891; Buckley (10th ed.), 239, and see Ord. LI, r. 1b.

(*e*) *Harlock* v. *Ashberry*, 19 Ch. D. 539.

(*f*) See *Salter* v. *Edgar*, [1886] W. N. 47; 54 L. T. 374; *Craven Bank* v. *Hartley*, [1886] W. N. 189; *Best* v. *Applegate*, 37 Ch. D. 42; *Lacon* v. *Tyrrell*, 56 L. T. 483; *Keith* v. *Day*, 39 Ch. D. 452; *Le Bas* v. *Grant*, 64 L. J. Ch. 368; An. Pr., [1927] p. 1079.

(*g*) *Inman* v. *Wearing*, 3 De G. & Sm. 729; and see *National Bank of Australasia* v. *United, etc.*, 4 A. C. 391; Fisher (6th ed.), 706-7.

(*h*) *Hansard* v. *Hardy*, 18 Ves., p. 460.

(*i*) *Inman* v. *Wearing*, 3 De G. & Sm. 729.

but not in the case of an equitable mortgage (*j*). In foreclosure proceedings the mortgagee is entitled to interest up to the date specified in the order for redemption (*k*).

It has been said that the right to redeem and the right to foreclose are co-relative, but this is not strictly accurate, for when property is conveyed to trustees for sale, in order to secure a sum of money, although the mortgagor may be entitled to redeem, the mortgagee is not entitled to foreclosure, but to a decree for sale (*l*); and it has been held that mortgagees might file a bill for an account and sale, without praying foreclosure, although the mortgage security contained an express power of sale (*m*). Where a mortgage is in the form of a trust for sale, the trust is not one which the mortgagor could enforce (*n*).

An order for foreclosure is a conveyance on sale within the meaning of the Stamp Act, 1891 (*o*).

Redemption.

The former practice in a foreclosure action was to give the several incumbrancers or the owners or purchasers of the equity of redemption, successive periods for redemption, according to the order in which they acquired their charges or interests (*p*), allowing a period of six months from the date of the certificate to the first party entitled to redeem, and three months (*q*), or sometimes one month (*r*), to each successive party.

In *Moore* v. *Morton* (*s*) the mortgagee had obtained the usual foreclosure decree against the mortgagor when subsequent incumbrancers were discovered; a further action was commenced against them, not making the mortgagor a party : held, that a decree could not be made in his absence.

But where, in foreclosure actions, questions as to priorities not

(*j*) *Marshall* v. *Shrewsbury*, L. R. 10 Ch. 250, 254; Fisher (6th ed.), p. 1022; Seton (7th ed.), 1853.

(*k*) *Hill* v. *Rowlands*, [1897] 2 Ch. 361.

(*l*) *Schweitzer* v. *Mayhew*, 31 B. 37; *Re Alison*, 11 Ch. D. 284; *Kirkwood* v. *Thompson*, 2 H. & M. 392; *Locking* v. *Parker*, L. R. 8 Ch. 30.

(*m*) *Hutton* v. *Sealy*, 27 L. J. Ch. 263.

(*n*) *Locking* v. *Parker*, *supra*; and *Re Alison*, *supra*.

(*o*) *Huntingdon* v. *I. R. Comrs.*, [1896] 1 Q. B. 422; section 6 of Finance Act, 1898; *Re Leeuw*, [1922] 2 Ch., pp. 555-6.

(*p*) *Beevor* v. *Luck*, 4 Eq. 537, 541; *Titley* v. *Davies*, 2 Y. & C. Ch. 399; *Loveday* v. *Chapman*, 32 L. T. 689; *Sweet* v. *Combley*, 25 Ch. D. 463.

(*q*) Seton (7th ed.), 1910.

(*r*) *Houghton* v. *Sevenoaks Estates Co.*, [1884] W. N. 243.

(*s*) 82 L. T. 90, 98.

affecting the plaintiff were raised between co-defendants, a day certain was fixed for all the defendants to redeem or be foreclosed, without prejudice to the rights of the several defendants *inter se* (*t*). And where subsequent incumbrances have been created on the same day (*u*), where different persons claim under one puisne incumbrancer as sub-mortgagees or devisees (*x*), or under the same instrument (*y*), one single right of redemption only has been granted. So also, where there were several judgment creditors, they were allowed only one period of redemption (*z*).

In *Doble* v. *Manley* (*a*), Chitty, J., said he had consulted Pearson, J., and Kay, J., and all were unanimously of opinion that, if the subsequent incumbrancers did not appear, one time only would be given for redemption. If any subsequent mortgagees appeared and claimed to have successive periods, it would have to be considered whether they were entitled to them or not. In *Platt* v. *Mendel* (*b*), Chitty, J., said that if puisne incumbrancers appear and there is no question of priority, at their request, and not at the request of the mortgagor, the practice is to give successive periods of redemption. For an order giving successive periods of redemption, see *Smithett* v. *Hesketh* (*c*).

Although a foreclosure or sale will be ordered to satisfy the mortgagee, nevertheless indulgence will be shown to the mortgagor, and the *time for payment will be enlarged*, even after an order absolute of foreclosure has been signed and enrolled (*d*), if a proper case can be shown, and the security be not deficient (*e*). But the order to enlarge the time for payment is by no means of course; and it will be refused where no ground for granting it is assigned (*f*),

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(*t*) *Bartlett* v. *Rees*, 12 Eq. 395; see also *Edwards* v. *Martin*, 7 W. R. 30; *General Credit, etc., Co.* v. *Glegg*, 22 Ch. D. 549; *Smith* v. *Olding*, 25 Ch. D. 462.

(*u*) *Long* v. *Storie*, 23 L. J. Ch. 200.

(*x*) *Loveday* v. *Chapman*, 32 L. T. 689.

(*y*) *Beevor* v. *Luck*, *supra*.

(*z*) *Bates* v. *Hillcoat*, 16 B. 139; *Radcliff* v. *Salmon*, 4 De G. & Sm. 526; *Stead* v. *Banks*, 5 De G. & Sm. 560.

(*a*) 28 Ch. D. 664.

(*b*) 27 Ch. D. 246; and see *Colman* v. *Llewellyn*, 34 Ch. D. 143; Seton (7th ed.), p. 1910.

(*c*) 44 Ch. D. 161.

(*d*) *Thornhill* v. *Manning*, 1 Si. (N.S.) 451; *Patch* v. *Ward*, L. R. 3 Ch. 203; *Beaton* v. *Boulton*, [1891] W. N. 30.

(*e*) *Cocker* v. *Bevis*, 1 Ch. Ca. 61; *Ismoord* v. *Claypool*, 1 Ch. R. 139; *Anon.*, Barnard, 221; *Edwards* v. *Cunliffe*, 1 Madd. 287; *Ford* v. *Wastell*, 6 Ha. 229, 2 Ph. 591; *Holford* v. *Yate*, 1 K. & J. 677; Seton (7th ed.), 1913.

(*f*) *Nanny* v. *Edwards*, 4 Russ. 124.

or where the security does not appear ample (*g*), or where the mortgagor is plaintiff (*h*), and, even in the case of infant mortgagors, the time will only be extended upon the terms of the immediate payment of the interest and costs (*i*). Where the mortgagor appeals against the decree the terms imposed are as follows : The time appointed for redemption is enlarged, pending the appeal, upon the terms of the mortgagor paying into Court the principal and arrears of interest, and the costs of the suit and of the application for enlarging the time, the mortgagee to receive the dividends of the money paid into Court when invested, on his undertaking to repay them should the decree be reversed (*k*).

On proceedings for foreclosure, where the mortgagor asks to enlarge the time appointed for payment, the Court will accede to the application only on the terms of his first paying the interest and costs already reported due; and these being paid, subsequent interest is to be computed on the principal only, that alone remaining unpaid (*l*). And although such interest and costs are generally directed to be paid at the time appointed for the payment of the whole (*m*), under particular circumstances a longer time will be allowed, as when the mortgagee has prevented the mortgagor from receiving the rents (*n*); and if payment be not made, time may be enlarged if a reasonable excuse be given (*o*). And where the mortgagee varied the account, by receiving the rent after the Master's report and *before* the day fixed for payment, the mortgagee was held not to be entitled to an order absolute for foreclosure, and a further reference and account was directed, a new day being appointed for payment (*p*); but the receipt by the mortgagee of rent *after* the day fixed for payment will not be a ground for appointing a new period for redemption (*q*).

(*g*) *Eyre* v. *Hanson*, 2 B. 478. (*h*) *Faulkner* v. *Bolton*, 7 Si. 319.

(*i*) *Coombe* v. *Stewart*, 13 B. 111; Seton (7th ed.), 1914.

(*k*) *Finch* v. *Shaw*, 20 B. 555.

(*l*) *Whatton* v. *Cradock*, 1 Keen, 267; *Brewin* v. *Austin*, 2 Keen, 211; Seton (7th ed.), p. 1914; *Elton* v. *Curteis*, 19 Ch. D. 49.

(*m*) *Edwards* v. *Cunliffe*, 1 Madd. 287, and see 2 Keen, 212.

(*n*) *Geldard* v. *Hornby*, 1 Ha. 251; *Ellis* v. *Griffiths*, 7 B. 83; *Eyre* v. *Hanson*, 2 B. 478.

(*o*) *Jones* v. *Creswicke*, 9 Si. 304; *Nanfan* v. *Perkins*, *ibid.*, 308.

(*p*) *Garlick* v. *Jackson*, 4 B. 154; *Alden* v. *Foster*, 5 B. 592; *Ellis* v. *Griffiths*, 7 B. 83; *Jenner-Fust* v. *Needham*, 32 Ch. D. 582; *Peat* v. *Nicholson*, 34 W. R. 451; but see contra *House* v. *Stephens*, 32 Ch. D. 194, and *Welch* v. *National Cycle Works*, 35 W. R. 137; and see [1927] A. P., p. 1076.

(*q*) *National Permanent Building Society* v. *Raper*, [1892] 1 Ch. 54; [1927] A. P., p. 1077; *Webster* v. *Patteson*, 25 Ch. D. 626; *Colman* v. *Llewellyn*, 34 Ch. D. 143.

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Opening Foreclosure.

Even after final order, foreclosure may, under certain circumstances, be opened : see *Beaton* v. *Boulton* (*r*), where a policy had increased by the death of insured after the day appointed for payment but before final order; the chief clerk made the order absolute on an *ex parte* application, and on appeal to the Court Stirling, J., held that the foreclosure must be opened. There are no definite rules controlling the judicial discretion which in such cases may be exercised. Each case depends upon its special circumstances (*s*).

The mortgagor should, however, come within a reasonable time, and what this is may depend upon the nature of the property; thus, where the estate is an estate in land in possession, and the mortgagee takes it in possession and deals with it, and alters the property, the mortgagor must come much more quickly than where it is an estate in reversion, as to which the mortgagee can do nothing except sell it (*t*).

A decree for foreclosure has been opened under peculiar circumstances, after the mortgagee had been in possession sixteen years (*u*); and for fraud, or collusion in getting the decree (*x*); or by the mortgagee's proceeding against the mortgagor upon some collateral security, as a bond or covenant, after foreclosure (*y*).

The mere overvalue of the estate, or a parol agreement or declaration of the mortgagee's to allow redemption (*z*), or his devising the estate as money (*a*), or calling it a debt in his will (*b*), or an error in a matter of form after long possession (*c*), will not induce the Court to open a decree of foreclosure. More especially will a decree not be opened after long possession, where the estate

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(*r*) [1891] W. N. 30.

(*s*) *Thornhill* v. *Manning*, 1 Sim. (N.S.) 451, 454; *Campbell* v. *Holyland*, 7 Ch. D. 166.

(*t*) *Campbell* v. *Holyland*, 7 Ch. D., p. 172, and instances there given.

(*u*) *Burgh* v. *Langton*, 5 Bro. P. C. 213; S. C., 2 Eq. Ca. Abr. 619, 5 Vin. Abr. 476, pl. 2.

(*x*) *Loyd* v. *Mansell*, 2 P. W. 73; *Gore* v. *Stacpoole*, 1 Dow. 18; *Harvey* v. *Tebbutt*, 1 J. & W. 197.

(*y*) *Dashwood* v. *Blithway*, 1 Eq. Ca. Abr. 317, 15 Vin. Abr. 476, pl. 3.

(*z*) *Whishall* v. *Short*, 2 Eq. Cas. Abr. 177, pl. 1, 7 Vin. Abr. 298, pl. 15, affirmed Dom. Proc. 3 Bro. P. C. 558.

(*a*) *Silberschildt* v. *Schiott*, 3 V. & B. 45; *Stuckville* v. *Dolben*, cited Sel. Ch. Ca. 10, 15 Vin. Abr. 476, pl. 1.

(*b*) *Took* v. *Ely*, 2 Eq. Ca. Abr. 608, pl. 1, 15 Vin. Abr. 476, pl. 1 (n.).

(*c*) *Jones* v. *Kenrick*, 5 Bro. P. C. 244.

has been dealt with in settlements, or alterations have been made in erecting and pulling down buildings (*d*).

A decree of foreclosure may, in the discretion of the Court, even be opened against a *purchaser* from the mortgagee. "The purchaser must be taken to know the general law that an order for foreclosure may be opened under proper circumstances and under a proper exercise of discretion by the Court" (*e*). If, for instance, the purchaser bought the estate within twenty-four hours after the foreclosure absolute, and with notice of the fact that it was of greater value than the amount of the mortgage debt, the Court would open the order for foreclosure (*f*). *Secus*, if the purchaser bought a freehold estate in possession after the lapse of a considerable time from the order of foreclosure absolute, with no notice of extraneous circumstances which would induce the Court to interfere (*g*).

Where, in a foreclosure suit, part of the mortgagor's interest was vested in the Crown, the Court would not decree foreclosure in respect thereof, but gave the plaintiff liberty to apply in Chambers for a sale (*h*).

So, where (in a case before the abolition of forfeitures for treason or felony) a mortgagor was convicted of felony, and the mortgagee filed a bill to realise his security, the Court decreed a sale, an account, payment of the purchase-money into Court, and payment of the mortgage debt, with liberty to the Attorney-General to apply for payment out of the balance (*i*).

Sale by the Court (*k*).

A sale, previous to the Chancery Improvement Act (*l*), would have been decreed by the Court instead of a foreclosure in certain cases, as in the case of a mortgage of a dry reversion (*m*); or if the

(*d*) *Took* v. *Ely*, *supra*; *Lant* v. *Crispe*, 5 Bro. P. C. 200.

(*e*) *Per* Jessel, M.R., in *Campbell* v. *Holyland*, 7 Ch. D., pp. 173-4.

(*f*) *Campbell* v. *Holyland*, 7 Ch. D. 173.

(*g*) *Ibid.*

(*h*) *Bartlett* v. *Rees*, 12 Eq. 395; *Hancock* v. *Att.-Gen.*, 33 L. J. Ch. 661.

(*i*) *Hancock* v. *Att-Gen.*, *supra*.

(*k*) See as to the exercise of the jurisdiction of the Court of Chancery to order a sale in place of foreclosure under the Chancery Improvement Act, 1852, *Hurst* v. *H.*, 16 B. 372; *Smith* v. *Robinson*, 1 Sm. & G. 140; *Laslett* v. *Cliffe*, 2 Sm. & G. 278; *Wickham* v. *Nicholson*, 19 B. 38; *Hewitt* v. *Nanson*, 28 L. J. Ch. 49; *Phillips* v. *Guttridge*, 4 De G. & J. 531; *Foster* v. *Harvey*, 11 W. R. 899, 12 W. R. 92; and Morgan & Chute's Chancery Acts and Orders (5th ed.), 196

(*l*) 15 & 16 Vict. c. 86.

(*m*) *How* v. *Vigures*, 1 Ch. R. 18, 15 Vin. 475.

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security were scanty (*n*); or if the bill, praying a sale, were taken *pro confesso* (*o*).

In the case of an infant heir or devisee of the mortgagor, there would, with the mortgagee's consent, even previous to the alteration in the law, have been an inquiry which would be more beneficial for the infant, a sale or foreclosure (*p*), and an order for sale without a reference would be made, if it appeared clearly for his benefit (*q*). In the cases where an infant is entitled to any interest in land by way of security, section 46 of the Trustee Act, 1925 (which takes the place of section 28 of the Trustee Act, 1893) enables the Court to make an order vesting or releasing such interest.

The jurisdiction given to the Court by section 48 of the Chancery Improvement Act was much enlarged by section 25 of the Conveyancing Act, 1881, which section, with certain amendments, has been re-enacted by section 91 of the Law of Property Act, 1925.

An order for sale can be made in a foreclosure or redemption action at any time before the action is concluded by a foreclosure absolute (*r*); and the order may be made on an interlocutory application before the trial of the action (*s*). In the case of an equitable mortgage, the Law of Property Act, 1925, s. 91, sub-s. 7, provides that the Court may create and vest a mortgage term in the mortgagee to enable him to carry out the sale as if the mortgage had been made by deed by way of legal mortgage.

Under section 47 of the Trustee Act, 1925 (which takes the place of section 30 of the Trustee Act, 1893), where the Court makes an order directing a sale or mortgage of land, every person who is entitled to any interest in the land and is a party to the action or otherwise bound by the order, is to be deemed a trustee for the purposes of the Act and a vesting order may be made accordingly.

As to forms of order for sale where the mortgagor has not appeared see *Wade* v. *Wilson* (*t*).

(*n*) *Earl of Kinnoul* v. *Money*, 3 Swans. 202 (n.).

(*o*) *Lucas* v. *Seale*, 2 Atk. 56; *Daniel* v. *Skipwith*, 2 B. C. C. 154; and see *Stamford, etc., Co.* v. *Keeble*, [1913] 2 Ch. 96, *per* Sargant, J., at p. 100.

(*p*) *Mondey* v. *M.*, 1 V. & B. 222.

(*q*) *Davis* v. *Dowding*, 2 Keen, 245; *Foster* v. *Eddy*, 18 L. J. Ch. 151.

(*r*) *Union Bank of London* v. *Ingram*, 20 Ch. D. 463; *Weston* v. *Davidson*, [1882] W. N. 28; *South Western Bank* v. *Turner*, 31 W. R. 113.

(*s*) *Woolley* v. *Colman*, 21 Ch. D. 169.

(*t*) 22 Ch. D. 235. For a form of order for a sale out of Court, *Cumberland, etc.* v. *Maryport*, [1892] 1 Ch. 92; and see Seeton (7th ed.), 1842-5.

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The Court has a discretion (*u*), and has refused to order a sale against the wishes of a first mortgagee, where the security was likely to prove insufficient. Where prior incumbrances do not oppose the application then subject to the provisions of sub-section 3 of section 91, the order will be made as of course (*x*). A sale may be directed of a mere equity of redemption (*y*), and, if other parties do not appear, a sale is ordered only of so much as will satisfy the plaintiff's mortgage (*z*). A mortgagee by deposit is entitled to foreclosure, but it has been doubted (*a*) whether such a mortgagee is entitled to an order for sale. It may now be taken as settled that the remedy of a mortgagee by deposit is not limited to foreclosure, but that he is entitled to sale (*b*).

Where the defendant in a foreclosure action applied for a sale at the making of the order, he was ordered to deposit security in Court for the costs of the sale and otherwise to be foreclosed (*c*). But in *Davies* v. *Wright* (*d*), where the conduct of the sale was given to the defendant mortgagor, he was not required to give security. As to the conduct of sale, in *Christie* v. *Van Tromp* (*e*), where the first mortgagee was plaintiff, and the property was clearly ample to answer all mortgages, the conduct was given to the plaintiff; in other cases, where it has been doubtful whether the property will really be sufficient, the conduct has been determined by the consideration as to who is most interested in getting a price (*f*); and leave has been given to sell out of Court, and, in case of sale by mortgagor, a reserve is fixed sufficient to cover what is due on the mortgages (*g*); and see as to general powers given by the rules for requiring proposals to be laid before the Judge, and

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(*u*) *Merchant Banking Co.* v. *London, etc., Bank*, [1886] W. N. 5; 55 L. J. Ch. 479; *Provident Clerks, etc.* v. *Lewis*, 67 L. T. 644, cf. *Norman* v. *Beaumont*, [1893] W. N. 45.

(*x*) See *Clarke* v. *Pannell*, 29 Sol. J. 147.

(*y*) *Cripps* v. *Wood*, 51 L. J. Ch. 584.

(*z*) *Wade* v. *Wilson*, 22 Ch. D. 235.

(*a*) *James* v. *J.*, 16 Eq. 153; *Backhouse* v. *Charlton*, 8 Ch. D. 444.

(*b*) *Woolf* v. *Barron*, [1873] W. N. p. 71; *Wade* v. *Wilson*, 22 Ch. D. 235; *Oldham* v. *Stringer*, 33 W. R. 251; *York Union Bank* v. *Artley*, 11 Ch. D. 205; Fisher (6th ed.), p. 511; Seton (7th ed.), p. 1983.

(*c*) *Weston* v. *Davidson*, [1882] W. N. 28; *Woolley* v. *Colman*, 21 Ch. D. 169; *Brewer* v. *Square*, [1892] 2 Ch. 111.

(*d*) 32 Ch. D. 220.

(*e*) [1886] W. N. 111; [1927] A. P. 912.

(*f*) See *Woolley* v. *Colman*, 21 Ch. D. 169; *Brewer* v. *Square*, [1892] 2 Ch. 111; *Davies* v. *Wright*, 32 Ch. D. 220; and *Norman* v. *Beaumont*, [1893] W. N. 45; *Union Bank* v. *Munster*, 37 Ch. D. 51; [1927] A. P., p. 912.

(*g*) *Ibid.*

for sales out of Court, R. S. C., Order LI, rr. 1a, 1b, 2, 3, 3a, 4, 5, 6, and 6a.

By section 50 of the Law of Property Act, 1925, which takes the place of section 5 of the Conveyancing Act, 1881, where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may direct or allow payment into Court of sufficient to answer the incumbrance and direct that the property be sold free from the incumbrance (*h*). A person entitled to an equitable charge created by will is entitled to sale, but not to foreclosure (*i*).

Prior to Lord Cranworth's Act (*k*) which gave the mortgagee, in the case of a mortgage created by deed, an implied power of sale, the mortgagee of *land* had, in the absence of an express power, no power of sale. A mortgagee of stocks and shares had the rights independently of statute, of a pledgee and could sell if the time for repayment had passed, or if no time were fixed, then on default in repayment after reasonable notice (*l*).

Sale by Mortgagee under Statutory Power of Sale.

The mortgagee is not a trustee of his statutory power of sale (*m*), but he must exercise a reasonable care and prudence in selling (*n*).

But where he has exercised the power and paid himself, he is in a fiduciary position as to the surplus for the mortgagor (*o*), and is bound to pay that surplus to the persons entitled (*p*).

Section 105 of the Law of Property Act, 1925 (re-enacting

(*h*) See *Dickin* v. *D.*, [1882] W. N. 113; 30 W. R. 887; *Re Lake & Taylor's Mortgage*, 28 Ch. D. 402; *Patching* v. *Bull*, 30 W. R. 244; *Re Wilberforce*, [1915] 1 Ch. 94.

(*i*) *Re Owen*, [1894] 3 Ch. 220, 226; and see *Harrold* v. *Plenty*, [1901] 2 Ch. 314; *Re Lloyd*, [1903] 1 Ch. 385. See also *Re Witham*, [1922] 2 Ch. pp. 421-2.

(*k*) 23 & 24 Vict. c. 145, ss. 11-24; repealed by the C. A., 1881, which has now been repealed by the L. P. Act, 1925; see *infra*.

(*l*) See *Deverges* v. *Sandeman*, [1902] 1 Ch. 579; *Stubbs* v. *Slater*, [1910] 1 Ch. 633, and see *infra* notes to *Russel* v. *R.*

(*m*) *Warner* v. *Jacob*, 20 Ch. D. 220; *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 410, 411; *Kennedy* v. *De Trafford*, [1896] 1 Ch. 762, 772; [1897] A. C. 180; *Nutt* v. *Easton*, [1899] 1 Ch. 873; [1900] 1 Ch. 29; *Belton* v. *Bass & Co.*, [1922] 2 Ch. 449; cf. *Hodson* v. *Deans*, [1903] 2 Ch. 647.

(*n*) *Colson* v. *Williams*, 61 L. T. 71.

(*o*) *Kennedy* v. *De Trafford*, [1896] 1 Ch., per Kay, J., at pp. 774, 775; *Charles* v. *Jones*, 35 Ch. D. 544.

(*p*) *West London Commercial Bank* v. *Reliance Building Society*, 27 Ch. D. 187; 29 Ch. D. 954; *Charles* v. *Jones*, *supra*; *Eley* v. *Read*, 76 L. T. 39; *Re Thomson's Mortgage Trusts*, [1920] 1 Ch. 508.

section 21, sub-section 3 of the Conveyancing Act, 1881), expressly provides that the mortgagee shall hold the proceeds of sale after discharge of prior incumbrances *in trust* to be applied in the manner therein directed. The words "in trust" would appear to make the mortgagee who sells an express trustee of any surplus remaining, after discharge of his claims, for the benefit of the persons entitled to the equity of redemption (*q*). The mortgagee, if a claim is made against him as to the surplus, cannot, therefore, as he could if he were merely a constructive trustee, rely on the Statutes of Limitations, unless he can bring his case within section 8 of the Trustee Act, 1888. In *Thorne* v. *Heard* (*r*), the solicitor for the first mortgagees, who was solicitor for the mortgagor, received the purchase-money on a sale by the first mortgagees, and after satisfying their mortgage misappropriated the surplus. The surplus moneys having never come into the hands of the first mortgagees, and they not being parties or privies to the fraud, it was held that they could set up the Statutes of Limitations against a claim by the second mortgagees.

As a general rule, a sale by a mortgagee will be restrained only on payment into Court by the mortgagor of the amount which the mortgagee swears to be due to him (*s*). But this rule is not strictly observed in cases where the mortgagee, at the date of the mortgage, was solicitor to the mortgagor (*t*).

After a judgment *nisi* for foreclosure the mortgagee cannot exercise his power of sale without the leave of the Court (*u*).

In *Re Rumney & Smith* (*x*), the power of a building society to transfer a mortgage to a person not subject to the rules of the society was regarded as open to doubt. Where such a mortgage

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(*q*) See *Locking* v. *Parker*, L. R. 8 Ch. at p. 40; *Banner* v. *Berridge*, 18 Ch. D., pp. 260-270. In the latter case the sale was by a mortgagee of a ship under section 71 of the Merchant Shipping Act, 1854, and that section contained no words declaring any trusts of the purchase-money. It was held that the mortgagee was a *constructive* trustee of the surplus. See also *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 208, 209; *Re Thomson's Mortgage Trusts*, *supra*.

(*r*) [1895] A. C. 495.

(*s*) *Hickson* v. *Darlow*, 23 Ch. D. 690, and the observations there on *Hill* v. *Kirkwood*, 28 W. R. 358; as to tender by cheque, *Blumberg* v. *Life Interests, etc., Corporation*, [1897] 1 Ch. 1.

(*t*) See *Macleod* v. *Jones*, 24 Ch. D. 289; Kerr on Injunctions (6th ed.), p. 525.

(*u*) *Stevens* v. *Theatres, Ltd.*, [1903] 1 Ch. 857; *Halkett* v. *Earl Dudley*, [1907] 1 Ch. p. 603; *Duff* v. *Devlin*, [1924] 1 I. R. p. 59; Kerr on Injunctions, p. 611, note (u).

(*x*) [1897] W. N. 42; 13 T. L. R. 479; 66 L. J. Ch. 482.

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gives an express power of sale to the trustees for the time being, the power cannot be exercised by a transferee (*y*).

After the Death of the Mortgagor.

The mortgagee has the option of commencing an action for administration or one to enforce his security (*z*). But, under section 34 and part 1 of the 1st Schedule to the Administration of Estates Act, 1925 (which take the place of section 10 of the Judicature Act, 1875), in the administration of an insolvent estate, the same rules are to prevail as to the rights of secured and unsecured creditors and as to debts and liabilities provable, etc., as are in force for the time being under the law of bankruptcy (*a*). Accordingly, the mortgagee in an administration suit can only prove for his whole debt upon giving up his security, and if he does not, he can only prove for the deficiency.

In *Re Gale* (*b*), Bacon, V.-C., held that the rule that an action against the executor personally for *devastavit* is barred after six years applied to a case where the executors had distributed personal estate with notice of a liability of testator's estate to a mortgage debt. But this rule did not apply where the claim was for administration, instead of on a *devastavit* (*c*).

Kay, J., in *Re Marsden* (*d*), referred to the executor as a trustee for creditors, but Chitty, J., in *Re Hyatt* (*e*), said he preferred to say that the executor, without calling him a trustee, owed a duty to the creditors and could not set up his own breach of duty as being a *devastavit* from which he would be protected after six years. Section 8 of the Trustee Act, 1888, would now be a good defence in such a case, unless the case came within one of the exceptions mentioned in the section (*f*). "An executor can plead the Trustee Act, 1888, against a creditor in like manner as an express trustee can plead it against his *cestui que trust*" (*g*).

So far as regards the claim of a mortgagee under the covenant

(*y*) Seton (7th ed.), p. 2058.
(*z*) *Dighton* v. *Withers*, 31 B. 423.
(*a*) Section 130 of Bankruptcy Act, 1914.
(*b*) 22 Ch. D. 820.
(*c*) *Re Marsden*, 26 Ch. D. 783; *re Hyatt*, 38 Ch. D. 609; Hewitt on Limitations, p. 238.
(*d*) 26 Ch. D. 783.
(*e*) 38 Ch. D. 609.
(*f*) *Re Blow*, [1914] 1 Ch. 233; and see *Lacons* v. *Warmoll*, [1907] 2 K. B. 350, 364.
(*g*) *Per* Swinfen Eady, L.J., [1914] 1 Ch., p. 245.

against the assets of a deceased mortgagor not included in the mortgage, it has long been settled that, if the heir in case of an intestacy, or the devisee in case of an absolute devise without a charge of debts, aliened for value before any action for administration, the land in the hands of the alienee was not liable for debts (*h*), though the heir or devisee became personally liable to the value of the land aliened (*i*). The doctrine was applied to leaseholds bequeathed as well as freeholds, where the executor had assented to the bequest (*k*). In *Dilkes* v. *Broadmead* (*l*), a case of marriage settlement, it was decided that when personal estate of a testator is *bona fide* conveyed by a legatee to a purchaser for value without notice of the debt due from the testator, a creditor cannot claim that the assignee should refund (*m*).

Hooper v. *Smart* (*n*) shows that the rule did not protect persons taking assignments for value of interests in a fund in Court while it remains in Court, although there may have been a certificate that no debts were due, if other creditors afterwards prove. Where the funds are still in the hands of beneficiaries, it has been held that the mortgagee may claim in equity that they should refund after considerable lapse of time, and that mere delay would not bar the equitable right (*o*).

As to proceedings for foreclosure after a decree for the administration of a mortgagor's estate, see *Brooksbank* v. *Higginbottom* (*p*). In *Re Summers* (*q*), it was held that in an administration of the estate of a person dying insolvent since 1875, a debt of an ordinary creditor bearing interest, only carried interest to the date of the administration judgment; but in the case of an action by a mort-

(*h*) *Spackman* v. *Timbrell*, 8 Si. 253; *Richardson* v. *Horton*, 7 B. 112; *Pimm* v. *Insall*, 1 Mac. & G. 449, 458; *Ex p. Morton*, 5 V. 549; and see and cf. *Coope* v. *Cresswell*, L. R. 2 Ch. 112, 122; *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567 (doctrine applied to equitable mortgage); *Re Hedgely*, 34 Ch. D. 379; *Re Atkinson*, [1908] 2 Ch. 307; *Re Moon*, [1907] 2 Ch. 304, 310; *Re Welch*, [1916] 1 Ch. 375, 382.

(*i*) 3 Will. & M. c. 14, re-enacted with enlargements by Debts Recovery Act, 1830.

(*k*) *Spackman* v. *Timbrell*, *supra*.

(*l*) 2 De G. F. & J. 566; Seton (7th ed.), p. 1593.

(*m*) See also *Re Hedgely*, *supra*. In the case of a person who dies on or after January 1, 1926, his land is held by his personal representative upon trust for sale. A. E. Act, 1925, s. 34 and First Schedule, Part I.

(*n*) 1 Ch. D. 91; and see *Noble* v. *Brett*, 24 B. 499; *Graham* v. *Drummond*, [1896] 1 Ch. 968; and see *Re Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239.

(*o*) *Ridgway* v. *Newstead*, 3 De G. F. & J. 474; *Blake* v. *Gale*, 31 Ch. D. 196; 32 Ch. D. 571; *Adamson* v. *Hammond*, L. R. 3 P. & D. 144, at p. 148.

(*p*) 31 B. 35.

(*q*) 13 Ch. D. 136.

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gagee to enforce his security and administer the estate of the deceased mortgagor, he was held entitled to have the proceeds of sale applied first in payment of interest down to the date of payment, then in payment of principal, and then to prove for balance of principal, not exceeding amount of principal due at date of judgment (*r*).

The mortgagee's costs in an administration action have priority over the costs of the executors and devisees (*s*).

As to the fund out of which a mortgage is payable on the death of the mortgagor, see *Ancaster* v. *Mayer*, *ante*, vol. i.

Receiver.

Although, according to the old practice, the Court would not appoint a receiver on the application of a legal mortgagee (*t*), under section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925 (which takes the place of section 25, sub-section 8, of the Judicature Act, 1873), the High Court may appoint a receiver "in all cases in which it appears to the Court to be just or convenient so to do." On an interlocutory application in a foreclosure suit an order was made for appointment of a receiver of the whole property, as to part of which the plaintiff was legal, and as to part equitable mortgagee (*u*). The mortgagee has now power to appoint a receiver under section 101, sub-section 1 (iii), of the Law of Property Act, 1925, which takes the place of section 19, subsection 3, of the Conveyancing Act, 1881, without coming to Court; but this does not interfere with the right to have a receiver appointed by the Court, and this seems the better course where an action for foreclosure is pending (*x*). The mortgagor, if he wishes it, may have the nomination made in Chambers; but if not, the Court will appoint the nominee of the mortgagee (*y*).

In *Mason* v. *Westoby* (*z*), a receiver was appointed on the application of a mortgagee in possession who had received all the interest owing and costs, and held a balance of rents. North, J.,

(*r*) *Re Talbott*, 39 Ch. D. 567.

(*s*) *Pinchard* v. *Fellows*, 17 Eq. 421; *Re Banks*, 75 L. T. 387; 45 W. R. 206; Seton (7th ed.), p. 1851; *Cook* v. *Hart*, 12 Eq. 463; *Mason* v. *Bogg*, 2 My. & C. 443; cf. *Re Spensley*, 15 Eq. 16.

(*t*) *Habershon* v. *Gill*, [1875] W. N. 231.

(*u*) *Pease* v. *Fletcher*, 1 Ch. D. 273; and see *Truman* v. *Redgrave*, 18 Ch. D. 547.

(*x*) *See Tillett* v. *Nixon*, 25 Ch. D. 238.

(*y*) *Ibid.*

(*z*) 32 Ch. D. 206.

in *Re Prytherch* (*a*) said : "I am not aware that a mortgagee who has exercised his right of taking possession, has any right to give up that possession whenever he likes." In *Tillett* v. *Nixon* (*b*), however—which was an action for foreclosure by a mortgagee in possession—upon motion by the mortgagee for the appointment of a receiver, Pearson, J., said : "I have no doubt the mortgagee might appoint a receiver under the Conveyancing Act," but as an action was pending it was desirable for the Court to appoint. In the recent case of the *Anchor Trust Co.* v. *Bell* (*c*), Lawrence, J., stated his approval of the opinion thus expressed by Pearson, J., in *Tillett* v. *Nixon*. The mortgagee is entitled *prima facie* to an order that the mortgagor do deliver up possession to the receiver, but the matter is within the discretion of the Court (*d*). A receiver and manager of a business carried on upon mortgaged property will not be appointed unless :

(1) The business is included in the security (*e*);

(2) Or it is necessary to protect the mortgaged property (*f*);

(3) Or it is necessary to realise the property by selling the business with it as a going concern (*g*).

A mortgagee of *business premises*, such as a hotel, or of a colliery with the business or goodwill, who is prevented by the mortgagor from taking possession under the mortgage, may obtain, upon an interlocutory application, an order for the appointment of a receiver and manager, an injunction restraining the mortgagor from interfering with the management of the business, and the possession of the premises (*h*); *secus*, if the mortgage does not expressly or impliedly include the business or goodwill (*i*). Debenture-holders who have a floating security upon the undertaking and all the property, present and future, of a company, are

(*a*) 42 Ch. D. 590, 599.

(*b*) 25 Ch. D. 239.

(*c*) [1926] Ch., p. 817.

(*d*) *Pratchett* v. *Drew*, [1924] 1 Ch. 280, and the cases there cited.

(*e*) *Whitley* v. *Challis*, [1892] 1 Ch. 64; *Re Leas Hotel Co.*, [1902] 1 Ch. 332; *Leney & Sons, Ltd.* v. *Callingham*, [1908] 1 K. B. 79, 85.

(*f*) *Campbell* v. *Lloyds, etc., Bank*, [1891] 1 Ch. 136 (n); *Leney & Sons, Ltd.* v. *Callingham*, *supra*.

(*g*) *Makins* v. *Percy Ibotson & Sons*, [1891] 1 Ch. 133.

(*h*) *Truman* v. *Redgrave*, 18 Ch. D. 547; and see *National Provincial, etc.* v. *United, etc.*, 85 L. J. Ch. 106.

(*i*) *County of Gloucester Bank* v. *Rudry Merthyr, etc., Colliery Co.*, [1895] 1 Ch. 629; *Whitley* v. *Challis*, [1892] 1 Ch. 64; *Bartlett* v. *West Met. Tramways Co.*, [1893] 3 Ch. 437; and see *Gardner* v. *L. C. & D. Ry.*, L. R. 2 Ch. 201; *Marshall* v. *South Staffs. Tramways Co.*, [1895] 2 Ch. 36; *Re Leas Hotel Co.*, [1902] 1 Ch. 332; *Leney & Sons, Ltd.* v. *Callingham*, [1908] 1 K. B. 79, 85.

entitled to the appointment of a receiver of the property subject to the debentures if their security is in jeopardy, although nothing may be payable in respect of principal or interest, and there has been no default or breach of contract by the company (*k*). The Court has jurisdiction to appoint a receiver in an action to enforce a floating security, though the writ was issued before money was payable under the debenture, if the security has matured at the date of the appointment (*l*).

Bankruptcy of Mortgagor, etc.—Upon the bankruptcy of the mortgagor, the mortgagee may either realise his security and prove for the balance due to him, after deducting the net amount realised, or may surrender his security and prove for the whole debt, or may require the trustee to elect whether he will exercise his power of redeeming the security or requiring it to be realised, and then, if the trustee does not elect within six months, the mortgagee becomes entitled to the property free from redemption (*m*).

In the case of mortgages executed after the commencement of the Law of Property Act, 1925, s. 110 provides that where the statutory or express power for a mortgagee either to sell or to appoint a receiver is made exercisable by reason of the mortgagor committing an act of bankruptcy or being adjudged a bankrupt, such power shall not be exercised only on account of the act of bankruptcy or adjudication without the leave of the Court.

With reference to the possession of the title deeds, it is provided by section 106, sub-section 4 of the Law of Property Act, 1925, that at any time after the power of sale conferred by the Act has become exercisable the person entitled to exercise the power may demand and recover from any person, other than a person having in the mortgaged property an estate or interest in priority to the mortgage, all the deeds and documents relating to the property or to the title thereto which a purchaser under the power of sale would be entitled to demand and recover.

Where an order has been made to wind up a company, a mortgagee, who has commenced an action against the company to realise his security, will be given leave, under section 142 of the Companies (Consolidation) Act, 1908 (*n*), to proceed with his

(*k*) *Re London Pressed Hinge Co.*, [1905] 1 Ch. 576; and see *Re New York Taxicab Co., Ltd.*, [1913] 1 Ch. 1.

(*l*) *Re Carshalton Park Estate*, [1908] 2 Ch. 62; [1928] A. P., pp. 5, 2356.

(*m*) Bankruptcy Act, 1914, 2nd Sched., rr. 10—18. See the notes to *Russel* v. *R.*, *infra*.

(*n*) Replacing Companies Act, 1862, s. 67.

action, except under special circumstances, or unless the same relief is or will be given to him in the winding-up as he would obtain in the action (*o*). So also a receiver appointed in a debenture-holders' action, commenced subsequently to the winding-up proceedings, will be continued when leave is given to the plaintiffs in the debenture-holders' action to proceed (*p*).

The trustee in bankruptcy of a mortgagee can obtain judgment for foreclosure against the trustee in bankruptcy of the mortgagor. and is not obliged to make his application to the Court of Bankruptcy (*q*). A transfer to the Judge exercising jurisdiction in bankruptcy of a foreclosure action pending before another Judge, will not be made (under the Bankruptcy Act, 1914, s. 105, sub-s. 4) at the instance of the trustee in bankruptcy unless he claims by a higher title than that which the bankrupt had (*r*).

It may be here mentioned that, irrespective of any proceedings to enforce his security, the mortgagee, if he find that his security is defective, may commence an action to compel the perfecting of his security (*s*).

The above notes relating to the exercise of a mortgagee's powers must be read as subject to the provisions of the Rent and Mortgage Restriction Acts, in the case of the mortgages to which those Acts apply (*t*).

10. Remedies of the Mortgagor.

Redemption.—Any person interested in the equity of redemption is entitled to redeem (*u*). The right has been held to extend to the *heir* at common law, or the customary heir (according to the tenure of the land) (*x*); to a lunatic, through his committee (*y*); to the devisee of the equity of redemption (*z*); to a tenant for life,

(*o*) See *Re David Lloyd & Co.*, 6 Ch. D. 339; *Re Longdendale Cotton Spinning Co.*, 8 Ch. D. 150; *Re Pound, Son & Hutchins*, 42 Ch. D. 402; cf. *Andrew* v. *Swansea Society*, 44 L. T. 106.

(*p*) *Strong* v. *Carlyle Press*, [1893] 1 Ch. 268.

(*q*) *Waddell* v. *Toleman*, 9 Ch. D. 212; *Ex p. Fletcher*, 10 Ch. D. 610.

(*r*) *Re Champagné*, 69 L. T. 763.

(*s*) See *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119; *Malone* v. *Geraghty*, 3 Dr. & W. 246; 1 H. L. Cas. 81; *Sporle* v. *Whayman*, 20 B. 607.

(*t*) See Sophian, Rent Restrictions Acts.

(*u*) *Pearce* v. *Morris*, L. R. 5 Ch., p. 229; *Tarn* v. *Turner*, 39 Ch. D. 456; Coote (9th ed.), p. 715 *et seq.*; Seton (7th ed.), pp. 1858—9.

(*x*) *Pym* v. *Bowreman*, 3 Swans. 241 (n.); *Lloyd* v. *Wait*, 1 Ph. 61.

(*y*) *Ex p. Grimstone*, Amb. 706.

(*z*) *Lewis* v. *Nangle*, 2 Ves. Sen. 431; *Philips* v. *Hele*, 1 Ch. R. 190.

remainderman (*a*), or reversioner (*b*); to a dowress (*c*) (*secus*, if she joined in the conveyance with her husband (*d*), unless the right to redeem was reserved to her (*e*)); to a tenant by the curtesy (*f*), jointress (*g*); an assignee (*h*); assignees in bankruptcy (*i*).

Also a subsequent mortgagee making the mortgagor or his heir a party (*k*); judgment creditors (*l*); tenants by elegit or statute and sequestration (*m*); a judgment creditor, whose judgment does not affect the land at the date of a decree in a foreclosure suit, if he acquire a charge on the land by issuing a writ of elegit, and obtaining a return from the sheriff, within six months from the date of the decree (*n*), a judgment creditor, also, although he is unable to proceed with the execution of an elegit by reason of there being mortgages on the estate, notwithstanding the provisions of 27 & 28 Vict. c. 112 (*o*); a plaintiff in a creditor's suit (*p*); a creditor whose debt subsists in equity, although released at law (*q*).

Also the Crown or its grantee, upon forfeiture of the equity of redemption (*r*); the lord claiming the reversion on forfeiture of the equity of redemption of a term (*s*); and a tenant holding under a lease made by the mortgagor after a legal mortgage (*t*).

Persons entitled in default of appointment, where a mortgage is made in execution of a power (*u*). Where a person entitled to

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(*a*) Cf. *Prout* v. *Cock*, [1896] 2 Ch. 808.

(*b*) *Ravald* v. *Russell*, You. 9; *Raffety* v. *King*, 1 Keen, p. 618; *Aynsly* v. *Reed*, Dick. 249.

(*c*) *Palmes* v. *Danby*, Pr. Ch. 137.

(*d*) *Dawson* v. *Bank of Whitehaven*, 6 Ch. D. 218.

(*e*) *Ibid.*, 225; and see *Jackson* v. *Parker*, Amb. 687; *Jackson* v. *Innes*, 1 Bli. 104.

(*f*) *Jones* v. *Meredith*, Bunb. 347.

(*g*) See principal case of *Howard* v. *Harris*; and see Seton (7th ed.), p. 1862.

(*h*) *Anon.*, 3 Atk. 314; and see *Secretary of State, etc.* v. *British, etc.*, 67 L. T. 434.

(*i*) *Francklyn* v. *Fern*, Barnard. C. 30.

(*k*) *Fell* v. *Brown*, 2 Bro. Ch. 276.

(*l*) *Stonehewer* v. *Thompson*, 2 Atk. 440.

(*m*) *Jones* v. *Meredith*, Bunb. 347; 2 Eq. Ca. Abr. 549; *Fawcet* v. *Fothergill*, Dick. 19.

(*n*) *Mildred* v. *Austin*, 8 Eq. 220.

(*o*) *Beckett* v. *Buckley*, 17 Eq. 435; and see *Hatton* v. *Haywood*, L. R. 9 Ch. 229; *Thompson* v. *Gill*, [1903] 1 K. B. 760; and see *Ashburton* v. *Nocton*, [1915] 1 Ch. 274.

(*p*) *Christian* v. *Field*, 2 Ha. 177.

(*q*) *Acton* v. *Peirce*, 2 Vern. 480; *S. C.*, nom. *Acton* v. *A.*, Pr. Ch. 237.

(*r*) *Att.-Gen.* v. *Crofts*, 4 Bro. P. C. 136; *Lovell's Case*, 1 Salk. 85; 1 Eden, 210.

(*s*) *Downe* v. *Morris*, 3 Ha. 394.

(*t*) *Keech* v. *Hall*, Dougl. 22; *Tarn* v. *Turner*, 39 Ch. D. 456.

(*u*) *Innes* v. *Jackson*, 16 V., p. 367.

redeem tenders the mortgage money and interest and costs, he is entitled to the delivery of the title-deeds, and to a reconveyance of the property (*x*); but under the Law of Property Act, 1925, an endorsed receipt is sufficient, although the mortgagor is entitled to require a reconveyance (*y*).

In *Hall* v. *Heward* (*z*), the executrix of the mortgagor was held entitled to redeem the real as well as the personal estate of the testator, on the ground that the owner of the equity in one of two mortgaged estates is not entitled and cannot be compelled to redeem one without the other (*a*). Bacon, V.-C., made the usual order for accounts and, on payment of what should be found due, for conveyance to the executrix free from all incumbrances by the defendant, but subject to such right or equity of redemption as might be subsisting therein in any other person or persons, and his judgment was affirmed by the Court of Appeal. In *Flint* v. *Howard* (*b*), P. in 1876 mortgaged some paper mills to H. for £6,000, and by deed of even date assigned a reversion in personalty as collateral security for the debt. In 1882 P. made a second mortgage of the mills and the reversion to the plaintiff for £5,000; and in 1884 P. made a third mortgage of the mills only to the plaintiff for £2,500. In 1885 the plaintiff by deed transferred his third mortgage to H. and released the mills from his second mortgage, so that H. became first and second mortgagee of the mills, as well as first mortgagee of the reversion, and the plaintiff second mortgagee of the reversion. P. made subsequent mortgages both of mills and reversion. The plaintiff foreclosed the mortgages on the reversion which were subsequent to his own, and then brought an action claiming to redeem H.'s mortgage on the reversion on payment of £6,000, and to have a transfer from him of his first mortgage on the mills, as a security for what he had paid. Held (by the Court of Appeal, affirming Romer, J.), that he was entitled to redeem the reversion and the mills on payment of the £6,000 to H.; that this sum must be apportioned between the mills and the reversion, according to their respective values; and that the plaintiff was entitled to have a conveyance of the reversion absolutely, and of the mills to be held

(*x*) *Per* Lord Hatherley, L.C., in *Pearce* v. *Morris*, L. R. 5 Ch., p. 229.
(*y*) Section 115, sub-section 4.
(*z*) 32 Ch. D. 430; and see *Gee* v. *Liddell*, [1913] 2 Ch. 62.
(*a*) And see *Smith* v. *Green*, 1 Coll. 555; *Elisha* v. *E.*, Seton (7th ed.), p. 1863.
(*b*) [1893] 2 Ch. 54; see notes to *Aldrich* v. *Cooper*, Vol. I.

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as security for such part of the money paid as should be apportioned to that property. For a form of order in a complicated case, where the plaintiffs were first and second mortgagees, and a jointress was the third incumbrancer in respect of her jointure, the plaintiffs fourth mortgagees, and there were other subsequent mortgages, see *Smithett* v. *Hesketh* (*c*), in which case the Court said the jointress was entitled to redeem, and on redeeming to have an assignment of the plaintiffs' first and second mortgages, so as to keep them alive—that if she redeemed, the plaintiffs as fourth mortgagees could only redeem subject to her jointure; if she did not redeem she would be foreclosed.

"The tenant for life having a conveyance, and having the deeds, cannot be redeemed by those in remainder, but retains the life estate, and when the remainderman comes into possession of the estate he can then obtain a redemption of the charge which the tenant for life had acquired" (*d*).

A mortgagee who is also assignee or mortgagee of a particular estate in the equity of redemption is not, during the continuance of that particular estate, subject to redemption at the hands of a remainderman (*e*).

A mortgagee is not bound to convey the legal estate in the mortgaged property and to deliver up the title-deeds to a person from whom he has accepted payment of principal, interest, and costs, if that person has only contracted to purchase part of the mortgaged estate, and has not accepted the title (*f*).

Tender.—It has been held that a person cannot redeem before the time appointed in the mortgage deed for payment, although he tenders to the mortgagee both the principal and the interest due up to that time (*g*).

Ordinarily, after default in payment according to the terms of the deed, a mortgagor desiring to redeem must, by a rule of practice (*h*), give six months' notice of his intention to do so, or pay six months' interest in lieu thereof (*i*). Where, however, the

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(*c*) 44 Ch. D. 161; Seton (7th ed.), p. 1863.
(*d*) *Per* Lord Hatherley, L.C., in *Pearce* v. *Morris*, L. R. 5 Ch. 230.
(*e*) *Prout* v. *Cock*, [1896] 2 Ch. 808.
(*f*) *Pearce* v. *Morris*, L. R. 5 Ch. 227, varying the decree in *S. C.*, 8 Eq. 217.
(*g*) *Brown* v. *Cole*, 14 Si. 427; Coote (9th ed.), pp. 161, 730, 770.
(*h*) See *per* Shadwell, V.-C., in *Browne* v. *Lockhart*, 10 Si. at p. 424; *per* Romer, J., in *Smith* v. *S.*, [1891] 3 Ch. 552.
(*i*) *Johnson* v. *Evans*, 61 L. T. 18.

mortgagee has demanded payment or commenced an action (*k*), or entered into possession (*l*), then neither notice nor payment of six months' interest is necessary, and the mortgagor can redeem at once, on payment of principal and interest, whether the day of payment under the mortgage has arrived or not. After the usual certificate in a foreclosure action, finding the amount due up to the end of six months from date of certificate, the mortgagor is not entitled to redeem before the expiration of the six months on payment of principal with interest up to time of payment only (*m*).

The rule as to the right of the mortgagee to six months' notice or interest applies to all mortgages of property, whether real or personal, in possession or in reversion, where the mortgage is formal, so that it is reasonable to infer that the mortgage is intended to be of a permanent nature. But the rule does not apply to an equitable mortgage by deposit of title-deeds where the inference is that the security is intended to be of a temporary nature (*n*).

Where notice is given by the mortgagor of his intention to pay off, and the money is not paid at the appointed time, a new notice must be given or a further six months' interest is payable if the mortgagee demands it (*o*). But if (after the day named in the mortgage for payment has passed) the mortgagee gives notice calling in the money, the mortgagor, it seems, is entitled to pay off at once, paying interest only up to the date of such payment off; and if he makes default in paying within the time named in the mortgagee's notice, but subsequently makes payment, the mortgagor is not bound by reason of such default to include in such payment six months' interest in lieu of notice (*p*).

But if the mortgagee after due notice refuses to accept a tender of a sum sufficient to cover principal, interest, and costs, he will be compelled to pay the costs of a suit for redemption (*q*), but it seems he will not be deprived of his costs in a redemption suit

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(*k*) *Letts* v. *Hutchins*, 13 Eq. 176; *Smith* v. *S.*, [1891] 3 Ch. 550; *Re Alcock*, 23 Ch. D. 372; *Edmondson* v. *Copland*, [1911] 2 Ch. 301.

(*l*) *Bovill* v. *Endle*, [1896] 1 Ch. 648.

(*m*) *Hill* v. *Rowlands*, [1897] 2 Ch. 361.

(*n*) *Fitzgerald's Trustee* v. *Mellersh*, [1892] 1 Ch. 385, 389; and see *Spencer-Bell to L. & S. W. Ry. Co.*, 33 W. R. 771.

(*o*) *Bartlett* v. *Franklin*, 15 W. R. 1077; 36 L. J. Ch. 671-2; *Edmondson* v. *Copland*, [1911] 2 Ch. 301.

(*p*) *Edmondson* v. *Copland*, [1911] 2 Ch. p. 308; Seton (7th ed.), p. 1872.

(*q*) *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 128; *Harmer* v. *Priestley*, 16 B. 569; *Hoskin* v. *Sincock*, 13 W. R. 487; Seton (7th ed.), pp. 1837, 1877.

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because he has overstated the amount due to him (*r*). A mortgagee denying the title of the mortgagor may be ordered to pay costs (*s*).

It has been held that, though a conditional tender is not good, a tender under protest, reserving the right of the debtor to dispute the amount due, is a good tender if it does not impose any conditions on the creditor, and that after such a tender the mortgagor is entitled to accounts, reserving further consideration and costs in case it should appear that the tender was sufficient (*t*). A mortgagee's solicitor may not accept a cheque unless authorised to do so; consequently the tender of a cheque is not good in the absence of such authority (*u*).

To stop interest running, not only must there be a sufficient tender by the mortgagor of principal, interest, and costs, but he must be able to satisfy the Court that he had and always kept the money ready for payment (*x*). Tender properly made and improperly rejected, is not, in case of a mortgage, equivalent to payment so as to be the foundation of an action for detinue for wrongful detention of the deeds. Lord Macnaghten explains the distinction herein between the pledge of a chattel, where the general property in the chattel remained in the pledgor, and a special property in the pledgee which is determined by sufficient tender, and a mortgage; and it is the same thing for this purpose whether the mortgage is legal or equitable, and even if it is created merely by the deposit of title-deeds (*y*). The proper course for the mortgagor after tender is to submit to pay into Court a sufficient sum and apply for an order (*z*).

11. Fixtures as between Mortgagor and Mortgagee.

It is settled that the rules as to removal as between landlord and tenant do not apply as between mortgagor and mortgagee (*a*).

(*r*) *Cotterell* v. *Stratton*, L. R. 8 Ch. 295; Seton (7th ed.), p. 1877; cf. *Rourke* v. *Robinson*, [1911] 1 Ch. 480.

(*s*) *Kinnaird* v. *Trollope*, 42 Ch. D. 610, at p. 619; and *Hall* v. *Heward*, 32 Ch. D. 430.

(*t*) *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1 (C. A.); Seton, p. 1877; and see *Rourke* v. *Robinson*, *supra*; *Webb* v. *Cross*, [1912] 1 Ch. 323.

(*u*) *Blumberg* v. *Life, etc., Corporation*, [1897] 1 Ch. 171; [1898] 1 Ch. 27.

(*x*) *Edmondson* v. *Copland*, [1911] 2 Ch. 301.

(*y*) *Bank of New South Wales* v. *O'Connor*, 14 A. C. 273, 282.

(*z*) *Ibid.*, p. 283; Seton (7th ed.), p. 1875.

(*a*) *Meux* v. *Jacobs*, L. R. 7 H. L. 481; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123; *Ellis* v. *Glover & Hobson*, [1908] 1 K. B. 388; and see *Elwes* v. *Maw*, Smith, L.C.

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As between a mortgagee in fee of land and the mortgagor the mortgagee is entitled to all fixtures which may be upon the land, whether placed there before or after the mortgage (*b*). This rule applies whether the interest mortgaged is freehold or leasehold (*c*), and it is immaterial whether the mortgage is legal or equitable (*d*). The interest of a mortgagor of leasehold property in the fixtures attached to the premises continues only so long as he retains some interest in the term (*e*).

The rule has been fully applied even where chattels have been affixed to the mortgaged premises under hire-purchase agreements entered into by the mortgagor. In cases of this character, as between the vendor and the purchaser, the latter until all instalments agreed upon are paid is but a bailee, and the vendor, on default by the purchaser in the payment of any instalment, has the right to retake the chattels so bailed. When the mortgage precedes the hire-purchase agreement the application of the rule presents little difficulty. The chattels when affixed are comprised in the mortgage, and nothing short of some agreement, express or implied, will limit the mortgagee's rights over them as a part of his security (*f*). Accordingly, in *Reynolds* v. *Ashby* (*g*), the vendor under such an agreement, seeking to exercise his rights under the agreement, was held not entitled to recover the chattels from mortgagees who had taken possession. So also in *Ellis* v. *Glover & Hobson, Ltd.* (*h*), the mortgagee, who had not entered, was held entitled to recover the value of fixtures removed by the vendor in breach of a hire-purchase agreement by the mortgagor, together with damages for the removal. It would, however, appear that during the continuance of the mortgagor's possession the mortgagee

(*b*) See *e.g.*, *Meux* v. *Jacobs*, L. R. 7 H. L. 481; *Walmesley* v. *Milne*, 7 C. B. (N.S.) 115; *Holland* v. *Hodgson*, L. R. 7 C. P. 328; *Hobson* v. *Gorringe*, [1897] 1 Ch. 189; *Ellis* v. *Glover & Hobson*, [1908] 1 K. B. 388; see judgment of Farwell, L.J., at p. 398; *Reynolds* v. *Ashby*, [1903] 1 K. B. 87; *Re Rogerstone Brick and Stone Co.*, [1919] 1 Ch. 110; Adkin and Bowen on Fixtures, p. 173.

(*c*) *Southport & West Lancashire Ry. Co.* v. *Thompson*, 37 Ch. D. 64; *Meux* v. *Jacobs*, *supra*.

(*d*) See, *e.g.*, *Meux* v. *Jacobs*, *supra*; cf. *Re Samuel Allen & Sons, Ltd.*, [1907] 1 Ch. 575; *Re Morison, Jones & Taylor, Ltd.*, [1914] 1 Ch. 50.

(*e*) *Boyd* v. *Shorrock*, 5 Eq. 72, 79; *Re Rogerstone Brick and Stone Co.*, [1919] 1 Ch. 110.

(*f*) See *per* Farwell, L.J., in *Ellis* v. *Glover & Hobson, Ltd.*, [1908] 1 K. B. 399; Adkin and Bowen, p. 179.

(*g*) [1903] 1 K. B. 87; [1904] A. C. 466; cf. *Howie's Trustees* v. *MacLay*, 5 F. 214.

(*h*) [1908] 1 K. B. 388; Adkin and Bowen, p. 193.

would not be entitled to an injunction to restrain the removal of such fixtures or to obtain damages for their removal unless his security were thereby rendered deficient (*i*). Further, it may be that if the mortgagee had express notice of the terms of a hire-purchase agreement made with the mortgagor whilst in possession, the mortgagee would be bound thereby on taking possession (*k*).

Where the hire-purchase agreement precedes the mortgage, and a legal mortgagee has advanced his money without notice of the hire-purchase agreement, he has been held entitled *on taking possession* to retain the chattels then affixed against the vendor who has received only part of the instalments of purchase-money (*l*). In *Gough* v. *Wood* (*m*) it was held that, having regard to the nature of the premises mortgaged (nursery gardens), the mortgagee by allowing the mortgagor to continue in possession impliedly authorised him to remove fixtures which he might affix for the purposes of his business. Accordingly the vendor was entitled to fixtures which he had removed on the purchaser's default *before* the mortgagee entered. This implied licence would of course be determined by the mortgagee's entry (*n*).

In *Hobson* v. *Gorringe* (*o*), A. L. Smith, L.J., in delivering the judgment of the Court (*p*), pointed out that the defendant Gorringe (the mortgagee), was a purchaser without notice of the plaintiff's equity. In *Re Samuel Allen & Sons, Ltd.* (*q*), the purchaser under a hire-purchase agreement subsequently made an equitable mortgage of the premises, to which the chattels were then affixed, to a bank by deposit of title-deeds. The purchaser made default under the agreement, and the vendor thereupon demanded re-delivery of the chattels. Parker, J., held that the agreement could not be considered as of a purely personal nature, and that, since the claims of the vendor and the bank were alike equitable, the claim of the vendor must be preferred as being prior in time.

(*i*) See *per* Farwell, L.J., *Ellis* v. *Glover & Hobson, Ltd.*, *supra*, at p. 399.
(*k*) See *per* Romer, L.J., in *Reynolds* v. *Ashby*, [1903] 1 K. B. at p. 101.
(*l*) *Hobson* v. *Gorringe*, [1897] 1 Ch. 182.
(*m*) [1894] 1 Q. B. 713.
(*n*) See this case explained *per* Kay, L.J., *Ex p. Huddersfield Banking, etc*, [1895] 2 Ch. at p. 286, discussed in *Hobson* v. *Gorringe*, *supra*, and distinguished in *Reynolds* v. *Ashby*, *supra*, and by Farwell, L.J., in *Ellis* v. *Glover & Hobson*, *supra*, at pp. 401, 402. In the latter case there was an express provision in the mortgage deed against removal of fixtures.
(*o*) [1897] 1 Ch. 182. (*p*) *Ibid.*, at p. 192.
(*q*) [1907] 1 Ch. 575; *Re Morrison, Jones & Taylor, Ltd.*, [1914] 1 Ch. 50.

Howard v. Harris.

Questions of difficulty as to the mortgage of fixtures arise under the Bills of Sale Acts, 1878 and 1882. When the Act of 1878 was passed, a mortgage of land, whether by deed (*r*), or deposit with (*s*) or without (*t*) a memorandum, passed the fixtures to the mortgagee as part of the land; and this is still the law (*u*). But, on the other hand, if with the assurance of the land there were an assignment by a separate witnessing part (*v*), or by the same witnessing part with a separate *habendum* to the mortgagee absolutely (*x*); or by the same witnessing part with an omission of a *habendum* as to the fixtures, while the *habendum* as to the land was for a term (*y*); or if there were a power of severing or selling fixtures separately (*z*); then the mortgage, if unregistered, was void as against holders of registered bills of sale, or execution creditors, or a trustee in bankruptcy or liquidation.

The Bills of Sale Act, 1878, by section 4, included in "personal chattels" all fixtures and growing crops where "separately" assigned, but, excepting "trade machinery," excluded from "personal chattels" all other fixtures when assigned with any freehold or leasehold land to which they were attached. By section 5, trade machinery is defined to be machinery in or attached to any factory or workshop exclusive of (1) the fixed motive power, (2) fixed power machinery, and (3) pipes therein mentioned. Section 7 enacted that no fixtures or growing crops should be deemed to be separately assigned by reason only of being assigned by separate words, or that power was given to sever them, provided that by the same instrument any freehold or leasehold interest was assigned in the land to which they were attached, and that the construction should be retrospective and apply to mortgages before the Act (*a*). It may here be noted that debentures of a joint stock company, creating a floating charge which may comprise fixtures are expressly excepted from the Bills of Sale Act, 1882, by

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(*r*) *Ex p. Barclay, re Joyce*, L. R. 9 Ch. 577; and see *Boyd* v. *Shorrock*, 5 Eq. 72; *Climie* v. *Wood*, L. R. 4 Ex. 328, in Exch. Chamb.; *Holland* v. *Hodgson*, L. R. 7 C. P. 329, in Exch. Chamb.; *Mather* v. *Fraser*, 2 K. & J. 536.

(*s*) *Ex p. Astbury*, L. R. 4 Ch. 630; *Ex p. Barclay, re Gowan*, 5 De G. M. & G. 403.

(*t*) *Longbottom* v. *Berry*, L. R. 5 Q. B. 123.

(*u*) *Batcheldor* v. *Yates*, 38 Ch. D. 112.

(*v*) *Begbie* v. *Fenwick*, L. R. 8 Ch. 1075 (n.).

(*x*) *Re Eslick, ex p. Alexander*, 4 Ch. D. 503.

(*y*) *Ex p. Brown, re Reed*, 9 Ch. D. 390.

(*z*) *Ex p. Daglish*, L. R. 8 Ch. 1072; *Johns* v. *Ware*, [1899] 1 Ch. 359.

(*a*) *Ex p. Moore & Robinson's Banking Co.*, 14 Ch. D. 379.

section 17 of that Act; and debentures for the registration of which provision is made in the Companies (Consolidation) Act, 1908, are not within the Bills of Sale Act, 1878 (*b*).

The Bills of Sale Act, 1882, s. 9, enacts that a bill of sale, given as security for the payment of money by the grantor, if not in accordance with the form in the schedule, is to be absolutely void (*c*).

In *Batcheldor* v. *Yates* (*d*), the owner of a building used for his business in which was trade machinery had, in 1886, mortgaged it in fee by deed without any special reference to fixtures or machinery, but it was agreed expressly by the mortgage deed that the powers of section 19 of the Conveyancing Act, 1881, should be exercisable without notice. It was argued that the section gave power to sell part separately from the whole, and that this made the deed void as to the trade machinery, it being unregistered. The Court of Appeal held that the statutory power would not authorise a sale of the fixtures separately from the land, and that the deed passed the trade machinery to the mortgagee only by virtue of its being affixed to the freehold.

Bowen, L.J., says: "Then comes section 5, which introduces the real difficulty as to trade machinery, because it enacts that trade machinery is to be deemed that which it is not, * * * 'personal chattels.' * * * According to the modern system of drafting, an Act of Parliament might be passed with regard to dairy farms, which, after a number of regulations as to how cows are to be milked, went on to say that for all purposes of the Act a horse is to be deemed a cow. * * * I think the words in section 5, as to a disposition of trade machinery, were intended only to exclude from the Act such dispositions as, if they related to ordinary personal chattels, would not be within the Act. * * * Assuming, then, that for the purposes of the Act trade machinery is personal chattels to all intents and purposes, we still have to come back to section 4, and find out whether this is an assurance of trade machinery in the sense in which the term 'assurance' is used as to personal chattels. It cannot be treated as such an assurance, for it does not seem to give the mortgagee any right to

(*b*) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627.

(*c*) As to fixtures excluded by the Bills of Sale Act, 1878, s. 5, from trade machinery, see *Re Standard, etc. Co.*, [1891] 1 Ch. 627; *Richards* v. *Overseers, etc.*, [1896] 2 Ch. 212; *Topham* v. *Greenside*, 37 Ch. D. 281; cf. *Clark* v. *Balm*, [1908] 1 K. B. 667.

(*d*) 38 Ch. D. 112.

the trade machinery apart from the land. The trade machinery simply follows the land as the shadow follows the substance" (*e*).

In *Ex p. Lusty* (*f*), in 1888 the bankrupt had deposited with the plaintiff the deeds of title relating to leaseholds, which included fixed trade machinery, by way of mortgage, with a memorandum agreeing to give a legal mortgage but not specifically mentioning the fixtures. In 1888 a receiving order was made against him. Held by Cave, J., that the official receiver was not entitled to the trade machinery as against the mortgagee. He said : " In the case of *Re Yates*, the Court of Appeal came to the conclusion that the assignment of trade machinery, there struck at, must be an express assignment, and that an assignment of something else, which, by virtue of the law, carries with it trade machinery, does not fall within the Bills of Sale Act, 1878."

In *Small* v. *National Provincial Bank of England* (*g*), Stirling, J., held that a mortgage of land with fixed machinery specially mentioned and with special covenants was void as respects the machinery, but in the later case of *Re Brooke* (*h*), Kekewich, J., held that the principle of *Re Yates* (*supra*), that a conveyance of land passes fixed trade machinery not expressly mentioned and is not a bill of sale, applies equally where the conveyance expressly mentions the fixed trade machinery by reference to a schedule or otherwise. The test appears to be whether the instrument gives any power of selling the fixtures separately from the land. If it does, either expressly or by implication, and reading the instrument as a whole, then the Bills of Sale Acts apply; but if it does not give any such power, the security is outside those Acts (*i*).

By section 8 of the Bills of Sale Act, 1882, a bill of sale not duly registered and attested, or not setting forth the true consideration is void "*in respect of the personal chattels comprised therein.*" But section 9 of the Bills of Sale Act, 1882, which makes a bill of sale given by way of security for money which is not in the statutory form *void*, is not qualified by the words " in respect of the personal chattels comprised therein." Accordingly, a bill of sale void under this section is not effectual as regards the personal covenant (*k*). But section 9 only makes the instrument void so

(*e*) 38 Ch. D. 128.
(*f*) 60 L. T. 160; 37 W. R. 304.
(*g*) [1894] 1 Ch. 666.
(*h*) [1894] 2 Ch. 600.
(*i*) *Re Yates; Batcheldor* v. *Yates*, 38 Ch. D. 112; Reed on Bills of Sale (14th ed.), p. 122. Cf. *Re Rogerstone Brick and Stone Co.*, [1919] 1 Ch. 110.
(*k*) *Davis* v. *Rees*, 17 Q. B. D. 408; *Smith* v. *Whiteman*, [1909] 2 K. B. 437; *Hall* v. *Whiteman*, [1912] 1 K. B. 683.

far as it is a bill of sale; and accordingly where a deed is a bill of sale of chattels and not in the statutory form, and it is also a mortgage of land, the instrument, although void as a bill of sale, will be valid as a mortgage of the land (*l*).

Section 6 of the Bills of Sale Act, 1878, makes an attornment clause giving a power of distress operate as a bill of sale as to personal chattels which could be seized or taken under the power of distress, subject to a proviso that this shall not extend to any mortgage of any estate or interest in land which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.

In *Hall* v. *Comfort* (*m*), this was treated as saving the ordinary attornment clause; but it was afterwards held that such a clause was not within the proviso of section 6 of the Act of 1878, and was void, under section 8 of the Act of 1882, for want of registration (*n*). In *Mumford* v. *Collier* (*o*), it was held that the attornment clause was only invalidated as regards personal chattels and if none were taken it still remained valid as creating the relation of landlord and tenant, and accordingly enabled the mortgagee to recover possession under R. S. C., Order III, r. 6, or Order XIV, r. 1.

Assuming that a mortgage on a building is so made as to operate as a conveyance of the fixtures with the land without being obnoxious to the Bills of Sale Acts or the provisions as to apparent possession in those Acts, it is apprehended that, though the mortgagor remains in possession, the fixtures would not pass to the trustee in bankruptcy as being within the reputed ownership clauses of the Bankruptcy Act (*p*).

12. Rent and Mortgage Interest Restriction Acts.

It is necessary for a mortgagee to bear in mind the restrictions placed on the exercise of his powers by the Rent and Mortgage Interest Restriction Acts, in the cases to which those Acts apply. The first of these statutes was passed (as a temporary measure) early in the war, and the policy then adopted has ever since been continued. The Act of 1920 (10 & 11 Geo. 5, c. 17) is the principal Act now

(*l*) *Re O'Dwyer*, 19 L. R. Ir. 19; Reed on Bills of Sale (14th ed.), p. 185; and see *Re Burdett*, 20 Q. B. D. 310; *Re Willis*, 21 Q. B. D. 384.

(*m*) 18 Q. B. D. 11.

(*n*) *Green* v. *Marsh*, [1892] 2 Q. B. 330; *Re Willis*, *supra*.

(*o*) 25 Q. B. D. 281; Reed on Bills of Sale (14th ed.), p. 113.

(*p*) Williams' Bankruptcy Practice (13th ed.), pp. 267—8; Reed, p. 278.

in force, and this has been substantially amended by the Act of 1923 (13 & 14 Geo. 5, c. 32). The Acts apply to mortgages of dwelling-houses of which the standard rent or the rateable value does not exceed the amount therein stated. In cases to which the principal Act applies, where the interest payable under a mortgage (at the rate permitted by the Act) is not more than twenty-one days in arrear, and the mortgagor's covenants, other than the covenant for payment of principal money, are performed, and the mortgagor keeps the premises in a proper state of repair and pays the interest payable under any prior incumbrance, it is not lawful for the mortgagee (except as therein provided) to call in his mortgage or to take any steps for enforcing his security. By section 14 of the amending Act, the landlord of a house in occupation of a tenant, which is subject to a mortgage to which the Act applies, may apply to the County Court for an order restraining the mortgagee from enforcing his security, if such enforcement would cause exceptional hardship to the landlord.

By 15 & 16 Geo. 5, c. 32, it was provided that the Act of 1920 (as amended by any subsequent enactment) should continue in force until December 25, 1927, and that Part II of the Act of 1923 (which part includes section 14 referred to above) should continue in force until five years later—*i.e.*, until December 25, 1932. By 17 & 18 Geo. 5, c. 34, the Act of 1920 and any amending Acts were continued in force until December 25, 1928.

RUSSEL *v.* RUSSEL.

1 Bro. Ch. 269 (*a*).

Equitable Mortgage by Deposit of Title-deeds.

Pledge of a lease carried into effect, against assignees of a bankrupt. Evidence of the bankrupt, he having had his allowance and certificate allowed to be read.

A LEASE having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee brought this bill for a sale of the leasehold estate.

Mr. Lloyd, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

Mr. Kenyon, for the defendants, the assignees, insisted that the plaintiff's claim was against the law of the land; for that it would be charging land without writing, which is against the fourth clause of the Statute of Frauds (*b*).

LORD LOUGHBOROUGH, Lord Commissioner.—In this case it is a delivery of the title to the plaintiff for a valuable consideration. The Court has nothing to do but to supply the legal formalities. In all these cases the contract is not *to be* performed, but *is* executed.

ASHURST, Lord Commissioner.—Where the contract is for a sale and is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation, upon what terms the lease was delivered.

(*a*) *Hales* v. *Van Berchem*, 2 Vern. 617, where it was held that the deposit in that case for the performance of a written agreement, though there was no writing declaring it to be a security, was not within the statute.

(*b*) 29 Car. 2, c. 3, s. 4.

Russel v. Russel.

A question arose as to reading the bankrupt's evidence, he having had his allowance and certificate, but the Court suffered it to be read, thinking him not bound to refund.

An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt.

Upon the trial, the jury found it was deposited as a security (*c*).

NOTES.

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3. What property and interests are included in a mortgage by deposit, p. 82.
4. For what debts an equitable mortgage may be a security, p. 83.
5. To whom the benefit of an equitable mortgage by deposit will extend, p. 85
6. As against whom a deposit of title-deeds is good, p. 85.
7. Priorities of mortgages legal and equitable, p. 87.
8. Statutory enactments affecting priorities, p. 94.
9. Privileges and remedies of equitable mortgagees, p. 97.

1. Generally.

The new legislation introduced by the Law of Property Act, 1925, does not do away with or affect the power of creating an equitable mortgage by deposit of title-deeds. Section 13 of this Act provides : " This Act shall not prejudicially affect the right or interest of any person arising out of or consequent on the possession by him of any documents relating to a legal estate in land, nor affect any question arising out of or consequent upon any omission to obtain or any other absence of possession by any person of any documents relating to a legal estate in land."

Section 40 of the Law of Property Act, 1925, which replaces section 4 of the Statute of Frauds and applies to contracts whether made before or after the commencement of the Act, enacts that—

" 40.—(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in

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(*c*) The Reporter has been informed that this cause came on afterwards (though he has not been able to ascertain the date) before Lord Thurlow, on the equity reserved, when his Lordship ordered that the lease should be sold, and the plaintiff paid his money.

The same point has been since determined in the cases of *Featherstone* v. *Fenwick*, May, 1784, and *Hurford* v. *Carpenter*, April 17 and 18, 1785, where Lord Thurlow held, that the deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated. Although there was no special agreement to assign, the deposit affords a presumption that such was the intent.

Russel v. Russel.

land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

" (2) This section applies to contracts whether made before or after the commencement of this Act, and does not affect the law relating to part performance, or sales by the Court."

The principal case of *Russel* v. *R.*, decided in 1783, was often commented on and disapproved of as creating an interest in land without any memorandum of writing signed by the party to be charged (*d*), contrary to section 4 of the Statute of Frauds. The decision is explained as resting on the ground of part performance, and there must be some act changing the legal position of the parties. Lord Loughborough, in the principal case, said : " In these cases the contract is not *to be* performed, but *is* executed," and in the case of *Ex p. Broderick* (*e*), it was held that the doctrine allowing an equitable mortgage by deposit of deeds was grounded on its being a contract part performed, that a mere verbal agreement for deposit without an act is not sufficient to exclude the Statute of Frauds, and that to make it effectual there must be some act of part performance changing the legal position of the parties. In *Ex p. Broderick* there was an oral promise to give a bank security for a debt; the promisor was owner of an undivided fifth in reversion of a farm. Subsequently the reversion fell into possession, and the owner of another fifth, who was holder of the deeds in right of his fifth and happened to be manager of the bank, told the promisor that he held the deeds as to the latter's one-fifth for the bank. It was held that there being no act altering the legal position of the parties, this was not sufficient to take the case out of the statute or make a valid equitable mortgage. In the case of personal estate, a charge may be created by agreement without writing and without the deposit of any documents (*f*).

An equitable mortgagee by deposit of title-deeds has no legal right to possession, or to be paid the rents of the mortgaged

(*d*) See *per* Lord Eldon in *Ex p. Coming*, 9 V. 115; *Ex p. Whitbread*, 19 V. 209; *Ex p. Wright*, 19 V. 258.

(*e*) 18 Q. B. D. 380, 766; and see *Ex p. Coombe*, 4 Madd. 249.

(*f*) *Tibbitts* v. *George*, 5 Ad. & El. 107; *Parish* v. *Poole*, 53 L. T. 35; Fisher (6th ed.), p. 124; Coote (9th ed.), p. 1495.

property. If he acquires possession lawfully, he is entitled to the rents from the date of his taking possession (*g*), and rents paid to him with notice of his rights cannot be recovered back by the tenant (*h*). These rights were recognised even before the Judicature Act, 1873, but as the law then stood an equitable mortgagee by deposit could not retain the title-deeds of an estate in an action of trover at law against him by a previous purchaser of the fee from the depositor, the mortgagor vendor having been negligently allowed to retain the deeds (*i*).

All property which can be made the subject of a legal mortgage can be made the subject of an equitable mortgage; and a charge (for value) upon all a person's existing property "of what nature or kind soever" is effectual if the property to which it attaches can be ascertained at the time of enforcement (*k*).

A deposit of an agreement for a lease (*l*), though afterwards granted upon different terms (*m*), or of a building agreement to grant leases (*n*), or of a policy of insurance (*o*), or of a registered mortgage of a ship (*p*), will create an equitable mortgage.

Shares in Companies.—These are frequently mortgaged by the deposit of share certificates, notice of the deposit being given to the company (*q*). The lender in such case is not merely a pledgee, and so where a certificate of shares is deposited as security for a debt and interest without a transfer or memorandum, the remedy of the lender against the shares is an order for transfer and foreclosure (*r*). The mortgagee by deposit of shares has an implied power to sell, and, if no time for payment has been fixed, then upon

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(*g*) *Ex p. Bignold*, 4 D. & C. 259; cf. *Sumpter* v. *Cooper*, 2 B. & Ad. 223; and see *Turner* v. *Walsh*, [1909] 2 K. B. 484; *Re Ind, Coope & Co., Ltd.*, [1911] 2 Ch. 223.

(*h*) *Finck* v. *Tranter*, [1905] 1 K. B. 427.

(*i*) *Harrington* v. *Price*, 3 B. & Ad. 170; but cf. *Walker* v. *Linom*, [1907] 2 Ch. 105.

(*k*) *Re Kelcey*, [1899] 2 Ch. 530.

(*l*) *The Unity Joint Stock Mutual Banking Association* v. *King*, 25 B. 72.

(*m*) *Ex p. Reid*, 17 L. J. Bank. 19.

(*n*) *Union Bank of London* v. *Kent*, 39 Ch. D. 238; and see *Grierson* v. *Nat. Pro. Bank*, [1913] 2 Ch. 18.

(*o*) *Ferris* v. *Mullins*, 2 Sm. & G. 378.

(*p*) *Lacon* v. *Liffen*, 4 Gif. 75; 9 Jur. (N.S.) 13.

(*q*) *Ex p. Moss*, 3 De G. & Sm. 599; *Ex p. Stewart, re Shelley*, 34 L. J. Bank. 6; 13 W. R. 356; *Colonial Bank* v. *Whinney*, 11 A. C. 426. Notice to the company is not generally necessary to take the shares out of the order and disposition of the debtor, shares being choses in action: Buckley (10th ed.), p. 66.

(*r*) *Harrold* v. *Plenty*, [1901] 2 Ch. 314; Fisher (6th ed.), p. 92; Coote (9th ed.), pp. 311, 315.

giving reasonable notice of his intention to sell (*s*); and where a mortgagee by mistake demands payment in his notice of more than is due the sale is not invalidated (*t*).

It has been held that, where the owner of shares borrows money, and deposits with the lender certificates of his shares, and also transfers thereof not by way of deed signed by him, but with the date and name of the transferee left blank, the lender has an implied power to fill up the blanks, and obtain registration, in cases where a deed is not required for transfer (*u*). But if no time be fixed for repayment of the loan, and nothing was said as to the object of a transfer, the depositee has no authority, *without* a previous demand for repayment of the loan, to sell or sub-mortgage the shares and fill in the name of the purchaser or sub-mortgagee as transferee (*x*), or give to another a similar right (*y*). A transferee of shares by blank transfer deposited by way of security cannot give to another any greater rights than he himself has as equitable mortgagee. The execution of a transfer in blank may, however, bind the transferor by estoppel in favour of persons taking in good faith from the transferee (*z*).

The cases, however, affirming the validity of blank transfers filled up after signature by the transferor only apply when the transfer of shares is, and may lawfully be, made without a deed. A deed delivered with the transferee's name in blank is void and cannot be set up as the deed of the transferor by authority not under seal to fill up the blanks (*a*), and see *Powell* v. *London and Provincial Bank* (*b*), where a trustee deposited certificates and blank transfer signed and sealed as a deed to secure his own debt with a bank who had no notice of the trust. The bank filled up

(*s*) *Deverges* v. *Sandeman*, [1902] 1 Ch. 579, 593; *Stubbs* v. *Slater*, [1910] 1 Ch. 632; and see *Ellis & Co.'s Trustee* v. *Dixon-Johnson*, [1924] 1 Ch. 342; [1924] 2 Ch. 451; [1925] A. C. 489.

(*t*) *Stubbs* v. *Slater*, *supra*.

(*u*) *Ex p. Sargent, re Tahiti Cotton Co.*, 17 Eq. 273; and see *Re Tees Bottle Co., Davies' Case*, 33 L. T. 834; *Ortigosa* v. *Brown, etc.*, 38 L. T. 147; *Re Kimberley Co.*, 58 L. T. 305; *Re Indo-China, etc., Co.*, [1917] 2 Ch. 100; Buckley (10th ed.), p. 586.

(*x*) *France* v. *Clark*, 22 Ch. D. 830; 26 Ch. D. 257.

(*y*) *Ibid.*; cf. *Deverges* v. *Sandeman & Co.*, [1902] 1 Ch. 579.

(*z*) *Sheffield* v. *London Joint Stock Bank*, 13 A. C. 333; *Colonial Bank* v. *Hepworth*, 36 Ch. D. 36; and see *Colonial Bank* v. *Cady*, 15 A. C. 267; *London & County Banking Co.* v. *London & River Plate Bank*, 21 Q. B. D. 535; *Simmons* v. *London Joint Stock Bank*, [1892] A. C. 201; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120; *Fry* v. *Smellie*, [1912] 3 K. B. 282.

(*a*) *Société Générale de Paris* v. *Walker*, 11 A. C. 20.

(*b*) [1893] 1 Ch. 610; [1893] 2 Ch. 555.

the blanks and procured themselves to be registered as owners : it was held that as the transfer was not re-executed after the blanks had been filled up it was not the deed of the transferor and did not pass the legal estate, and that the prior title of the beneficiaries prevailed. A person executing such a deed might, however, be precluded from denying its validity against a grantee for value without notice (*c*).

The effect of notice in determining the priorities of equitable rights is inapplicable to shares in a company incorporated under the Companies Acts (*d*).

And a deposit of a land order of a New Zealand Company, by way of mortgage, was held to be good, without notice having been given to the company of the deposit (*e*).

A limited liability company can make a mortgage by deposit (*f*), and section 93 of the Companies (Consolidation) Act, 1908, requires registration of the prescribed particulars of certain specified mortgages or charges together with the instrument of charge, if any. That section accordingly applies though there is no memorandum accompanying the deposit.

Deposits by Building Societies.—Persons taking mortgages by deposit from a building society take subject to the rules of the society as to borrowing and giving security (*g*), but if the borrowing was *ultra vires*, the mortgagees have been allowed to hold the deeds as a security for so much of their loans as was applied in payment of the debts and liabilities of the society properly payable (*h*). So where the rules did not allow mortgages by deposit of deeds to be made of specific properties for specific sums, but only a charge of all moneys borrowed on the general funds, the mortgagees by deposit were compelled to give up their securities, but were entitled to payment out of the assets in the winding-up, after satisfaction of

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(*c*) *Colonial Bank* v. *Cady*, 15 A. C., *per* Lord Herschell at p. 286; and *Sheffield* v. *London Joint Stock Bank*, 13 A. C. 333.

(*d*) *Société Générale, etc.* v. *Walker*, 11 A. C. 20.

(*e*) *Ex p. Barnett*, De G. 194.

(*f*) See, *e.g.*, *Re General Provident Assurance Co., ex p. National Bank*, 14 Eq. 507; *Re Patent File Co., ex p. Birmingham Banking Co.*, L. R. 6 Ch. 83; *Seligman* v. *Prince & Co.*, [1895] 2 Ch. 617.

(*g*) *Laing* v. *Reed*, L. R. 5 Ch. 4; *Re Victoria Building Society*, 9 Eq. 605; Wurtzburg on Building Societies (5th ed.), p. 105.

(*h*) *Blackburn Building Society* v. *Cunliffe Brooks & Co.*, 22 Ch. D. 61; *Sinclair* v. *Brougham*, [1914] A. C. 398; and see notes to *Ryall* v. *Rowells* under "Subrogation," *ante*, Vol. I.

outside creditors, and in priority to the claims of all shareholders and *members* (*i*).

Deeds relating to Land in Foreign Countries.—Although the law of Scotland knows nothing of equitable mortgages, the owner of a Scotch estate can be compelled in England to give effect to a charge made by the deposit of title-deeds (*k*), there being nothing in the *lex loci* to prevent it.

A deposit of the title-deeds of a house in Shanghai has been held good, although no memorandum of the deposit was made at the British Consulate at Shanghai, and the house remained registered in the name of the depositors (*l*).

Moreover, where the *lex loci rei sitæ* does not forbid, and the parties do not contract with reference to any other particular law, and the general law of the place is English, an equitable lien will be created upon land by a deposit of title-deeds (*m*).

Under the Land Registration Act, 1925, s. 66 (which takes the place of section 8, sub-section 6 of the Land Transfer Act, 1897), the proprietor of any registered land or charge may (subject to the overriding interests, if any, to any entry to the contrary on the register, and to any estates or interests registered or protected on the register at the date of the deposit) create a lien on the registered land or charge by deposit of the land certificate or charge certificate; and such lien (subject as aforesaid) is to be equivalent to a lien created in the case of unregistered land by the deposit of documents of title or of the mortgage deed by an owner entitled for his own benefit to the registered estate, or a mortgagee beneficially entitled to the mortgage, as the case may be (*n*).

Effect of Deposit of Title-deeds.—The effect of a mere deposit of title-deeds to secure a sum of money has been thus stated by Kindersley, V.-C. : " By the deposit the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in

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(*i*) *Murray* v. *Scott*, 9 A. C. 519; see also *Re Mutual Aid, etc., Society*, 29 Ch. D. 182; 30 Ch. D. 434; *Re Birkbeck, etc., Building Society*, [1912] 2 Ch. 183.

(*k*) *Ex p. Pollard*, Mont. & C. 239; 4 Deac. 27; *Coote* v. *Jecks*, 13 Eq. 597; Westl., International Law (7th ed.), p. 225. Cf. *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

(*l*) *Ex p. Holthausen*, L. R. 9 Ch. 722; and see *B. S. A. Co.* v. *De Beers Consol. Mines, Ltd.*, [1910] 1 Ch. p. 387; *Re Smith*, [1916] 2 Ch. 206.

(*m*) *Varden Seth Sam* v. *Luckpathy Royjee Lallah*, 9 Moo. Ind. App. 303.

(*n*) As to giving notice of a deposit, in the case of registered land, see Land Registration Rules, 1925, Nos. 239-246.

the mortgagee " (*o*); and Jessel, M.R., in *Carter* v. *Wake* (*p*), says of a mortgage by deposit of title-deeds of land, " When there is a deposit of title-deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage."

The effect of a mortgage by deposit is to give a lien on the lands, but not, it seems, on the deeds. Hence it has been held in Ireland that where title-deeds are deposited by way of mortgage, the equitable mortgagee may be ordered, without prejudice to his rights, to lodge the deeds in Court (*q*). But if with such deposit there be a memorandum of the equitable mortgage, such memorandum, it seems, would be an instrument which the mortgagee would be entitled to retain (*r*).

Where a person deposits deeds upon a condition, as, for instance, that a sum of money shall be advanced for seven days to another party, if the persons with whom the deeds are deposited do not fulfil the condition, they will have no lien upon the deeds (*s*).

Where a person fraudulently obtains the title-deeds from the real owner, he cannot, by depositing them with a third party to secure an advance of money, create an equitable mortgage as against the real owner, who will be able to recover them back by an action (*t*); and the Statute of Limitations will not run against the real owner until a demand has been made by him for the deeds and it has been refused (*u*).

If there are no title-deeds or conveyances in the depositor's possession, an equitable mortgage may be created by the deposit of the receipt for purchase-money containing the terms of the agreement for sale (*x*); but the deposit of an attested copy of a deed will not, it seems, be sufficient for that purpose (*y*).

Transfer of Equitable Mortgage.—A mortgage by deposit may be transferred by a delivery of the deeds without the memorandum, should there be one, if the transfer is for value (*z*); but not by a

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(*o*) *Pryce* v. *Bury*, 2 Drew. 41; affirmed 18 Jur. 967; see 16 Eq. 153 (n.).
(*p*) 4 Ch. D. 605, 606.
(*q*) *Re Girdwood*, 5 L. R. Ir. 45.
(*r*) *Ibid.*, p. 47.
(*s*) *Burton* v. *Gray*, L. R. 8 Ch. 932.
(*t*) *Spackman* v. *Foster*, 11 Q. B. D. 99-101.
(*u*) *Ibid.*, and see *Miller* v. *Dell*, [1891] 1 Q. B. 468. Cf. *Beaumont* v. *Jeffery*, [1925] 2 Ch. 1.
(*x*) *Goodwin* v. *Waghorn*, 4 L. J. (N.S.) 172.
(*y*) *Ex p. Broadbent*, 1 M. & A. 635; 4 D. & C. 3.
(*z*) *Ex p. Smith*, 2 Mont. D. & De G. 587.

parol *voluntary* gift with delivery of the deed, and as the mortgagee's interest in the deed is incidental to his interest in the mortgage, the donee in such a case has no right to retain the deed (*a*).

2. How Equitable Mortgages may be Created.

An equitable mortgage can be created either (1) by actual deposit of title-deeds, in which case parol evidence is admissible to show the meaning of the deposit and the extent of the security created (*b*), *or* (2) if there be no deposit of title-deeds, then by a memorandum in writing (*c*), purporting to create a security for money advanced (*d*). When there is a deposit the evidence of intention may be by a memorandum in writing, or partly by writing and partly by parol (*e*), and to constitute a charge it is not necessary that there should be formal words of charge; the intention may be collected from the general nature of the instrument (*f*).

A valid equitable mortgage may be created by a written memorandum of deposit, although no deposit takes place and the deeds are in the hands of a third party (*g*).

A *written* agreement to deposit a deed not then executed, as, for instance, a lease when granted, has been held upon the granting of the lease to create a valid equitable mortgage (*h*). But if no deposit has been actually made, a mere verbal agreement to deposit a lease when granted (*i*), or a mere verbal order

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(*a*) *Re Richardson*, 30 Ch. D. 396; and see *Edwards* v. *Jones*, 1 My. & Cr. 226, and *infra*, notes to *Ellison* v. *E.*

(*b*) *Ex p. Haigh*, 11 V. 403; *Ex p. Mountfort*, 14 V. 606; *Ex p. Kensington*, 2 V. & B. 80; *Cradock* v. *Scottish Provident*, 69 L. T. 380.

(*c*) *Ex p. Leathes*, 3 Deac. & C. 112; *Ex p. Heathcote*, 2 Mont. D. & De G. 711; *Daw* v. *Terrell*, 33 B. 218; and see *infra*, *note* (*g*).

(*d*) If the agreement is executory there is no equitable mortgage, an agreement to lend not being specifically enforceable; see *Rogers* v. *Challis*, 27 B. 175; *South African Territories, Ltd.* v. *Wallington*, [1898] A. C. 309; *Re Smelting Corporation*, [1915] 1 Ch. 472; but note section 105 of Companies (Consolidation) Act, 1908, as to specific performance of agreement to take debentures.

(*e*) See *Ex p. Combe*, 17 V. 369.

(*f*) *Casperd* v. *Att.-Gen.*, 6 Price, 411; *Ede* v. *Knowles*, 2 Y. & C. Ch. 172; *Burgess* v. *Moxon*, 2 Jur. (N.S.) 1059; *Cradock* v. *Scottish, etc.*, 69 L. T. 380; *Re Hurley*, [1894] 1 Ir. R. 488.

(*g*) *Daw* v. *Terrell*, 33 B. 218; *Ex p. Farley*, 1 Mont. D. & De G. 683; *Ex p. Heathcoate*, 2 Mont. D. & De G. 711.

(*h*) *Ex p. Orrett*, 3 Mont. & A. 153; *Ex p. Smith*, 2 Mont. D. & De G. 587; *Ex p. Sheffield Union Bank Co.*, 13 L. T. 477.

(*i*) *Ex p. Coombe*, 4 Madd. 249.

to the intended lessor to do so (*k*), will not create a valid equitable mortgage in favour of the persons with whom the deposit is so agreed or ordered to be made (*l*).

Moreover, a written memorandum of a mere *intention* to make a deposit, if it were not communicated to the creditor by the debtor while he could legally do so, though it might create a trust for the payment of the debt will not create a valid equitable mortgage (*m*).

The circumstances of the deposit must be such as to justify a presumption of intention. In *Burgess* v. *Moxon* (*n*), Stuart, V.-C., considered that such a presumption arises from the mere possession of the deeds. Lord Selborne, however, in *Dixon* v. *Muckleston* (*o*), says the mere possession of deeds without evidence of the manner in which the possession originated, so that a contract may be inferred, will not be enough to create an equitable mortgage. In *Bozon* v. *Williams* (*p*), Sir W. Alexander, C.B., says : " It is stated to have been decided that the mere deposit of deeds constitutes an equitable mortgage, even without a word being said. * * * Where it has been so decided, it has always been where the possession could be accounted for in no other way, or the holder was otherwise a stranger to the title and the lands," as in *Smith* v. *Constant* (*q*).

Where title-deeds were left in the counting-house of a banker, after he had refused to advance money on them, it was inferred that no equitable mortgage was intended (*r*).

So it has been held that the mere possession, by a mortgagee by deed of freeholds, of the deeds relating to leaseholds belonging to the same owner, was not sufficient to imply a mortgage of the leaseholds (*s*).

The evidence that the deeds were deposited as security ought

(*k*) *Ex p. Perry*, 3 Mont. D. & De G. 252.

(*l*) See also *Ex p. Hallifax*, 2 Mont. D. & De G. 544.

(*m*) *Wilson* v. *Balfour*, 2 Camp. 579; *Re Bankhead's Trust*, 2 K. & J. 560; Coote (9th ed.), p. 98.

(*n*) 2 Jur. (N.S.) 1059; Coote, p. 91.

(*o*) L. R. 8 Ch. 155.

(*p*) 3 Y. & J. 150, at p. 161; see also *Featherstone* v. *Fenwick*, 1 Bro. Ch. 270 (n.); *Harford* v. *Carpenter*, *ibid.*; *Edge* v. *Worthington*, 1 Cox, 211; *Ex p. Langston*, 17 V. 227; Coote, p. 91.

(*q*) 4 De G. M. & G. 213; see p. 216. See also *Ex p. Jones*, 3 M. & A. 152; *Williams* v. *Medlicot*, 6 Price, 495; *Re MacMahon*, 55 L. T. 763; *Re Greer*, [1907] 1 Ir. R. 57.

(*r*) *Lucas* v. *Dorrien*, 7 Taunt. 278, 1 J. B. Moore, 29; Fisher (8th ed.), p. 309.

(*s*) See *Wardle* v. *Oakley*, 36 B. 27; Coote, p. 91.

to be produced at the hearing of the cause (*t*), for, if it be not then sufficient, no inquiry will be directed (*u*).

The terms of an agreement upon the deposit of the deeds may show the intention of the parties was not create a mortgage, but merely to provide an indemnity against some liability, *e.g.*, a contingent liability on a joint and several promissory note (*x*).

And it has been long since established that, where there is a statement or memorandum in writing of the circumstances under which the deposit was made, parol evidence is not admissible to contradict it (*y*). But it has been held that an agreement in writing, accompanying the deposit of title-deeds to secure a specific sum, might be extended as a security for future advances beyond that sum by a subsequent verbal agreement (*z*).

An agreement accompanied by a deposit of title-deeds, for making a mortgage, or for pledging the same as a security, requires an *ad valorem* stamp (*a*), *secus* a memorandum simply stating the purpose of the deposit (*b*). But where the agreement, in consequence of being unstamped, is inadmissible as evidence, other parol evidence may be given in order to establish the equitable mortgage (*c*).

A presumption arises of an intention to create an equitable mortgage by the deposit of title-deeds, for the purpose of preparing a legal mortgage (*d*); or by a direction to hold them until the settlement of an account or the execution of a mortgage (*e*).

Where the deeds remain as a deposit in the hands of the debtor, although accompanied by a memorandum, especially if it be not

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(*t*) *Chapman* v. *C.*, 13 B. 308.

(*u*) *Ibid.*; *Holden* v. *Hearn*, 1 B. 445, 456; *Kebell* v. *Philpot*, 7 L. J. Ch. 237; Coote (9th ed.), p. 91.

(*x*) *Sporle* v. *Whayman*, 20 B. 607.

(*y*) *Ex p. Coombe*, 17 V. 369; *Shaw* v. *Foster*, L. R. 5 H. L. 340, 341; and see *Baynard* v. *Woolley*, 20 B. 583; Coote, p. 89.

(*z*) *Ex p. Kensington*, 2 V. & B. 79; *Ex p. Nettleship*, 2 Mont. D. & De G. 124; Fisher (6th ed.), p. 21; Coote (9th ed.), p. 92.

(*a*) Stamp Act, 1891, ss. 85, 86.

(*b*) *Meek* v. *Bayliss*, 31 L. J. Ch. 448; Alpe on Stamp Duties (17th ed.), p. 204.

(*c*) *Hiern* v. *Mill*, 13 V. 114; and see *Birchall* v. *Bullough*, [1896] 1 Q. B. 325, showing how an unstamped document may be used to refresh witnesses' memory in cross-examination; Alpe, p. 40.

(*d*) *Edge* v. *Worthington*, 1 Cox, 211; *Hockley* v. *Bantock*, 1 Russ. 141; *Keys* v. *Williams*, 3 Y. & C. Ex. 62; *James* v. *Rice*, 5 De G. M. & G. 461; *Brizick* v. *Manners*, 9 Mod. 284; *King* v. *Benson*, 6 Price, 433, cited; *Ex p. Hooper*, 1 Mer. 7; *Ex p. Pearse & Prothero*, 1 Buck, 525; Fisher (6th ed.), p. 19.

(*e*) *Fenwick* v. *Potts*, 8 De G. M. & G. 506; *Lloyd* v. *Attwood*, 3 De G. & J. 614; Fisher, p. 19.

communicated to the creditor, a valid equitable mortgage will not be created thereby (*f*).

Where, however, the debtor holds the deposit with a memorandum of deposit as the servant of the creditor it may be good (*g*).

A deposit of deeds with a third person for the benefit of, and communicated to, the creditor will be valid, provided the intention with which it was made be satisfactorily proved. And the possession of the agent of the debtor will be sufficient if the intention to make him a trustee be shown by the memorandum of deposit (*h*).

A deposit of deeds with the wife of the depositor, to be kept by her for the creditor, was held by Eldon, C., not to constitute a valid equitable mortgage (*i*).

An equitable mortgage may be created by deposit of *part* of the title-deeds (*k*); if part of the deeds be given to A, and afterwards part to B, by way of security in each case, both A and B will be secured (*l*), and in the absence of negligence on the part of A he will be preferred to B (*m*).

Nor is it necessary that the deeds deposited should show a good title in the depositor, as for instance, when he deposits all the deeds except the conveyance to himself (*n*).

A deposit, moreover, by a landlord of a lease to a creditor as a security, has been held to amount to an equitable mortgage of the whole fee (*o*).

A deposit of deeds, relating to part of an estate, with a representation that they relate to the whole, will not create an equitable mortgage over the whole of the property, but merely over that part actually comprised in the deeds so deposited (*p*); but the depositor would if his representation were fraudulent be liable in damages (*q*).

(*f*) *Adams* v. *Claxton*, 6 V. 226, 230; Fisher, p. 19.

(*g*) *Ferris* v. *Mullins*, 2 Sm. & G. 378; Coote (9th ed.), p. 98; Fisher, p. 20.

(*h*) *Lloyd* v. *Attwood*, 3 De G. & J. 614.

(*i*) *Ex p. Coming*, 9 Ves. 115.

(*k*) *Ex p. Chippendale*, 1 Deac. 67; *S. C.*, 2 M. & A. 299; *Ex p. Arkwright*, 3 Mont. D. & De G. 129; *Lacon* v. *Allen*, 3 Dr. 579.

(*l*) *Roberts* v. *Croft*, 24 B. 223; 2 De G. & J. 1; *Dixon* v. *Muckleston*, L. R. 8 Ch. 155; cf. *Ex p. Pearse & Prothero*, Buck, 525.

(*m*) As to degree of care required, see *Dixon* v. *Muckleston*, 8 Ch. pp. 160 *et seq.*; *Walker* v. *Linom*, [1907] 2 Ch. 104; Coote, p. 1350.

(*n*) *Ex p. Wetherell*, 11 V. 398; *Roberts* v. *Croft*, 24 B. 223; 2 De G. & J. 1; *Thorpe* v. *Holdsworth*, 7 Eq. 147; *Ex p. Pott*, 7 Jur. 159; cf. *Walker* v. *Linom*, *supra*.

(*o*) *Richards* v. *Borrett*, 3 Esp. 102.

(*p*) *Jones* v. *Williams*, 24 B. 47.

(*q*) *Roberts* v. *Croft*, 24 B. 223.

Russel v. Russel.

A deposit of an agreement for a lease by a person having only a lien upon the property will, as against the lien, create a charge for the amount advanced upon the deposit (*r*).

Where a deposit has been made by a partial owner he will only affect his own interest (*s*).

An executor, having a beneficial interest in the property, may make a deposit without his co-executor joining (*t*).

An equitable mortgage of lands in Middlesex, created by a mere deposit of deeds, did not require registration under the provisions of the Middlesex Registry Act (*u*), because there was no instrument to be registered (*x*). And it would not be rendered void by a subsequent deed conveying the premises duly registered (*y*); but where a deposit of deeds was accompanied by a memorandum, it required registration in order to maintain its priority (*z*). The Land Charges Act, 1925, s. 18, provides that it is not necessary to register under the Middlesex Registry Act, any land charge of Class A (in the Act mentioned) or other instrument made or created on or after July 30, 1900, or any land charge (except a puisine mortgage) of Class B, Class C, or Class D created or made after the commencement of the Act, which is or was capable of registration under the Act or any enactment replaced by such Act.

The effect of the possession of documents "relating to a legal estate in land" is preserved by section 13 of the Law of Property Act, 1925. Under the Land Charges Act, 1925, a legal mortgage, *not* being a mortgage protected by a deposit of documents relating to the legal estate, and (where the land is within the district of a local deeds registry) *not* being registered in the local deeds register (in the Act called a "puisne mortgage"), requires registration as a land charge. It is important to observe that although the new legislation preserves the right of creating an equitable mortgage by

(*r*) *The Unity Joint Stock Mutual Banking Association* v. *King*, 25 B. 72.

(*s*) *Williams* v. *Medlicot*, 6 Price, 495; *Turner* v. *Letts*, 20 B. 185.

(*t*) *Ex p. Sheffield Union Banking Co.*, 13 L. T. 477. But see section 2, subsection 2 of A. E. Act, 1925.

(*u*) 7th Anne, c. 20.

(*x*) *Sumpter* v. *Cooper*, 2 B. & Ad. 223, 226; *Re M'Kinney's Estate*, 6 Ir. R. Eq. 445; *Re Hamilton*, 9 Ir. Ch. R. 512.

(*y*) *Sumpter* v. *Cooper*, 2 B. & Ad. 223; and see *White* v. *Neaylon*, 11 A. C. 171.

(*z*) *Neve* v. *Pennell*, 2 Hem. & M. 170; *Moore* v. *Culverhouse*, 27 B. 639; *Re Wright's Mortgage*, 16 Eq. 41; *Credland* v. *Potter*, 18 Eq. 350; L. R. 10 Ch. 8. As to the position of an unregistered equitable mortgagee as against the trustee in bankruptcy of the mortgagor, see *Jones* v. *Barker*, [1909] 1 Ch. 321.

deposit of documents of title, to be within the saving clause the documents must relate to the legal estate.

3. What Property and Interests are included in a Mortgage by Deposit.

Prima facie, the deposit of deeds by a debtor constitutes what in familiar language is called an equitable mortgage upon the whole of the property comprised in them (*a*).

Where, however, the deposit is accompanied by a written memorandum, it may show to what property the security extends, as, for instance, whether certain estates (*b*), fixtures (*c*), or furniture (*d*), are to be comprehended therein.

For instance, if deeds deposited by way of equitable mortgage apply to various properties, but it is apparent on the memorandum accompanying the deposit and from the dealings of the parties that a portion only of these properties was intended as a security, the lien of the depositee will extend no further than that portion (*e*).

Prima facie an equitable mortgage by deposit of deeds will be confined to the property comprised in the deeds deposited (*f*), even though the depositor may falsely state that the deeds actually deposited relate to property not comprised therein (*g*). But it was held in a case where a map was deposited with the deeds that the security extended to premises delineated on the map but to which the mortgagor had only a possessory title (*h*).

Where a debtor who has deposited deeds with his creditor abstracts them, and they cannot be distinguished, the creditor will have a lien on all the deeds of the debtor (*i*).

A deposit of title-deeds will comprehend any interest which the depositor may afterwards acquire in the property (*k*); and where

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(*a*) *Per* Knight-Bruce, V.-C., in *Ashton* v. *Dalton*, 2 Coll. 566; and see *Ex p. Bisdee*, 1 Mont. D. & De G. 333; Coote (9th ed.), p. 95.

(*b*) *Ex p. Glyn*, 1 Mont. D. & De G. 29.

(*c*) *Ex p. Lloyd*, 1 M. & A. 494, 3 D. & C. 765.

(*d*) *Ex p. Hunt*, 1 Mont. D. & De G. 139.

(*e*) *Wylde* v. *Radford*, 33 L. J. Ch. 51; 12 W. R. 38; see also *Ex p. Heathcoate*, 2 Mont. D. & De G. 711; *Ex p. Robinson*, 1 D. & C. 119; *Ex p. Leathes*, 3 D. & C. 112; *Daw* v. *Terrell*, 33 B. 218; Fisher (6th ed.), p. 20.

(*f*) *Ex p. Powell*, 6 Jur. 490.

(*g*) *Jones* v. *Williams*, 24 B. 47; Fisher, p. 20.

(*h*) *Simmons* v. *Montague*, [1909] 1 Ir. R. 87; Coote (9th ed.), p. 95.

(*i*) *Mason* v. *Morley*, 34 B. 475.

(*k*) *Pryce* v. *Bury*, 16 Eq. 153 (n.); *S. C.*, 2 Drew. 11; *Ex p. Farley*, 1 Mont. D. & De G. 683; Fisher, p. 20.

the owner of an estate subject to a mortgage afterwards paid it off, although he took a surrender of the term and kept the deed in his own possession, it was held that the lien created by the deposit extended to the whole of the estate, freed from the incumbrance (*l*).

4. For what Debts an Equitable Mortgage may be a Security.

Ordinarily, as in *Russel* v. *R.*, an equitable mortgage by deposit will be a security only for the sum then advanced, or which may be mentioned in the memorandum accompanying it, if any; and it will not, by implication, be held to include antecedent debts (*m*), unless having regard to the whole transaction and the circumstances of the case, it appears to have been the intention of the parties (*n*); and the expression "may advance," in the accompanying memorandum, does not necessarily prevent the deposit from being a security for past advances (*o*). If the transaction is executory, as where there is a mere agreement in writing to lend upon security, and no money is advanced, no equitable mortgage is created (*p*).

Although a legal mortgage cannot be extended to subsequent advances by a subsequent parol agreement (*q*), a deposit of deeds, whether it be accompanied by a memorandum or not, may by evidence, either written or parol, be held to extend to subsequent advances, upon proof of an agreement that the deposit was originally made as a security as well for the first as for any subsequent advance, or upon proof that any subsequent advance was made upon the understanding that the deeds were to be a security for it (*r*); for Lord Eldon said that this distinction appeared to him to be too thin, that you should not have the benefit of such an agreement unless you added to the terms of that agreement the fact that the deeds were put back into the hands of the owner, and a re-delivery of them required; on which fact there is no doubt

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(*l*) *Ex p. Bisdee*, 1 Mont. D. & De G. 333; Coote, p. 95.

(*m*) *Ex p. Martin*, 4 D. & C. 457; 2 M. & A. 243; *Mountford* v. *Scott*, T. & R. 274; Fisher (6th ed.), p. 21.

(*n*) *Ex p. Farley*, 1 Mont. D. & De G. 683, 689; *Ex p. Smith*, 2 Mont. D. & De G. 587; Fisher, p. 21; Coote (9th ed.), p. 92.

(*o*) *Ex p. Farley*, *supra*.

(*p*) *Rogers* v. *Challis*, 27 B. 175; *Western Wagon and Property Co.* v. *West*, [1892] 1 Ch. 271; Coote, p. 77.

(*q*) *Ex p. Hooper*, 1 Mer. 7.

(*r*) *Ex p. Langston*, 17 V. 227; *Ex p. Whitbread*, 19 V. 209; *Ex p. Kensington*, 2 V. & B. 79; *Ex p. Nettleship*, 2 Mont. D. & De G. 124; *Ede* v. *Knowles*, 2 Y. & C. Ch. 172.

that the deposit would amount to an equitable lien within the principle of the cases (*s*).

Upon the same principle, where money had been advanced, previous to the abolition of the usury laws, at £6 per cent. on a promissory note, and a deposit of title-deeds of freehold property as a collateral security, and afterwards it was agreed by parol that a legal mortgage should be executed to secure the principal, and interest at £5 per cent., but no mortgage was executed, it was held that the parol agreement was sufficient to change the illegal into a legal contract, and that a return and fresh deposit of the deeds was not necessary to take the second contract out of the Statute of Frauds (*t*).

A debtor had deposited his title-deeds with his creditor *until such time as his account should not exceed* £100, at which time they were to be restored to him. The debtor died indebted to the creditor in £274. It was held by Knight-Bruce, V.-C., that the deeds so deposited were a security for the whole £274 (*u*).

Although the deposit of deeds has been merely for the purpose of securing a simple contract debt, the debt will, in accordance with the practice of the Court, bear interest from the date of the deposit, and by reason of it, though there be no express contract as to interest (*x*).

Where there is a contract in a security for the payment of money on a day certain, with interest at a fixed rate down to that day, no further contract for the continuance of the same rate of interest after that day is implied (*y*), but interest by way of damages at £4 or £5 per cent. from that date will be allowed by the Court or a jury until the day of payment of the principal (*z*), and, if a provision be made as to the amount of interest payable on non-payment of the principal upon a certain day, it must be complied with (*a*).

(*s*) *Ex p. Kensington*, 2 V. & B. 83; 2 Rose, 138; Fisher, p. 21.

(*t*) *James* v. *Rice*, 5 De G. M. & G. 461; see also *Hodgkinson* v. *Wyatt*, 9 B. 566.

(*u*) *Ashton* v. *Dalton*, 2 Coll. 565; Coote (9th ed.), pp. 92 and 95.

(*x*) *Re Kerr's Policy*, 8 Eq. 331; *Re Drax*, [1903] 1 Ch. 781; *Carey* v. *Doyne*, 5 Ir. Ch. R. 104; but see *Ashton* v. *Dalton*, 2 Coll. 565; *Lippard* v. *Ricketts*, 14 Eq. 291; Coote (9th ed.), p. 1185.

(*y*) *Cook* v. *Fowler*, L. R. 7 H. L. 27.

(*z*) *Ibid.*, and see *Re Roberts*, 14 Ch. D. 49; *Mellersh* v. *Brown*, 45 Ch. D. 225; see also *L. C. & D. Ry. Co.* v. *S. E. Ry. Co.*, [1893] A. C. 429; Coote, p. 1183; and cf. *Re Dixon*, [1900] 2 Ch. 561, as to interest on penal bond.

(*a*) *Ex p. Furber*, 17 Ch. D. 191.

Russel v. Russel.

5. To whom the Benefit of an Equitable Mortgage by Deposit will extend.

A mortgage by deposit with a firm may be extended to future members by agreement by parol (*b*), or by dealings with the new firm (*c*).

It seems, however, that parol evidence, without a memorandum in writing, is not admissible to prove that a man who holds deeds as a security for his own debt holds them also as trustee to secure the debt of another. It would be otherwise where the depositee has himself advanced nothing (*d*).

And new owners of property may have shown such acquiescence in a deposit by the former owners as to be equivalent to a re-deposit (*e*).

Bankers by the usage of trade, which, being part of the law merchant, is therefore judicially noticed, have a general lien on all securities deposited with them as bankers by a customer (*f*). So likewise have stockbrokers (*g*), and, although a general lien will not exist if there be an express contract or circumstances that show an implied contract inconsistent with such lien (*h*), nevertheless a deposit to secure a specific sum will not prevent a general lien from attaching (*i*).

Whether taking security amounts to an abandonment of a lien, is a question of intention (*k*).

6. As against whom a Deposit of Title-deeds is Good.

A deposit of deeds is good as against the Crown, if made before the depositor became a debtor to the Crown by record or

(*b*) *Ex p. Kensington*, 2 V. & B. 79, 83.

(*c*) *Ex p. Oakes*, 2 Mont. D. & De G. 234; see also *Ex p. Smith*, *ibid.*, 314; and see *Re O'Brien*, 11 L. R. Ir. 213.

(*d*) *Ex p. Whitbread*, 19 V. 209; *Ex p. Crossfield*, 3 Ir. Eq. R. 67.

(*e*) *Re Wynn Hall Coal Co.*, 10 Eq. 515, 520.

(*f*) *Davis* v. *Bowsher*, 5 T. R. 488; *Bolland* v. *Bygrave*, 1 R. & M. 279; *Re European Bank, Agra Bank Claim*, L. R. 8 Ch. 41.

(*g*) *Jones* v. *Peppercorne*, John. 430; *Re London and Globe Finance Corporation*, [1902] 2 Ch. 416; *John D. Hope & Co.* v. *Glendinning*, [1911] A. C. 419.

(*h*) *Brandao* v. *Barnett*, 3 C. B. 519; 12 Cl. & Fin. 787; *Wilde* v. *Radford*, 9 Jur. (N.S.) 1169; 33 L. J. Ch. 51; 12 W. R. 38; *Vanderzee* v. *Willis*, 3 Bro. Ch. 21; *Leese* v. *Martin*, 17 Eq. 224; *London Chartered Bank of Australia* v. *White*, 4 A. C. 413.

(*i*) *Jones* v. *Peppercorne*, *supra*; *Re Williams*, 3 Ir. R. Eq. 346; *Re London and Globe Finance Corporation*, *supra*.

(*k*) *Re Taylor*, [1891] 1 Ch. 590; *Bank of Africa* v. *Salisbury*, [1892] A. C. 281; *Groom* v. *Cheesewright*, [1895] 1 Ch. 730; *Re Douglas Norman & Co.*, [1898] 1 Ch. 199; *Re Morris*, [1908] 1 K. B. 473.

specialty (*l*), unless it be made in favour of a person in whom it was a breach of duty to the Crown to take it (*m*).

An equitable mortgagee, by deposit of title-deeds, has priority over a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an *elegit*, without notice of the equitable mortgage (*n*). For a judgment creditor only takes the interest of the debtor; he is not a mortgagee, and takes subject to all charges (*o*).

An equitable mortgagee of land being a purchaser for valuable consideration *pro tanto*, his charge would, if made prior to the Voluntary Conveyances Act, 1893 (*p*), be effectual against a prior voluntary settlement (*q*). But that Act as to documents executed after June 29, 1893, has abolished the rule that a conveyance for value by the settlor would, under 27 Eliz. c. 4, override a voluntary settlement, and the Act applies to settlements before and after its date. As a creditor, the equitable mortgagee may, if he can show that the settlement was fraudulent under 13 Eliz. c. 5, avoid such settlement provided that he was a creditor at the time of the execution thereof (*r*).

It was held in *Meggison* v. *Foster* (*s*), that an equitable mortgage by deposit of title-deeds to secure a voluntary bond debt was valid as against the trustee in bankruptcy of the obligor, where it was shown that he was solvent at the time of the transaction, and that there was no fraud, and that the bond without reference to the charge was subsequently settled on, and in consideration of, a marriage. In this case the subsequent consideration of marriage may have operated on the same principle as that on which a subsequent valid agreement may render valid a deposit for illegal consideration (*t*); but, as the deposit operates as an agreement to

(*l*) *Casperd* v. *Att.-Gen.*, 6 Price, 411; *S. C.*, Dan. 239.

(*m*) *Broughton* v. *Davis*, 1 Price, 216.

(*n*) *Whitworth* v. *Gaugain*, 3 Ha. 416, affirmed by Lord Lyndhurst, C., 1 Ph. 728; *Abbott* v. *Stratton*, 9 Ir. Eq. R. 233; *Anderson* v. *Kemshead*, 16 B. 329, 344; *Battersby* v. *Homan*, 2 Ir. Ch. R. 232.

(*o*) *Per* Kay, J., *Re Bell*, 34 W. R. 363; *Re London Pressed Hinge Co.*, [1905] 1 Ch. 576 (creditors and debenture holders); and see cases *supra*, and *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238; *Re Marquis of Anglesey*, [1903] 2 Ch. 727; *Jones* v. *Barker*, [1909] 1 Ch. 321.

(*p*) 56 & 57 Vict. c. 21.

(*q*) See *Ede* v. *Knowles*, 2 Y. & C. Ch. 172; *Lister* v. *Turner*, 5 Ha. 281; *Kerrison* v. *Dorrien*, 9 Bing. 76.

(*r*) *Lister* v. *Turner*, 5 Ha. 281; *Ede* v. *Knowles*, 2 Y. & C. Ch. 172.

(*s*) 2 Y. & C. Ch. 336.

(*t*) *James* v. *Rice*, 5 De G. M. & G. 461, contract originally invalid as in breach of the usury laws.

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execute a mortgage (*u*), it cannot be taken as establishing that a deposit would be effectual if purely voluntary, and not confirmed by some subsequent agreement for value; and if effectual as a voluntary settlement it would be liable to be upset within two years, or (upon certain conditions) within ten years, under section 42 of the Bankruptcy Act, 1914, which replaces section 47 of the Act of 1883.

7. Priorities of Mortgages Legal and Equitable.

Generally.—In cases not governed by the legislation of 1925, as to which see *infra*, pp. 94—97, equitable mortgages are subject to the rule that where equities are equal (*x*) the prior equity shall prevail. The rule applies in the case of deposit by a trustee holding documents relating to the trust property. The *cestuis que trust* " will not lose their priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the *cestuis que trust* have no reason to suppose that there has been any want of good faith on the part of the custodian of the deeds " (*y*).

Thus the mere fact of the *cestuis que trust* of railway shares, registered in the name of a sole trustee, allowing him to have possession of the certificates of the shares which the trustee deposits by way of equitable mortgage, will not have the effect of postponing the prior title of the *cestuis que trust* to that of the equitable mortgagee (*z*). The mere taking a conveyance in the name of a clerk who had access to the securities and who took and deposited the deeds with a mortgagee was held not sufficient to postpone the real owner to the trustee's mortgagee (*a*). On the same principle where a banker held certificates of stock in trust for a company and deposited them by way of security for the banker's debt, it was held that the equitable title of the company had

(*u*) *Pryce* v. *Bury*, 2 Drew. 11; *Carter* v. *Wake*, 4 Ch. D. 605, 606.

(*x*) See as to the meaning of equality the judgment of Kindersley, V.-C., in *Rice* v. *R.*, 2 Drew. 73.

(*y*) See *Taylor* v. *London and County Bank*, [1901] 2 Ch. 231, 261; *Burgis* v. *Constantine*, [1908] 2 K. B., at p. 501.

(*z*) *Shropshire Union Railways and Canal Co.* v. *The Queen*, L. R. 7 H. L. 496; *Burgis* v. *Constantine*, [1908] 2 K. B. 484; *Coleman* v. *London County, etc., Bank*, [1916] 2 Ch. 353; cf. *Great West Permanent Loan Co.* v. *Friesen*, [1925] A. C. 208.

(*a*) *Carritt* v. *Real and Personal Advance Co.*, 42 Ch. D. 263, distinguished in *Rimmer* v. *Webster*, [1902] 2 Ch. 163; and see *Walker* v. *Linom*, [1907] 2 Ch. 104.

priority to the mortgage (*b*), nor can the claim of purchaser for value without notice be raised by the equitable mortgagees, as against equitable interests prior in date (*c*). In *Cave* v. *C.* (*d*) the distinction between a prior *equity* and a prior equitable interest was recognised, and it was held that a legal mortgagee, without notice, obtained priority over the *cestui que trust*, but that the claim of the *cestui que trust*, being prior in point of time, took priority over an equitable mortgage. In *Lloyds Bank* v. *Jones* (*e*), the trustee, legal owner, and his *cestuis que trust* were postponed to a prior equitable charge by deposit, but that was on the ground that it was the duty of the trustee to inquire for the deeds; he had failed to do so, and the *cestuis que trust* were postponed by reason of his negligence.

In *Walker* v. *Linom* (*f*), W., by his marriage settlement, conveyed real estate to trustees. The solicitors, who acted for all parties, believed that the trustees had received all the title-deeds, but W. in fact retained the last deed, the conveyance to himself. W. subsequently purported to convey the real estate to a purchaser without notice. Parker, J., held that the negligence of the trustees in not getting in the title-deeds must postpone their legal title to the equity of the purchaser and that the beneficiaries were in no better position than their trustees.

Postponing the Legal Mortgagee.—The rule was that a legal mortgagee or any purchaser for value without notice having the legal estate took priority over all equitable mortgages or claims unless there was something to postpone him (*h*).

(*b*) *Shropshire Union Railways and Canal Co.* v. *R.*, L. R. 8 Q. B. 420; L. R. 7 H. L. 496; *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192; *Cory* v. *Eyre*, 1 De G. & S. 149; *Re Vernon, Ewens & Co.*, 33 Ch. D. 402; *Manningford* v. *Toleman*, 1 Coll. 670; *Stackhouse* v. *Countess of Jersey*, 1 John. & H. 721; *Bradley* v. *Riches*, 9 Ch. D. 189; *Capell* v. *Winter*, [1907] 2 Ch. 376.

(*c*) See note to *Basset* v. *Nosworthy*, *post*.

(*d*) 15 Ch. D. 639; *National Provincial Bk.* v. *Whipp*, 33 Ch. D. 1; *Cloutte* v. *Storey*, [1911] 1 Ch. 18, 24.

(*e*) 29 Ch. D. 221; and see *Oliver* v. *Hinton*, [1899] 2 Ch. 264; *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632; *Re Castell and Brown, Ltd.*, [1898] 1 Ch. 315; *Re Valletort, etc., Laundry Co.*, [1903] 2 Ch. 654; *Wilson* v. *Kelland*, [1910] 2 Ch. 306; cf. *Cottey* v. *National Provincial Bank, etc.*, 20 T. L. R. 607; cf. *Coleman* v. *London, County, etc., Bank*, [1916] 2 Ch. 353.

(*f*) [1907] 2 Ch. 104; and see and cf. *Re Bobbett's Estate*, [1904] 1 Ir. R. 461; *Capell* v. *Winter*, [1907] 2 Ch. 376.

(*g*) See also *Re Richards*, 45 Ch. D. 589; *Isaac* v. *Worstencroft*, 67 L. T. 351; *Powell* v. *London & Provincial Bank*, [1893] 1 Ch. 610, [1893] 2 Ch. 555; *Carritt* v. *Real and Personal Advance Co.*, *supra*; *Re Vernon, Ewens & Co.*, 33 Ch. D. 402.

(*h*) *Plumb* v. *Fluitt*, 2 Anst. 432.

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In the case of *Northern Counties of England Fire Insurance Co.* v. *Whipp* (*i*), Fry, L.J., delivering the judgment of the Court of Appeal, gave a clear epitome of the result of the cases to that date, 1884. He divided the cases into two categories. First, those which relate to the conduct of the legal mortgagee in not obtaining possession of the title-deeds. Secondly, those relating to the conduct of the legal mortgagee in giving up or not retaining possession of the deeds when he had them. Those under the first category he divided into four classes :

(1) Where the legal mortgagee or purchaser had made no inquiry for the title-deeds, and had been postponed, either to a prior equitable estate, as in *Worthington* v. *Morgan* (*k*), or to a subsequent equitable owner who used diligence in inquiring for the deeds (*l*).

(2) Where the legal mortgagee had made inquiry for the deeds, and had received a reasonable excuse for their non-delivery, and had accordingly not lost his priority (*m*).

(3) Where the legal mortgagee had received part of the deeds under a reasonable belief that he was receiving all, and had accordingly not lost his priority (*n*).

(4) Where the legal mortgagee had left the deeds in the hands of the mortgagor with authority to deal with them for the purpose of raising money, and the mortgagor had exceeded his instructions; in such a case the legal mortgagee has been postponed (*o*).

As to the second category, where the mortgagee parts with the deeds, Fry, L.J., divided the cases into two classes :

(1) Where the title-deeds had been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to his object in borrowing them, and the legal mortgagee has retained his priority over the subsequent equities (*p*).

(*i*) 26 Ch. D. 482, distinguished in *Farrand* v. *Yorkshire, etc. Co.*, 40 Ch. D. 182; and see *Taylor* v. *London & County Banking Co.*, [1901] 2 Ch. 231; *Grierson* v. *Nat. Prov. Bank*, [1913] 2 Ch. 18.

(*k*) 16 Si. 547.

(*l*) *Clarke* v. *Palmer*, 21 Ch. D. 124.

(*m*) *Barnett* v. *Weston*, 12 V. 130; *Hewitt* v. *Loosemore*, 9 Ha. 449; *Brown* v. *Stedman*, 44 W. R. 458; *Cottey* v. *National Provincial Bank of England, etc.*, 20 T. L. R. 607.

(*n*) *Hunt* v. *Elmes*, 2 De G. F. & J. 578; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652; *Colyer* v. *Finch*, 5 H. L. C. 905; *Oliver* v. *Hinton*, [1899] 2 Ch. 264.

(*o*) *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21; *Rimmer* v. *Webster*, [1902] 2 Ch. 163; *Burgis* v. *Constantine*, [1908] 2 K. B. at p. 503; *Fry* v. *Smellie*, [1912] 3 K. B. 282.

(*p*) *Peter* v. *Russel*, 1 Eq. Ca. Abr. 321; *Martinez* v. *Cooper*, 2 Russ. 198.

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(2) Where the legal mortgagee had returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee; in such cases the Court has postponed the legal to the equitable estate (*q*).

In *Brocklesby* v. *Temperance, etc., Society* (*r*), the legal mortgagee was postponed where his agent not only exceeded his authority, but obtained the loan by fraud and forgery, although the lender had made no inquiry as to the agent's authority. In *Lloyds Bank, Lim.* v. *Bullock* (*s*), the doctrine of *Perry-Herrick* v. *Attwood* (*t*) was not applied as against a building society who were mortgagees and had indorsed the statutory receipt on their mortgage deed, and given it up to their solicitor to obtain payment, who then fraudulently dealt with it. It was held that the society had delivered the mortgage as an escrow, that the legal estate remained in the society, and that they were entitled to priority over a subsequent equitable mortgagee. On the other hand, it is to be observed that these cases rest simply upon the general principles of the law of principal and agent (*u*), and do not affect the principle laid down by Lord Cairns in *Shropshire Union, etc.* v. *R.* (*x*), that the title of a *cestui que trust* is not displaced by anything short of the acquisition of the legal estate by a *bona fide* purchaser for value without notice of the trust (*y*).

In addition to the cases mentioned by Fry, L.J., a legal mortgagee would be postponed to a prior equitable mortgagee, if he did not make the proper investigations of title, when such investigations, if made, would have disclosed the prior incumbrance (*z*).

In the case of *Clarke* v. *Palmer* (*a*), P mortgaged estates to

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(*q*) *Briggs* v. *Jones*, 10 Eq. 92; and see *Perry-Herrick* v. *Attwood*, *supra*; *Brocklesby* v. *Temperance, etc., Society*, [1893] 3 Ch. 130; [1895] A. C. 173.

(*r*) [1895] A. C. 173. (*s*) [1896] 2 Ch. 192.

(*t*) 2 De G. & J. 21; see *Rimmer* v. *Webster*, [1902] 2 Ch. 163.

(*u*) See *per* Lord Macnaghten in *Brocklesby* v. *Temperance, etc., Society*, [1895] A. C. at p. 184.

(*x*) L. R. 7 H. L. at pp. 507, 509.

(*y*) See *Burgis* v. *Constantine*, [1908] 2 K. B. 484.

(*z*) *Oliver* v. *Hinton*, [1899] 2 Ch. 264; *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632; *Perham* v. *Kempster*, [1907] 1 Ch. 373; *Hudston* v. *Viney*, [1921] 1 Ch. 98; *Robson* v. *Flight*, 4 De G. J. & S. 608, *per* Lord Westbury; see *per* Turner, L.J., *Wilson* v. *Hart*, L. R. 1 Ch. 463, 467; *per* Lord Hatherley in *Parker* v. *Whyte*, 1 Hem. & M. 167; *per* Jessel, M.R., in *Patman* v. *Harland*, 17 Ch. D. 353; cf. *Hunter* v. *Walters*, L. R. 7 Ch. 75, 83; see also *Le Neve* v. *Le N.*, notes, *post*.

(*a*) 21 Ch. D. 124; *Walker* v. *Linom*, [1907] 2 Ch. 104; cf. *Grierson* v. *Nat. Prov. Bank*, [1913] 2 Ch. 18.

M, and was allowed to retain possession of the title-deeds. P subsequently mortgaged one of the estates to A B, who obtained possession of the deeds, and all the estates to C, who advanced his moneys after ascertaining the position of the deeds, and upon the faith that A B was the only prior mortgagee. Held, that M, by not obtaining possession of the deeds, enabled P to deal with his estates as an unencumbered owner; that A B, having been diligent in obtaining the deeds, acquired priority; and that C also having been diligent in ascertaining that A B had the deeds, apparently as first mortgagee, the same principle extended to him, and he also had priority over M.

And the result is the same where, although the legal mortgagee is innocent, a fraudulent deposit has been made by his agent, whom, by the trust he placed in him, he enabled to commit a fraud (*b*).

Postponing the Equitable Mortgagee.—The judgment in *Northern Counties, etc., Co.* v. *Whipp* (*bb*) distinguished the case of what may give priority between two equities from that of postponing a legal mortgage (*c*). Kay, J., in *Taylor* v. *Russell* (*d*), denied that a lesser degree of negligence would suffice for the postponement of an equitable incumbrance than that required to postpone a legal mortgage, and reviewed the authorities on the point at length. The Court of Appeal, in reversing his decision on the ground that the second mortgagee was entitled to the protection of the legal estate which he had got in, expressed no opinion on this point, but Lord Macnaghten, in his speech on the appeal to the House of Lords, stated that he was not convinced of the correctness of the view expressed by Kay, J., that negligence necessary to postpone a prior equitable mortgagee (in such a case as that before him) must be so gross as to render him responsible for the fraud committed on the (subsequent) mortgagee, and that, in fact, it is immaterial in such cases whether the prior mortgagee has or has not the legal estate (*e*). The rule, as between equitable interests, was stated by Kindersley, V.-C., in the leading case of *Rice* v. *R.* (*g*), "As between persons having only equitable interests, if

(*b*) *Hunter* v. *Walters*, 11 Eq. 292; L. R. 7 Ch. 75; cf. *King* v. *Smith*, [1900] 2 Ch. 425.

(*bb*) *Supra*, p. 89.

(*c*) 26 Ch. D. 487.

(*d*) [1891] 1 Ch., at pp. 14—17.

(*e*) [1892] A. C., at p. 262; and see *Taylor* v *London and County Bank*, [1901] 2 Ch. 231, at p. 260. See as to equitable mortgages *Roberts* v. *Croft*, 24 B. 223; 2 De G. & J. 1.

(*g*) 2 Dr. 73, 78; and see *Bailey* v. *Barnes*, [1894] 1 Ch., at p. 36; *Bourke* v. *Lee*, [1904] 1 Ir. R. 280; *Capell* v. *Winter*, [1907] 2 Ch. 376.

their equities are *in all other respects equal*, priority of time gives the better equity; or, *qui prior est tempore potior est jure*. . . . And I think the meaning is this, that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to" (*h*).

As in some cases a legal mortgagee not getting or giving up the deeds may be postponed (see *ante*, pp. 89—90), so, *a fortiori*, where an equitable mortgagee, either by neglecting to get (*i*), or by giving up (*k*), the title-deeds, or otherwise by fraud or gross and wilful negligence, enables another to create a subsequent equitable mortgage, he may be postponed to such subsequent equitable mortgagee (*l*). These cases of postponement are sometimes treated as instances of estoppel *in pais* (*m*).

But an equitable mortgagee will not be postponed by reason of his not giving notice which he was not bound to give in order to perfect his security. Thus in *Union Bank of London* v. *Kent* (*n*) a company holding a building agreement, on an advance by the plaintiffs, handed over the building agreement with a covenant to give a mortgage of the leases when granted. The plaintiffs gave no notice to the proposed lessors. The lessors granted the leases to the mortgagor company, who fraudulently deposited them by way of equitable mortgage with mortgagees who had no notice of the plaintiffs' mortgage. Held, that, as priority as to land did not depend upon notice, and by the terms of the mortgage covenant the plaintiffs were not entitled to intercept the legal estate, there was no negligence on their part postponing them to

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(*h*) See also *Taylor* v. *Russell*, [1891] 1 Ch. 8, 17; *Nat. Prov. Bank* v. *Jackson*, 33 Ch. D. 1, 13; *Re Vernon, Ewens & Co.*, 33 Ch. D. 402, 408; *Union Bank, etc.* v. *Kent*, 39 Ch. D. 238, 245; *Peat* v. *Clayton*, [1906] 1 Ch. 659; *Jones* v. *Cooke-Hill's Trustee*, [1917] W. N. 73.

(*i*) *Layard* v. *Maud*, 4 Eq. 397.

(*k*) *Waldron* v. *Sloper*, 1 Drew. 193; cf. *Rimmer* v. *Webster*, [1902] 2 Ch. 163.

(*l*) *Waldron* v. *Sloper*, 1 Drew. 193; cf. *Re Vernon, Ewens & Co.*, 33 Ch. D. 402; see *Adsetts* v. *Hives*, 33 B. 52; *Clarke* v. *Palmer*, 21 Ch. D. 124; *Perry-Herrick* v. *Attwood*, 2 De G. & J. 37; *Rimmer* v. *Webster*, [1902] 2 Ch. 163; *Walker* v. *Linom*, [1907] 2 Ch. 104; *Jones* v. *Cooke-Hills Trustee*, [1917] W. N. 73.

(*m*) *Per* Farwell, J., in *Rimmer* v. *Webster*, [1902] 2 Ch. at p. 173, where *Rice* v. *R.*, 2 Dr. 73, is treated as a case of estoppel; but cf. *per* Parker, J., in *Capell* v. *Winter*, [1907] 2 Ch., at p. 382, where *Rice* v. *R.*, and *Lloyds Bank* v. *Bullock*, *supra*, are said not to depend on estoppel. See article, Law Quarterly Review, January, 1897, and *Pickard* v. *Sears*, 6 A. & E. 469; *Savage* v. *Foster*, Vol. I, *ante*.

(*n*) 39 Ch. D. 238; see *Taylor* v. *London & County Banking Co.*, [1901] 2 Ch. 231.

the subsequent mortgagees of the leases. Fry, L.J., referred first to the judgment of Lord Cairns in *Shropshire Union Ry. Co.* v. *R.* (*o*), that to postpone a pre-existing equitable title there must be something tangible and distinct, and divided the cases into two classes. "One class is where a mortgagee knows that a mortgagor has not fulfilled his obligations, and yet does nothing (*p*). The other is where the mortgagee does not know that the mortgagor has failed to fulfil his obligations, but knows only that there are obligations which he may in the future fail to fulfil, and yet takes no precautions against the consequences of his doing so. . . . I know of no decided case in which a mortgagee has been postponed on the ground that he did not take precautions against a future fraud by the mortgagor."

In *Société Générale de Paris* v. *Tramways Union Co.* (*q*), M deposited with S as security certificates of shares in a company and a blank transfer. Afterwards he fraudulently executed a blank transfer to the appellants and deposited it with them, alleging the certificates were lost. The appellants filled up the blanks in the transfer, had it executed by the manager as transferee, and sent it to the company. Subsequently the executors of S, who had died, gave notice of their deposit to the company. The company's regulations required the transfers to be by deed. It was held that the executors of S had priority.

Floating Charges and Subsequent Mortgages.

The nature of a floating charge is stated, and the cases bearing on the priorities of debentures and subsequent specific mortgages, legal or equitable, are referred to in the notes to *Ryall* v. *Rowles*, Vol. I.

In *Wilson* v. *Kelland* (*r*), debentures were secured by a trust deed. Both the debentures and the trust deed charged the present and future property of the company, and prohibited the creation of any charge upon that property ranking in priority to or *pari passu* with the debentures. The debentures, however, contained a condition that nothing *therein* contained should prevent the creation of a specific mortgage upon after-acquired freehold or leasehold

(*o*) L. R. 7 H. L. 496, 506; cf. *Rimmer* v. *Webster*, [1902] 2 Ch. 163.

(*p*) See, *e.g.*, *Layard* v. *Maud*, 4 Eq. 397.

(*q*) 14 Q. B. D. 424, 11 A. C. 20; cf. *Burgis* v. *Constantine*, [1908] 2 K. B. 484.

(*r*) [1910] 2 Ch. 306; Buckley (10th ed.), pp. 238, 246.

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property. It was held (apart from any question of notice) that the security created by the trust deed and the debentures was cumulative, and that the company had no power to make a subsequent specific mortgage of after-acquired property having priority to the debentures, the condition in the debentures being controlled by the trust deed. The mortgage to which priority was refused was a second mortgage, but the second mortgagees had acquired the first legal mortgage, which, it was decided, had priority over the debentures.

8. Statutory Enactments Affecting Priorities.

The Land Charges Act, 1925, s. 10, specifies various classes of interests in land which may be registered as land charges, Class C consisting of a mortgage, charge or obligation affecting land of any of the following kinds, made either before or after the commencement of the Act, but if before, only if acquired under a conveyance made after such commencement, namely :—

(i) Any legal mortgage not being a mortgage protected by a deposit of documents relating to the legal estate affected, and (where the land is within the jurisdiction of a local deeds registry) not being registered in the local deeds register (in the Act called a " puisne mortgage ");

(ii) Any equitable charge acquired by a tenant for life or statutory owner under any statute by reason of the discharge by him of death duties or other liabilities (in the Act called a " limited owner's charge ");

(iii) Any other equitable charge which is not secured by a deposit of documents relating to the legal estate affected, and does not arise or affect an interest arising under a trust for sale or a settlement, and is not included in any other class of land charge (in the Act called a " general equitable charge ");

(iv) Any contract by an estate owner (an expression defined as meaning the owner of a legal estate), or a person entitled to have a legal estate conveyed to him, to convey or create a legal estate, including a contract conferring an option of purchase (in the Act referred to as an " estate contract ").

By section 13, sub-section 2 of the same Act it is provided that a land charge of (*inter alia*) Class C, created or arising after the commencement of the Act, shall (except as therein mentioned) be

void as against a purchaser of the land charged, unless such charge is registered before completion of the purchase. And by section 14, sub-section 2, after the expiration of one year from the first conveyance occurring after the commencement of the Act of a land charge of Class C created before such commencement, the person entitled thereto will not be entitled to enforce or recover the charge as against a purchaser of the land or of any interest therein, unless the charge is registered before the completion of the purchase. The term "purchaser," as used in this Act, and also in the Law of Property Act, 1925, includes a mortgagee.

The Law of Property Act, 1925, s. 97, provides that every mortgage affecting a legal estate in land made after the commencement of the Act, whether legal or equitable (not being a mortgage protected by the deposit of documents relating to the legal estate) shall rank according to its registration as a land charge under the Land Charges Act, 1925. The section does not apply to mortgages or charges of registered land, or of land within the jurisdiction of a local deeds registry.

By section 22, sub-section 2 of the Land Charges Act, 1925, it is provided that the registration as a land charge of a puisne mortgage or charge is not to operate to prevent the same being overreached in favour of a prior mortgagee or a person deriving title under him where, by reason of a sale, foreclosure or otherwise, the right of the puisne mortgagee or subsequent chargee to redeem is barred. The Law of Property Act, 1925, provides (section 2, sub-section 1) that a conveyance to a purchaser of a legal estate in land will overreach any equitable interest affecting the estate, whether or not he has notice thereof, in any of the events therein mentioned, one of such events being—if the conveyance is made by a mortgagee or personal representative in the exercise of his paramount powers, and the equitable interest or power is capable of being overreached by such conveyance, and any capital money arising from the transaction is paid to the mortgagee or personal representative. By sub-section 5, so far as regards the interests therein mentioned (created before the Act, and therefore not within the Land Charges Act, 1925)—including the interest under a puisne mortgage within the meaning of the Land Charges Act, 1925, unless and until acquired under a transfer made after the commencement of the Act, and including also the benefit of an estate contract, unless and until the same is acquired under a conveyance made after the commencement of the Act—a purchaser of a legal estate will only take subject thereto

if he has notice thereof, and the same is not overreached under the section.

By section 197, sub-section 1, the registration in a local deeds registry of a memorial of an instrument transferring or creating a legal estate or charge by way of legal mortgage is to be deemed to constitute actual notice of the transfer or creation of the legal estate or charge, to all persons and for all purposes, so long as the registration continues in force; but by sub-section 2 the registration of an instrument not required to be registered does not operate to give notice of the instrument or its contents. By section 198, sub-section 1, registration of any instrument or matter under the Land Charges Act, 1925, or any enactment which it replaces, is to be deemed to constitute actual notice of such instrument or matter, to all persons and for all purposes; but (by sub-section 2) the section operates without prejudice to the provisions respecting further advances (*s*) by a mortgagee, and applies only to instruments and matters required or authorised to be registered under the Land Charges Act, 1925.

By section 199, sub-section 1, a purchaser (*t*) is not to be affected by notice of (i) any instrument or matter capable of registration under the Land Charges Act, 1925, which is not enforceable as against him by reason of non-registration; (ii) any other instrument or matter, unless (a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him, or (b) in the same transaction it has come to the knowledge of his counsel, or of his solicitor or agent, or would have come to the knowledge of his solicitor or agent if such inquiries and inspections had been made as ought reasonably to have been made. But sub-section 2 provides that para. (ii) of sub-section 1 is not to exempt a purchaser from liability under or an obligation to observe any covenant or provision contained in any instrument under which his title is derived.

The Law of Property Act, 1925, s. 137, provides (sub-section 1) that the law applicable to dealings with equitable things in action, regulating their priority, shall, as respects dealings with equitable interests in land, capital money, and securities representing capital money, effected after the commencement of the Act, apply to and

(*s*) As to further advances and tacking, see *infra*.

(*t*) "Purchaser" includes "a mortgagee": section 205 of the L. of P. Act, 1925.

regulate the priority of competing interests therein. By sub-section 3 a notice, otherwise than in writing, given to a trustee after the commencement of the Act as respects any dealing with an equitable interest in real or personal property, will not affect the competing claims of purchasers in that equitable interest. It is expressly provided by sub-section 7 that nothing in the section is to affect any priority acquired before the commencement of the Act.

9. Privileges and Remedies of Equitable Mortgagees.

A mere depositee of a lease cannot be compelled to take a legal assignment so as to enable the lessor to sue him at law on the covenants in the lease (*u*); nor will the case be altered by his having entered into possession of the premises and paid the rent (*x*). In such case, however, though not liable for rents and covenants he would be liable to the landlord in respect of his occupancy (*y*).

Sale, foreclosure, etc.—Considerable doubt having arisen whether the remedy of a mortgagee by deposit of deeds with or without a memorandum was confined to sale or extended to foreclosure, it is now settled that the remedy by foreclosure is available (*z*).

In *Carter* v. *Wake* (*a*), Jessel, M.R., said, "when there is a deposit of deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage." Where a certificate of shares is deposited as security for a debt and interest without a transfer or memorandum, the depositee is entitled to either sale (*b*), or foreclosure (*c*).

(*u*) *Moores* v. *Choat*, 8 Si. 508, and cases there cited; and *Moore* v. *Greg*, 2 De G. & Sm. 304, 2 Ph. 717, overruling *Lucas* v. *Comerford*, 1 V. 235, and *Flight* v. *Bentley*, 7 Si. 149.

(*x*) *Moore* v. *Greg*, 2 De G. & Sm. 304, 2 Ph. 717; *Newry Railway Co.* v. *Moss*, 14 B. 64; *Walters* v. *The Northern Coal Mining Co.*, 5 De G. M. & G. 629; *Cox* v. *Bishop*, 8 De G. M. & G. 815; *Friary Holroyd & Healey's Breweries, Ltd.* v. *Singleton*, [1899] 1 Ch. 86, reversed on the facts [1899] 2 Ch. 261; *Ramage* v. *Womack*, [1900] 1 Q. B. 116; *Hand* v. *Blow*, [1901] 2 Ch. 721.

(*y*) Dav. Conv. vol. ii., pt. 2, p. 121, 4th edit. (n.).

(*z*) *James* v. *J.*, 16 Eq. 153; *Backhouse* v. *Charlton*, 8 Ch. D. 444; *York Union Banking Co.* v. *Artley*, 11 Ch. D. 25; Coote (9th ed.), p. 1026.

(*a*) 4 Ch. D. 606. See *Fraser* v. *Byas*, 11 T. L. R. 481.

(*b*) *Stubbs* v. *Slater*, [1910] 1 Ch. 632.

(*c*) *Harrold* v. *Plenty*, [1901] 2 Ch. 314.

Russel v. Russel.

An equitable mortgagee may obtain a receiver (*d*), and he will be entitled to one on motion before the hearing on showing the possession of deeds, which raises a *prima facie* presumption that the deposit was made for the purpose of securing an advance of money (*e*).

It has been held in Ireland that an equitable mortgagee by deposit of a lease relating to lands there, where the lessee had been evicted for non-payment of rent, under the Irish Ejectment Acts, might file a bill for redemption against the landlord (*f*).

Where there has been a mere equitable mortgage of a policy of assurance on the life of the mortgagor, the assurance company are upon his death justified in refusing to pay the policy moneys to the mortgagee save with the consent of the legal personal representative of the mortgagor (*g*); and if there be none the mortgagee himself could take out administration to the deceased debtor (*h*). The mortgagee might, however, obtain an order for payment of the policy moneys by action in the Chancery Division, and in one case he was allowed to do so in the absence of the legal personal representative of the mortgagor (*i*).

And it has been held that, in such cases, where the default or delay in payment of the policy moneys was caused, not by the company, but by the mortgagee's neglect to clothe himself with a legal title to the money, interest will not commence to run till the order for payment of the principal has been made (*k*).

By a statute of 1896 (*l*) life assurance companies are enabled to pay policy moneys into Court when in the opinion of the board of directors no sufficient discharge can otherwise be obtained.

An equitable mortgagee by deposit of deeds is not deprived of

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(*d*) *Shakel* v. *Duke of Marlborough*, 4 Madd. 463; *London & County Banking Co.* v. *Lewis*, 21 Ch. D. 490; *Spiller* v. *S.*, 3 Swans. 556; *Hadley* v. *London Bank of Scotland*, 3 De G. J. & S. 63; Coote (9th ed.), p. 958.

(*e*) *Bodger* v. *B.*, 11 W. R. 160.

(*f*) *Malone* v. *Geraghty*, 3 Dr. & War. 239; 1 H. L. Cas. 81.

(*g*) *Crossley* v. *City of Glasgow Life Assurance Co.*, 4 Ch. D. 421; *Webster* v. *British Empire Mutual Life Assurance Co.*, 15 Ch. D. 169.

(*h*) *Webster* v. *British Empire Mutual Life Assurance Co.*, 15 Ch. D. p. 177.

(*i*) *Crossley* v. *City of Glasgow Life Assurance Co.*, 4 Ch. D. 421; cf. *Webster* v. *British Empire Mutual Life Assurance Co.*, 15 Ch. D. 169, 180; *Curtius* v. *Caledonian Fire and Life Insurance Co.*, 19 Ch. D. 534; and see Annual Practice, Order XVI, r. 46.

(*k*) *Webster* v. *British Empire Mutual Life Assurance Co.*, 15 Ch. D. 169, overruling on this point, *Crossley* v. *City of Glasgow Life Assurance Co.*, 4 Ch. D. 421.

(*l*) 59 Vict. c. 8.

his right to recover his debt by his inability to produce either the deeds deposited or the memorandum of deposit, when the Court believes that there was such a deposit, and that the deeds have been really lost (*m*); but he may lose his lien by voluntarily parting with the deeds (*n*).

As to vesting declarations under the Trustee Act, 1925, s. 51 (*o*), see *London & County Banking Co.* v. *Goddard* (*p*).

An equitable mortgagee by deposit may on the bankruptcy of the depositor seek relief either in the Court of Bankruptcy or in Chancery (*q*).

A mortgagee, whether legal or equitable, is a secured creditor within the meaning of the Bankruptcy Acts.

In the Second Schedule to the Act of 1914, Rules 10—18 relate to the proof of debts by secured creditors. These rules are thus summarised in Williams' Bankruptcy (*r*) : " The following courses are open to a secured creditor :—

" (1) He may rely on his security and not prove.

" (2) He may realise his security and then prove for the balance (Rule 10).

" (3) He may surrender his security and prove for the whole debt (Rule 11).

" (4) He may state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it if it be over property of the debtor; and in this case he will be entitled to receive dividends on the balance after deducting the assessed value of the security " (Rule 12).

In this case (4), the trustee may elect to redeem the security at the value so set or require it to be realised, and if he does not elect, the secured creditor, on the other hand, may give notice requiring the trustee to elect; and if he does not so elect within six months the mortgagee becomes entitled to the property free from redemption. When a secured creditor presents a bankruptcy petition against his debtor and adjudication follows, the estimate

(*m*) *Baskett* v. *Skeel*, 11 W. R. 1019; Coote (9th ed.), p. 843.
(*n*) *Re Driscoll*, 1 Ir. R. Eq. 285; Coote, p. 1345.
(*o*) Re-enacting section 12 of Trustee Act, 1893.
(*p*) [1897] 1 Ch. 642. See also L. P. Act, 1925, s. 9.
(*q*) *Ex p. Hirst*, 11 Ch. D. 278; *White* v. *Simmons*, L. R. 6 Ch. 555; *Waddell* v. *Toleman*, 9 Ch. D. 212; Coote, p. 1112.
(*r*) (13th ed.), pp. 470—474.

placed by the petitioning creditor upon the value of his security will be binding upon him—at all events *prima facie*—in proving in respect of the balance of his debt; but the trustee is not entitled, it seems, to insist upon redeeming the security at the value placed upon it in the petition (*s*).

There is another remedy, often the most convenient for the mortgagee, which has been adopted in successive Bankruptcy Acts, and is now embodied in Rules 75 to 79 of the Bankruptcy Rules of 1915. These empower a mortgagee to apply to the Court to have his security realised. Accounts are then to be taken and sale ordered, the conduct being in the discretion of the Court, the proceeds applied in payment of what may be found due to the mortgagee, and if not sufficient he may prove for the balance. But the general rule in bankruptcy applies, that no interest is given after the date of the bankruptcy (*t*).

When an equitable mortgagee by deposit applies to the Court of Bankruptcy to realise his security, the conduct of the sale is in the discretion of the Court. As a general rule where the security is sufficient the conduct of the sale will be given to the trustee, but where the security is insufficient the conduct of the sale will be given to the mortgagee; in either case, the costs, charges, and expenses of the trustee properly incurred, will be a first charge upon the proceeds of the sale (*u*).

No order for a sale will be made if the deposit of deeds was made for improper purposes, as, for instance, under the old law to secure future costs to a solicitor (*x*), especially if made shortly before the bankruptcy (*y*), or if the money were advanced to a trustee with the knowledge that he was about to commit a breach of trust by applying it for his own purposes (*z*); or when the bankruptcy closely followed upon the deposit so as to raise a presumption of fraudulent preference (*a*).

In the case of a stale demand, as where there was no memorandum, the deposit of deeds had been made twelve years before,

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(*s*) *Re Vautin*, [1899] 2 Q. B. 549; *Re Button*, [1905] 1 K. B. 602, 605; Williams' Bankruptcy (13th ed.), p. 468.

(*t*) *Quartermaine's Case*, [1892] 1 Ch. 639. Cf. *Re Pearce*, [1909] 2 Ch. 492.

(*u*) *Re Jordan*, 13 Q. B. D. 228; Williams' Bankruptcy, p. 515.

(*x*) *Ex p. Wake*, 2 Deac. 352; 3 Mont. & A. 329.

(*y*) *Ibid.*

(*z*) *Ex p. Turner*, 9 Mod. 418.

(*a*) *Ex p. Dewdney*, 4 D. & C. 181; *Ex p. Morgan*, 1 Mont. D. & De G. 116; *Ex p. Clouter*, 3 Mont. D. & De G. 187; *Ex p. Wake*, 2 Deac. 352; *Ex p. Ainsworth*, 2 Deac. 563; *sed vide Ex p. Heathcote*, 2 Mont. D. & De G. 711.

and the bankrupt was dead, the Court has refused to make the usual order for a sale (*b*), but an inquiry has been directed as to the circumstances attending a doubtful deposit (*c*).

In bankruptcy, an equitable mortgagee, except where he has actually received the rents (*d*), when he will not be required to refund (*e*), is entitled to them from the time only of the order for sale, which is considered equivalent to the appointment of a receiver (*f*). Notice to the tenants to pay rent to the mortgagee does not alter the rule (*g*).

An equitable mortgagee is also entitled to the growing crops on land in the mortgagor's occupation from the date of his application for a sale (*h*).

As to a *sale* in *bankruptcy* of property comprised in an equitable mortgage, see case cited in note (*i*).

Where a trustee had been appointed under the Bankruptcy Act of 1869, it was held that an equitable mortgagee might, instead of applying in bankruptcy, proceed in Chancery against the trustee for the purpose of having the security realised, the jurisdiction in Chancery not being taken away by the Bankruptcy Act (*k*), and that a second equitable mortgagee might commence an action against the liquidation trustee of the mortgagor, and the first mortgagees, claiming an equitable charge on the property, redemption against the first mortgagees, and, if necessary, foreclosure (*l*), but that the trustee ought not to raise objections to the exercise of jurisdiction by the Court of Bankruptcy if the mortgagee should be willing to submit to it (*m*).

It has been held that a proviso making void a lease upon an assignment does not apply to a mere deposit of it (*n*).

(*b*) *Ex p. Jones*, 3 M. & A. 152.

(*c*) *Ex p. Clouter*, 7 Jur. 135.

(*d*) *Ex p. Williams*, 13 W. R. 564.

(*e*) *Sumpter* v. *Cooper*, 2 B. & Ad. 223; *Garry* v. *Sharratt*, 10 B. & C. 716; *Pope* v. *Biggs*, 4 Man. & Ry. 193; 9 B. & C. 245.

(*f*) *Ex p. Bignold*, 2 M. & A. 16; *Ex p. Carlon*, 3 M. & A. 328; 2 Deac. 333; *Ex p. Thorpe*, 3 Deac. 85; 3 M. & A. 441.

(*g*) *Ex p. Burrell*, 3 M. & A. 439; *Ex p. Scott*, *ibid.* 592.

(*h*) *Ex p. Bignold*, 2 G. & J. 273; *sed vide Ex p. Alexander*, *ibid.* 275.

(*i*) *Re Jordan*, 13 Q. B. D. 228.

(*k*) *White* v. *Simmons*, L. R. 6 Ch. 555; *Ex p. Pannell*, 6 Ch. D. 335; *Waddell* v. *Toleman*, 9 Ch. D. 212.

(*l*) *Ex p. Hirst*, 11 Ch. D. 278; Coote (9th ed.), pp. 1112 and 1113.

(*m*) *Ex p. Fletcher*, 9 Ch. D. 381.

(*n*) *Doe* v. *Hogg*, 4 Dow. & Ry. 226; Ry. & M. 36; and *Gentle* v. *Faulkner*, [1900] 2 Q. B. 267; Woodfall (21st ed.), p. 828.

Russel v. Russel.

And upon a petition in bankruptcy by the equitable mortgagee by deposit merely of a lease granted to the bankrupt, *his executors, administrators, and permissive assigns*, with a covenant on the part of the lessee not to assign without licence of the lessors, the usual order for sale was made (*o*).

(*o*) *Ex p. Drake*, 1 Mont. D. & De G. 539.

MARSH *v.* LEE.

1670. 2 Ventris, 337 (*a*).

Tacking Incumbrances.

If a third mortgagee, having advanced his money without notice of a second mortgage, afterwards buy in a first mortgage or statute, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee, having obtained the first mortgage or statute, and having the law on his side, and equal equity, he shall thereby squeeze out and gain priority over the second mortgagee.

A Bill in Chancery was brought by Marsh, and an answer put in thereto.

The case was thus:—One English, being seised of the manor of Wicksall and of the manor of Monfield, in 1649 mortgages part of the manor of Wicksall to Burrell for £1,000. Afterwards, in 1655, he acknowledges a statute to Burrell of £800, for the payment of £400.

Afterwards, in 1662, English mortgages both these manors to Mrs. Duppa for £7,000.

Afterwards, in 1665, English mortgages the manor of Wicksall to Lee for £2,000, Lee *having no notice of the former mortgages.*

[(*b*) After Mrs. Duppa's death, her executors brought actions of ejectment against English and filed their bill of foreclosure against him. In Michaelmas Term, 1667, English suffered judgment in ejectment against him at the suit of the executors, with a *cesset executio* until May, 1668. The *cesset executio* having expired, English obtained an injunction against the proceedings at law upon the judgment in ejectment, until

(*a*) *S. C.*, 1 Ch. Ca. 162, 3 Ch. R. 62.

(*b*) This statement within brackets is drawn up from 1 Ch. Ca. 162, where the proceedings in the case are fully given.

hearing or another order; and on June 5, 1668, a decree was made, that English should redeem within a twelvemonth, or be foreclosed. On November 26, 1668, the Master reported, that £8,530 14s. would be payable to the plaintiffs on June 6, 1669.

On November 27, 1668, Lee, by the advice of counsel, purchases in the two incumbrances to Burrell, *viz.*, the mortgage of part of the manor of Wicksall, and the statute.

On February 5, 1669, the Master's report was confirmed. And now Marsh, executor of Duppa, sues Lee, who pleads this whole matter.]

My Lord Keeper, Sir Orlando Bridgeman, assisted by Hale, Chief Baron, and Justice Rainsford, held, that Lee might make use of these incumbrances to protect his own mortgage. For they said, that *he had both law and equity for him.*

First, he had law; for that he had a precedent mortgage in 1649 (which, indeed, was but upon part), and also the statute in 1655; so that, while these remained in force, Marsh could not come in.

Next, he had equity; for he having a subsequent mortgage, yet, it *being without notice*, he ought to be relieved in this Court. And, therefore, my Lord Chief Baron put the case, as if the first mortgage had been of the manor of Wicksall to Burrell, and afterwards it had been mortgaged to Duppa, and afterwards to Lee, *not having notice*; if afterwards Lee bought in Burrell's mortgage, he shall hold the estate against Duppa, until he be satisfied for both the money which he paid Burrell and also his own money lent upon the last mortgage: and for that he said, that it had been so adjudged in Camera Scaccarii, in the Court of Equity, since the King came in, in one *Shelley's Case.*

Next he put the case of the statute, which English entered in to Burrell, in 1655, and was afterwards bought by Lee from Burrell. He held that Duppa shall not bring Lee to any account upon this statute here in equity, any otherwise than he may do at common law.

Nota.—It was agreed that the lands were extended upon the statute at the third part of the true value. Now, at common law, the conusor, or he that claims under him, must bring a *scire facias ad computand*, as in the 4 Co. 69 b. But then the

conusee shall not account according to the true value, but according to the extended value, and also for the whole statute: and if the conusee is satisfied by the extended value, the conusor shall recover; or if the conusor will pay down the rest of the money which is behind, with damages, he shall also recover. But if the conusor will sue the conusee in a Court of equity, then he shall bring him to account for what he hath received of the profits above the extended value.

Now then our case here is somewhat more, for Lee has also equity on his side, and therefore Duppa shall not bring him to account for what he has received above the extended value, unless he has also received enough to satisfy his own mortgage of £2,000, as well as the statute; and therefore, if Marsh will take off this statute by a suit in this Court, he must be content that Lee doth account upon the extended value for the whole £800 and damages.

Secondly, they held that whereas part of the manor of Wicksall was mortgaged to Burrell, but now the whole manor was mortgaged to Lee, yet the first mortgage should not extend to protect more than that part of the manor which was first mortgaged to Burrell.

And my Lord Chief Baron Hale put the case thus:—If a man is seised of sixty acres, and mortgages twenty to A, and then mortgages the whole to B, and then mortgages the whole to C, and afterwards C purchases in the first mortgage, that shall not protect more than the twenty acres; but it shall protect those twenty acres so as B shall never recover that, until he pay C all the money upon the first and last mortgage.

But Hale said that he thought that in this case, inasmuch as the mortgage to Lee (*c*) was only of part of Wicksall, therefore Marsh might bring Lee to an account upon the extended value, whereupon these two manors were extended upon the statute; and if Lee had received the money due upon the statute, by receiving of the profits according to the extended value, or if she will pay down the residue of the money due upon the statute, or if she will pay down so much as the proportion will come to for Monfield, then she may discharge the manor of Monfield.

(*c*) That is to say the mortgage which Lee took as assignee of Burrell.

Marsh v. Lee.

But then my Lord Keeper asked him how he would have it appointed (*d*), and how much should be laid upon Monfield, and how much upon Wicksall? for that part of Wicksall is under that extent.

To which Hale answered, that if Marsh did sue Lee for the discharge of this statute from Monfield, Monfield should be discharged by her paying down as much as the proportion comes to, or when Lee shall have received so much according to the extended value, and that he thought there might be a proportion found out by the Court.

Nota. Sir H. Finch (*e*), counsel for Lee, cited *Primate and Jackson's Case* (*f*), *Grove and Grove's Case* (*g*), and *Mrs. Calamy's Case* (*h*), all which were resolved in this Court—That a purchaser or mortgagee coming in upon a valuable consideration, without notice, and purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first, though before the last mortgage, though he purchased in the incumbrance after he had notice of the second mortgage.

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(*d*) Qy. "Apportioned."
(*e*) Afterwards Earl of Nottingham.
(*f*) Hardres Rep., at p. 318 nom. *Hedworth* v. *Primate*.
(*g*) *Churchill* v. *Grove*, Nels. Rep. 89; 1 Ch. Ca. 35.
(*h*) *Higgon* v. *Syddal, Calamy, and Others*, 1 Ch. Ca. 149.

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5 Consolidation of mortgages, p. 129.

1. Generally.

The rules regulating "tacking," sometimes called the creditor's *tabula in naufragio*, are closely related to the rules governing the defence of purchase of the legal estate without notice, but the two bodies of rules are distinct. In cases of tacking by an equitable mortgagee or purchaser, a mortgagee or purchaser (*i*) obtaining an equitable interest at the time of the advance or payment made by him *subsequently* acquires the legal estate; the rule that Courts of equity would not interfere with one who had acquired the legal estate without notice of prior equitable rights applies where the purchaser or mortgagee has furnished value at the time that he acquired the legal estate (*k*). The importance of distinguishing between the two bodies of rules appears in cases where the legal estate that is got in is a trust estate (*l*). Cases in which a legal mortgagee adds a subsequent equitable incumbrance to his legal mortgage under the rules of tacking are free from this danger of confusion.

The foundation for the doctrine of tacking is explained by Lord Hardwicke in *Wortley* v. *Birkhead* (*m*). The rule applies to mortgages of personal estate as well as to mortgages of real estate, although its application in the case of personal estate is comparatively rare (*n*).

2. Statutory Alterations.

By the Yorkshire Registries Act, 1884 (*o*), tacking was abolished as to lands in Yorkshire.

By the Law of Property Act, 1925, s. 94, sub-s. 1, it is provided that after the commencement of the Act a prior mortgagee shall have a right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable)—

(*i*) See *Bailey* v. *Barnes*, [1894] 1 Ch. 25.

(*k*) See notes to *Basset* v. *Nosworthy*, *infra*.

(*l*) See *Taylor* v. *Russell*, [1891] 1 Ch. 8, 28.

(*m*) 2 Ves. Sen. 571.

(*n*) *Coleman* v. *Winch*, 1 P. W. 775; *Calisher* v. *Forbes*, L. R. 7 Ch. 109; Coote (9th ed.), pp. 1245, 1283.

(*o*) 47 & 48 Vict. c. 54, amended by 48 & 49 Vict. c. 26, s. 5.

(a) if an arrangement has been made to that effect with the subsequent mortgagees; *or*

(b) if he had no notice of such subsequent mortgages at the time when the further advance was made; *or*

(c) whether or not he had such notice, where the mortgage imposes an obligation on him to make such further advances.

This sub-section applies whether or not the prior mortgage was made expressly for securing further advances.

By sub-section 2, in relation to the making of further advances after the commencement of the Act, a mortgagee shall not be deemed to have notice of a mortgage merely by reason that it was registered as a land charge or in a local deeds registry, if it was not so registered at the time when the original mortgage was created, or when the last search (if any) by or on behalf of the mortgagee was made, whichever last happened. This sub-section only applies where the prior mortgage was made expressly for securing a current account or other further advances.

Sub-section 3 contains the important provision that "save in regard to the making of further advances as aforesaid, the right to tack is hereby abolished." But this is qualified by the proviso that nothing in the Act is to affect any priority acquired before the commencement of the Act by tacking, or in respect of further advances made without notice of a subsequent incumbrance or by arrangement with the subsequent incumbrancer.

The above section applies to mortgages of land made before, or after the commencement of, the Act, but not to charges registered under the Land Registration Act, 1925, or any enactment replaced by that Act.

It will be seen from the above that tacking is abolished, excepting as to further advances by a mortgagee, and excepting also that the alteration made by section 94 of the Law of Property Act, 1925, does not affect the priority acquired before the Act by means of tacking. Having regard to these changes, the notes contained in the earlier editions of this work upon the general doctrine of tacking have, in the present edition, been much curtailed.

It is important to observe that the right of tacking in respect of further advances, expressly recognised by the Law of Property Act, 1925, s. 94, appears to be wholly independent of any question concerning the legal estate. Accordingly, a mortgagee whose

mortgage rests upon a deposit of title-deeds would be able, it is thought, to exercise the right (*p*).

3. The Law before 1926.

Rules as to Tacking in Brace v. Duchess of Marlborough (*q*).

First Rule.—The *first* rule laid down, within which, indeed, the principal case falls, is that if a third mortgagee, without notice of the second mortgage when he advanced his money, buys in the first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgagee; and this the Lord Chief Justice Hale called a "plank" gained by the third mortgagee, or *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*.

It has always been treated as clear that the purchaser may take the legal estate *after notice* of the mesne incumbrance (with the exceptions hereinafter mentioned in certain cases of trust) provided he *paid his money before notice*, and that "by lending the money without notice he becomes an honest creditor, and acquires the right to protect his debt. But he is not compelled to look for this protection till his debt is in danger of being prejudiced, and therefore, when that danger is first discovered to him (whether it be by a suit in equity, or by any extra judicial means), as the honesty of his debt is not affected by the discovery, so the rights of protecting that debt, and the efficacy of such protection, are not prejudiced. Hence arose the rule which permitted the subsequent incumbrancers to purchase *pendente lite*" (*r*).

Notice, moreover, of his advance, given by the second to the first mortgagee, will not prevent the third mortgagee, who lends his money without notice thereof, from obtaining a transfer of

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(*p*) As to registration and notice under sections 197 and 198 of the L. P. Act, 1925, being without prejudice to section 94, see *infra*.

(*q*) 2 P. W. 491.

(*r*) *Per* Lord Keeper Henley, in *Belchier* v. *Butler*, 1 Eden, 529; and see *Wortley* v. *Birkhead*, 2 Ves. Sen. 574; *Huntingdon* v. *Greenville*, 1 Vern. 49; *Turner* v. *Richmond*, 2 Vern. 81; *Robinson* v. *Davison*, 1 Bro. Ch. 63; *Bates* v. *Johnson*, John. 304; *Re Russell Road Purchase-Moneys*, 12 Eq. 78; and see *Sharpe* v. *Foy*, L. R. 4 Ch. 35.

and tacking his mortgage to the first, when the first is a subsisting and not a satisfied mortgage (*s*).

Where the person claiming to tack is a subsequent incumbrancer who advanced his money without notice of the incumbrance that he claims to oust, it has been held that he may rely on the legal estate acquired after a suit for foreclosure or for settling priorities has been commenced, if no decree has been made, though the first mortgagee may have by answer in the suit submitted to assign to the plaintiff on payment (*t*), but not if the legal estate be acquired after decree (*u*).

And though it is necessary and is expressed in the rule that the person claiming to tack must in the first instance have advanced his money without notice, still a purchaser or incumbrancer for valuable consideration, *with notice*, from or under a person who bought *without notice*, may shelter himself under the first purchaser, for otherwise a *bona fide* purchaser would be unable to deal with his property fully (*x*).

In *Bates* v. *Johnson* (*y*) a mortgagor, fraudulently concealing a trust, mortgaged to A by a legal first mortgage and to B by an equitable second mortgage : a suit being commenced by the *cestuis que trust* to establish the trust, B not only with notice of the trust but *pendente lite* paid off the first mortgagee and took a transfer of his mortgage, and it was held that B was entitled to tack his second mortgage to the first and hold both against the trust. In *Bailey* v. *Barnes* (*z*), Lindley, L.J., delivering the judgment of the Court of Appeal, said (*a*), " The maxim *qui prior est tempore potior est jure*, is in the plaintiffs' favour, and it seems strange that they should, without any default of their own, lose a security which they once possessed. But the above maxim is, in our law, subject to an important qualification, that, where equities are equal, the legal title prevails. Equality here does not

(*s*) *Peacock* v. *Burt*, 4 L. J. Ch. 33; overruling the doubt thrown out by Lord Eldon in *Mackreth* v. *Symmons*, 15 V. 335; and see *Bates* v. *Johnson*, John. 304; *West London Commercial Bank* v. *Reliance Permanent Building Society*, 29 Ch. D. 954.

(*t*) *Belchier* v. *Butler*, 1 Eden, 523; 5 Bro. P. C., at p. 292.

(*u*) *Wortley* v. *Birkhead*, 2 Ves. Sen. 571.

(*x*) *Lowther* v. *Carlton*, 2 Atk. 242; *Sweet* v. *Southcote*, 2 Bro. Ch. 66; *Wilkes* v. *Spooner*, [1911] 2 K. B. 473; *McQueen* v. *Farquhar*, 11 V. 478; *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599.

(*y*) John. 304; and see *Taylor* v. *Russell*, [1891] 1 Ch., at p. 22; [1892] A. C. 244.

(*z*) [1894] 1 Ch. 25.

(*a*) [1894] 1 Ch., at p. 36.

mean or refer to priority in point of time, as is shown by the cases on tacking. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other. Equitable owners who are upon an equality in this respect may struggle for the legal estate, and he who obtains it, having both law and equity on his side, is in a better position than he who has equity only. The reasoning is technical and not satisfactory, but as long ago as 1728, the law was judicially declared to be well settled and only alterable by Act of Parliament." So in the case of *Blackwood* v. *London Chartered Bank of Australia* (*b*), it was stated by Lord Selborne that " there is nothing more familiar than the doctrine of equity that a man who has *bona fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title if he can and may hold it, though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself."

Where the Legal Estate is affected by a Trust.—In *Mumford* v. *Stohwasser* (*c*) and *Harpham* v. *Shacklock* (*d*), tacking was disallowed, because the person taking the legal estate took it *with notice of a trust*. This makes it necessary to consider the principal distinction between the cases discussed in this note, where the legal estate is obtained *subsequently* to the payment, and the cases discussed in the note to *Basset* v. *Nosworthy*, where the payment and the acquisition of the legal estate are *contemporaneous*.

The cases of *Pilcher* v. *Rawlins* (*e*), *Lloyd* v. *Attwood* (*f*), *Jones* v. *Powles* (*g*), are cases of the latter class, where the legal estate was acquired by a purchaser or mortgagee at the time that he paid his money, and the legal estate was allowed to be a protection against prior equitable claims, though the person conveying it was consciously committing a fraud. So in *Young* v. *Y.* (*h*), a mortgagee who paid off and took a transfer of a legal mortgage, and at the same time made an advance to a person who fraudulently

(*b*) L. R. 5 P. C. 111.
(*c*) 18 Eq. 556.
(*d*) 19 Ch. D. 207.
(*e*) L. R. 7 Ch. 260; and see *Hudston* v. *Viney*, [1921] 1 Ch. 98.
(*f*) 3 De G. & J. 614.
(*g*) 3 My. & K. 581.
(*h*) 3 Eq. 801.

represented that he was entitled as heir of the mortgagor, was allowed to tack his advance to the mortgage. So in the cases relating to payment of building society mortgages, under the rule with respect to the effect of the statutory receipt established by the House of Lords in *Hosking* v. *Smith* (*i*), where the legal estate was obtained from the society contemporaneously with a further advance to the mortgagor, and the mortgagee was allowed to tack the further advance to the moneys paid to the society.

When the legal estate is obtained contemporaneously with the payment of consideration, it is only necessary that the purchaser should not have notice of the trust : it does not affect his title that the trustee or person conveying the estate was committing a fraud. Where, however, as in the principal case of *Marsh* v. *Lee*, the legal estate is obtained after the advance of the money, there is more difficulty if the legal estate is in any way affected with a trust. It is, of course, clear that the purchaser or mortgagee claiming the benefit of the doctrine must have paid the consideration for the equitable interest he claims to tack without notice of the prior incumbrance or equity which he claims to oust; it is clear also that he may obtain and protect himself by the legal estate after he has notice of such prior incumbrance or equity, if he obtains it from an unsatisfied mortgagee or person not affected by a trust. It is clear also " that a trust or equity to affect the conscience of him who has got in the legal estate must be a trust or equity not in favour of some third person who may have no care or desire to insist upon it, but a trust or equity in favour of the person against whom the legal estate is set up " (*k*). But a difficulty arises in determining what notice of a trust or equity affecting the legal estate is sufficient to affect the purchaser getting it in, and whether notice to the trustee or notice to the purchaser is material. In *Pilcher* v. *Rawlins* (*l*), James, L.J., said that " those cases where the person seeking conveyance knew the fact that the trustee was trustee for somebody else, and could not convey without a breach of trust, whilst the trustee was left in ignorance; those cases involve a principle which I have never been able to understand."

(*i*) 13 A. C. 582; and see *Crosbie-Hill* v. *Sayer*, [1908] 1 Ch. 866; and cf. *Manks* v. *Whiteley*, [1912] 1 Ch. 735; [1914] A. C. 132.

(*k*) See *Taylor* v. *Russell*, [1891] 1 Ch., at p. 29; [1892] A. C., at p. 253; *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch., at p. 256.

(*l*) L. R. 7 Ch. 269, *supra*.

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In the old case of *Saunders* v. *Dehew* (*m*), commonly cited as a leading authority, Anne Bayly, being possessed of a term for years, made a voluntary settlement thereof in trust for herself for life, remainder to her daughter, Isabella Barnes, for life, remainder to the children of Isabella, by Mr. Barnes, her then husband. Isabella mortgaged the land to the plaintiff for £200. In the mortgage deed Isabella was described as "the daughter and heir of John Bayly." The plaintiff, learning of the settlement, got an assignment of the term from the trustees. The Court held that the plaintiff could not protect himself by taking a conveyance from a trustee after he had notice of the trust, for thereby he became a trustee, and must not, to get a plank to save himself, be guilty of a breach of trust.

In *Prosser* v. *Rice* (*n*), it was laid down that a subsequent mortgagee getting the legal estate from a *bare trustee* (*o*) conveying *without consideration* was not entitled to tack.

In the case of *Bates* v. *Johnson*, Lord Hatherley said (*p*) : "The authorities only decided that any person having an unsatisfied mortgage might transfer to the third incumbrancer; but in the case of a satisfied mortgage, where the mortgagee would hold simply on trust for the original mortgagor, or in the case of a trustee of a satisfied term, which are the cases put by Lord Eldon in *Maundrell* v. *M.* (*q*), *Ex p. Knott* (*r*), I do not find any authority * * * to show that he can give to a third party a security which could only be acquired through the incidents of a breach of trust on his part. It is true I do not find any authority which expressly determines the contrary; *Saunders* v. *Dehew* (*s*), and *Allen* v. *Knight* (*t*), which came first before Wigram, V.-C., and afterwards before Lord Cottenham, have determined that when there is an express declaration of trust, the trustee cannot convey

(*m*) 2 Vern. 271; and see *Willoughby* v. *W.*, 1 T. R., at p. 771; *Allen* v. *Knight*, 5 Ha. 272; *Perham* v. *Kempster*, [1907] 1 Ch. 373. Cf. *Pearce* v. *Bulteel*, [1916] 2 Ch. 544.

(*n*) 28 B. 68 (a case of a building society mortgage); and see *Harpham* v. *Shacklock*, 19 Ch. D. 207; *Ortigosa* v. *Brown*, 47 L. J. Ch. 168; *De Winton* v. *Mayor of Brecon*, 26 B. 533.

(*o*) See as to the term "bare trustee," *Re Cunningham and Frayling*, [1891] 2 Ch. 567; *Morgan* v. *Swansea, etc. Authority*, 9 Ch. D. 582; *Re Docwra*, 29 Ch. D. 693; *Re Blandy Jenkins*, [1917] 1 Ch. 46.

(*p*) John. 304, at pp. 315, 316.

(*q*) 10 V. 246.

(*r*) 11 V. 614.

(*s*) 2 Vern. 271.

(*t*) 5 Ha. 272; 16 L. J. Ch. 370.

the property otherwise than in the condition in which he holds it; namely, fettered by the trusts declared by the deed."

In *Peacock* v. *Burt* (*u*), the first mortgagee had notice of the second mortgage, and after such notice made further advances to the mortgagor, and then transferred to a third mortgagee without giving him notice of the second. The third mortgagee, having no notice, was held entitled to tack not only his advances, but the further advances made by the first mortgagee after notice.

In *Sharples* v. *Adams* (*x*), Lord Romilly, M.R., observed, "If the owner in fee-simple, having the legal estate, creates an equitable charge in favour of A, and afterwards a second equitable charge in favour of B, and then a third equitable charge in favour of C, I apprehend that he cannot alter these equities by transferring the legal estate to any one of them, and the fact of the transfer of the legal estate to C, the owner of the third equitable charge, would not affect the rights of the first or the second. * * * And when the person having the legal estate holds it in the character of trustee for them all, he cannot prefer either or create a priority by giving the legal estate to anyone in particular."

In *Mumford* v. *Stohwasser* (*y*), the conflict was between an incumbrancer and the holder of a prior agreement for a lease. The incumbrancer had advanced his money without notice. Subsequently without any further advance he got the legal estate conveyed to him. Jessel, M.R., held that he had through the occupation of a tenant constructive notice of a trust and was consequently postponed to the *cestui que trust* (*z*). He said the case was covered by *Saunders* v. *Dehew* (*a*), and further that if the case arose he should hold "that a person knowing he is a trustee cannot, without receiving value *at the time*, by committing a breach of trust, deprive his own *cestui que trust* of his rights" (*b*).

In *Harpham* v. *Shacklock* (*c*), the Court of Appeal decided that a mortgagee (or purchaser) cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee

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(*u*) 4 L. J. Ch. 33; *Bates* v. *Johnson*, John. 304, *supra*; but see *West London Commercial Bank* v. *Reliance, etc. Building Soc.*, 29 Ch. D. 954.

(*x*) 32 B. 213, at p. 216.

(*y*) 18 Eq. 556.

(*z*) Disapproved as to notice, *Hunt* v. *Luck*, [1902] 1 Ch. 428.

(*a*) 2 Vern. 271.

(*b*) See *Perham* v. *Kempster*, [1907] 1 Ch. 373. But cf. *Pearce* v. *Bulteel*, [1916] 2 Ch. 544.

(*c*) 19 Ch. D. 207, 214.

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after the mortgagee has received notice of a prior equitable claim. In this case the defendants had got in the legal estate from P., who was a trustee for S., who was in turn a trustee for the plaintiffs. The defendants were accordingly attempting to set up the legal estate against the equity of the *cestui que trust* himself. Had the equity affecting the legal estate been that of a third person, the legal estate could have been set up against the equitable mortgagee (*d*).

In *West London Commercial Bank* v. *Reliance Permanent Building Society*, Cotton, L.J., in delivering judgment (*e*), said: "It is established by the cases that where there are first, second, and third mortgagees, the first mortgagee, even though he has notice of the second mortgage, can transfer the legal estate to the third mortgagee, if he had no notice when he took his security of the second mortgage, so as to give the third mortgagee priority over the second; that is to say, the first mortgagee can transfer his security to the third mortgagee, though the result may be to oust a person who would otherwise have had priority over the third mortgagee.

"Whether this is right, or whether we should so decide if such a case came before us, or whether the third mortgagee should, under such circumstances, be held liable to the second mortgagee, I give no opinion." In the same case Lindley, L.J., says, "Then another argument was addressed to us based upon *Peacock* v. *Burt* (*f*), and that class of cases, which have established the law as stated by Cotton, L.J.; but in my opinion they are cases which certainly ought not to be extended. *Peacock* v. *Burt* looks very like a conspiracy between the first and third mortgagees to cheat the second, which cannot be right. That, however, is the aspect which many of the old cases on the subject bear; still I am not at liberty to question those decisions, for although they are opposed to my ideas of morality, they are nevertheless law. However, I am not going to make them the pretext for doing further wrong" (*g*).

From the cases of *Mumford* v. *Stohwasser*, and *Harpham* v. *Shacklock*, *supra*, as qualified by *Taylor* v. *Russell* (*h*), it would seem that if the person having the legal estate was trustee either expressly or by construction of law for the mesne incumbrancers whom the purchaser claimed to oust, and either the trustee or the

(*d*) *Taylor* v. *Russell*, [1891] 1 Ch. 8, at p. 29.
(*e*) 29 Ch. D., at p. 961.
(*f*) 4 L. J. Ch. 33.
(*g*) 29 Ch. D., at p. 963.
(*h*) [1891] 1 Ch. 8; [1892] A. C. 244.

several purchasers had notice of this, such purchaser not paying value could obtain no protection by the legal estate so acquired (*i*).

The law was summed up by Wright, J., in *Powell* v. *London & Provincial Bank* (*k*) :—

" A transferee or incumbrancer taking a merely equitable interest takes in general only what his transferor could equitably give him, as is laid down in the case of *Shropshire Union Railways and Canal Co.* v. *R.* (*l*). In particular cases, however, he may on special grounds be entitled to priority over some previous equitable incumbrancer, as, for example, in case of laches on the part of that incumbrancer. A transferee or incumbrancer taking in the first instance for valuable consideration the whole legal estate takes it free from any equity which bound the transferor, unless in the case of negotiable instruments the transferee knew of or wilfully shut his eyes to that equity, and in other cases unless he knew or shut his eyes or neglected to make inquiries which the facts before him or his agent required him in reason to make. A transferee or incumbrancer for valuable consideration who takes in the first instance a merely equitable interest, without notice of any prior interest, can subsequently perfect his title, even after notice of the prior interest, by acquiring the legal estate, subject to the exceptions suggested in *Taylor* v. *Russell* (*m*); *Mumford* v. *Stohwasser* (*n*); *Harpham* v. *Shacklock* (*o*), and other cases, which may perhaps be stated as follows : The transferee must not get in the legal estate from a person whom he knows or ought to know to be a trustee of the estate upon express trusts for a prior incumbrancer (*p*). There are some expressions which carry the exception further, and suggest that a satisfied mortgagee is in the position of a trustee for this purpose for his mortgagor, and also that the legal estate cannot be effectually got indirectly from a person who is in fact a trustee on express trusts, even though the transferee has no knowledge of the fact, unless perhaps when value is given to the trustee at the time. These expressions do not, however, appear to

(*i*) See *Perham* v. *Kempster*, [1907] 1 Ch. 373. Cf. *Pearce* v. *Bulteel*, [1916] 2 Ch. 544.

(*k*) [1893] 1 Ch., at p. 615, affirmed [1893] 2 Ch. 558.

(*l*) L. R. 7 H. L. 496.

(*m*) [1892] A. C. 253, 259.

(*n*) 18 Eq. 563.

(*o*) 19 Ch. D. 214; and see *Perham* v. *Kempster*, [1907] 1 Ch. 373; *Pearce* v. *Bulteel*, [1916] 2 Ch. 544.

(*p*) See *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231.

have been as yet stated or accepted as established or developed law " (*q*).

What legal Interest is sufficient for Protection.—With regard to the nature of the legal interest sufficient to afford protection, it is not necessary to have the entire fee—a partial interest, as a term of years, is sufficient.

But a person who takes a partial interest in the legal estate will be postponed to an earlier legal interest carved thereout and vested in another. Thus, where the inheritance is mortgaged subject to a term, the mortgagee will be postponed to an incumbrancer who has got in the term (*r*); and an incumbrancer getting in a later term will be postponed to one having an earlier one. So it has been held that a term created by a tenant for life to secure an incumbrance on his life interest, will have priority over a subsequent reversionary term, though limited by him out of the inheritance, under a power contained in the will under which he took (*s*).

Where, however, as was decided in the principal case, a puisne incumbrancer on the whole of an estate, gets in the legal estate of a *part* thereof, the puisne incumbrance will only be protected to the extent of that part. Thus in the case put by Hale, C.B. : " If a man is seised of sixty acres, and mortgages twenty to A, and then mortgages the whole to B, and then mortgages the whole to C, and afterwards C purchases in the first mortgage, that shall not protect more than the twenty acres."

The Securities must be held in the same right.—The rule does not apply if the two securities are not held in the same right. For instance, if a prior mortgagee takes an assignment of a third mortgage, *as a trustee only for another person*, he shall not be allowed to tack the two mortgages together, to the prejudice of intervening incumbrancers. If this were permitted, a mere stranger purchasing the third mortgage, by declaring he bought it in trust only for the first mortgagee, might tack both together, and defeat all the other incumbrancers (*t*).

So also, upon the same principle, it was held that the executors

(*q*) See, *e.g.*, *Prosser* v. *Rice*, 28 B., at p. 74; observations of Lord Macnaghten in *Taylor* v. *Russell*, [1892] A. C., at p. 259; *Hitchcock* v. *Sedgwick*, 2 Vern. 156; *Willoughby* v. *W.*, 1 T. R. 773; *Maundrell* v. *M.*, 10 V., at p. 270; *Evans* v. *Bicknell*, 6 V., at p. 185

(*r*) *Ex p. Knott*, 11 V. 609.

(*s*) *Hurst* v. *H.*, 16 B. 372.

(*t*) *Per* Lord Hardwicke, in *Morret* v. *Paske*, 2 Atk. 52; *Shaw* v. *Neale*, 6 H. L. Cas. 581; but see *Newman* v. *N.*, 28 Ch. D. 674. Cf. *Barnett* v. *Weston*, 12 V. 130; *Wilmot* v. *Pike*, 5 Ha. 14; *Rooper* v. *Harrison*, 2 K. & J. 86.

of a first mortgagee of a leasehold, who had the *legal estate in his own right*, could not, as against a mesne incumbrancer, tack a mortgage of the equity of redemption which had vested in their testator *as the executor of another* (*u*).

But it seems that a person entitled to one security in his own right, and to another as executor or administrator, may nevertheless tack, if he is entitled to the beneficial interest in the latter security (*x*).

Second Rule.—The second rule laid down in *Brace* v. *Duchess of Marlborough* (*y*), is: "If a judgment creditor, or creditor by statute or recognisance, buys in the first mortgage, he shall not tack or unite this to his judgment, etc., and thereby gain a preference."

The Judgments Act, 1838 (*z*), made a judgment duly registered *a charge upon the land*; but it was doubted whether this enabled the judgment creditor to tack any more than he could previously (*a*).

By 27 & 28 Vict. c. 112, s. 1, no judgment, statute, or recognisance to be entered up after the passing of that Act was to affect any land until such land should have been *actually delivered in execution*.

And by the Land Charges Registration and Searches Act, 1888 (*b*), every writ and order affecting land was required to be registered in order to be effectual against a purchaser for value.

These enactments have now been repealed, and section 195, sub-section 1, of the Law of Property Act, 1925, provides that (subject as thereinafter mentioned) a judgment entered up in the Supreme Court (whether before or after the commencement of the Act) shall operate as an equitable charge upon every estate or interest in all land to which the judgment debtor at the date of entry or at any time thereafter is or becomes beneficially entitled. And by sub-section 2 every judgment creditor is to have the same remedies against the estate or interest in the land so charged as he would have been entitled to if the judgment debtor had agreed

(*u*) *Spencer* v. *Pearson*, 24 B. 266; and see *Newman* v. *N.*, *supra*.
(*x*) *Price* v. *Fastnedge*, Amb. 685; *Blackwell* v. *Symes*, *ibid.*, cited.
(*y*) 2 P. W. 491.
(*z*) 1 & 2 Vict. c. 110.
(*a*) See *Kinderley* v. *Jervis*, 22 B. 1; *Whitworth* v. *Gaugain*, 3 Ha. 416; *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 507; *Pickering* v. *The Ilfracombe Railway Co.*, L. R. 3 C. P. 235; *Robinson* v. *Nesbitt*, *ibid.*, 264; *Benham* v. *Keane*, 1 John. & H. 697.
(*b*) 51 & 52 Vict. c. 51, s. 5.

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in writing to charge the same with the amount of the judgment debt and interest thereon. But a judgment is not to operate as a charge unless or until a writ or order for the purpose of enforcing it is registered, and no judgment creditor is to be entitled to take proceedings to obtain the benefit of his charge until after the expiration of one year from the time of entering up the judgment. Section 6 of the Land Charges Act, 1925, reproduces, in substance, section 5 of 51 & 52 Vict. c. 51.

Fourth Rule.—The fourth rule in *Brace* v. *Duchess of Marlborough* (*c*), is that "if a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee till both the mortgage and statute or judgment be paid" (*d*).

The reason given for this rule is that it is to be presumed that the mortgagee lent his money upon such subsequent security, as knowing he had hold of the land by the mortgage, and in confidence ventured a further sum on a security which, though it passed no present interest in the land, yet must be admitted to be a lien thereon (*e*).

A Security not being a Lien on Land cannot be tacked.—A security cannot be tacked unless *it be a lien* upon the land either specifically or generally; hence it was held that, as copyholds previous to 1 & 2 Vict. c. 110 were not liable to an extent upon a judgment, a judgment debt could not be tacked to a mortgage of copyholds (*f*).

As against whom debts, being a lien on land, can be tacked.—Debts which are a lien on the estate, as, for instance, a mortgage debt (and under the old law a statute or judgment), may be tacked by the first mortgagee as against the mortgagor (*g*), and also all persons claiming under him, including mesne incumbrancers (*h*). It seems, however, that a further advance cannot be tacked to a first mortgage as against a surety for the first mortgage debt (*i*).

(*c*) 2 P. W. 494.

(*d*) See also *Shepherd* v. *Titley*, 2 Atk. 348; *Anon.*, 2 Ves. Sen. 662.

(*e*) *Brace* v. *Duchess of Marlborough*, 2 P. W. 493.

(*f*) See *Heir of Cannon* v. *Pack*, 6 Vin. Abr. 222, pl. 6.

(*g*) *Brace* v. *Duchess of Marlborough*, 2 P. W. 494; *Anon.*, 2 Ves. Sen. 662; *Shepherd* v. *Titley*, 2 Atk. 348; *Ex p. Knott*, 11 V. 609; *Ex p. Cox*, 2 Mont. D. & De G. 486; *Barnett* v. *Weston*, 12 V. 130; *Baker* v. *Harris*, 16 V. 397.

(*h*) *Ibid.*

(*i*) See *Bowker* v. *Bull*, 1 Si. (N.S.) 29; 15 Jur. 4; *Hopkinson* v. *Rolt*, 9 H. L. Cas. 514; *Re Kirkwood's Estate*, 1 L. R. Ir. 108; *Forbes* v. *Jackson*, 19 Ch. D.

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Formerly a first mortgagee was entitled to tack, as against the assignees in bankruptcy of the mortgagor, a subsequent judgment docketed, though no execution had issued at the time of the bankruptcy (*k*), but by section 195, sub-section 3 (iii) of the Law of Property Act, 1925, it is provided that no "such charge" (*i.e.*, the equitable charge which under the section a judgment creditor obtains when a writ or order to enforce the same has been registered) shall operate to give the judgment creditor any preference in case of the bankruptcy of the judgment debtor, unless the judgment has been entered up one year at least before the bankruptcy.

Against whom a mortgagee may tack debts not being liens on the mortgaged property.—With regard to the right of a mortgagee to tack to his security debts not being liens upon the estate, it seems that in the case of a mortgagee of real estate he might, as against the heir (*l*) and devisee (*m*) of the mortgagor, always tack *specialty debts*, and under the Administration of Estates Act, 1833, he might, as against the heir or devisee of the mortgagor, tack simple contract debts (*n*).

In the case of a mortgage of personalty the mortgagee, as against the executor of the mortgagor, could always tack, not only bond and other specialty (*o*), but also simple contract debts (*p*).

The reason why tacking of debts by mortgagees has been allowed, is to prevent a circuity of action against persons in whose hands the equities of redemption of the mortgaged properties were assets for the payment of debts (*q*).

But a mortgagee cannot tack debts not being liens upon the mortgaged estate, whether they be bond or other specialty debts or simple contract debts, as against the mortgagor (*r*), or his creditors (*s*).

615; and see *Nicholas* v. *Ridley*, [1904] 1 Ch. 192. See *infra*, notes to *Dering* v. *Winchelsea*.

(*k*) *Baker* v. *Harris*, 16 V. 397.

(*l*) *Margrave* v. *Le Hooke*, 2 Vern. 207; *Anon.*, 2 Ves. Sen. 662; *Morret* v. *Paske*, 2 Atk. 53; *Jones* v. *Smith*, 2 V. 376; *Elvy* v. *Norwood*, 5 De G. & Sm. 240.

(*m*) *Heams* v. *Bance*, 3 Atk. 630; *Coleman* v. *Winch*, 1 P. W. 775; *Du Vigier* v. *Lee*, 2 Ha. 340; *Dingle* v. *Coppen*, [1899] 1 Ch. 726; *Re Lloyd*, [1903] 1 Ch. 385.

(*n*) *Rolfe* v. *Chester*, 20 B. 610; *Thomas* v. *T.*, 22 B. 341.

(*o*) *Anon.*, 2 Vern. 176.

(*p*) *Coleman* v. *Winch*, 1 P. W. 775; *Eccles* v. *Thawill*, Pr. Ch. 18.

(*q*) See *Heams* v. *Bance*, 3 Atk. 630; *Lowthian* v. *Hasel*, 3 Bro. Ch. 162; *Langford* v. *Jackson* (*Anon.*), 2 Ves. Sen. 662.

(*r*) *Challis* v. *Casborn*, Pr. Ch. 407; *Archer* v. *Snatt*, 2 Stra. 1107; *Elvy* v. *Norwood*, 5 De G. & Sm. 240.

(*s*) *Coleman* v. *Winch*, 1 P. W. 775; *Heams* v. *Bance*, 3 Atk. 630; *Hamerton* v. *Rogers*, 1 V. 513; *Adams* v. *Claxton*, 6 V. 225; *Rolfe* v. *Chester*, 20 B. 610.

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In *Re Gregson* (*t*), G. died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself, payable during his own life. He had also mortgaged a policy on his own life to the same mortgagees. After the death of G. the mortgagees received in respect of the policy a sum more than sufficient to satisfy the amount secured on the mortgage. They claimed, in a creditors' action for administration, to set off arrears of the annuity granted by the deceased against the balance received in respect of the policy and due to the executor of the deceased. North, J., held they were not entitled to do so (*u*).

Sixth Rule.—In all the above cases, as is laid down in the sixth rule in *Brace* v. *Duchess of Marlborough* (*x*), no subsequent incumbrancer will be allowed to tack his incumbrance to a prior legal estate, unless when he lent his money he had *no notice* of the mesne mortgage, statute or judgment; for being without notice is his sole equity (*y*).

The rule is the same with regard to a first mortgagee, who will not be allowed to tack a subsequent mortgage if he made the advance having notice of an intermediate incumbrance (*z*), and so where the first mortgage was to three persons, A, B and C, jointly, they being trustees, and one of them, B, a solicitor, had notice, at the time of a subsequent advance made by them jointly, of an intermediate incumbrance, it was held that the successors in title of A, B and C could not tack. Each of them was individually entitled as against strangers to the whole of the security and debt, and therefore notice to any one of them of the intermediate incumbrance availed as against all (*a*).

Although it is essential that the consideration for the equitable interest must have been paid without notice of the mesne incumbrance or equity, nevertheless, a purchaser or incumbrancer with

(*t*) 36 Ch. D. 223.

(*u*) See *Re Raggett*, 16 Ch. D. 117; *Talbot* v. *Frere*, 9 Ch. D. 568; and cf. *Re Gedney*, [1908] 1 Ch. 804, 808, 811. Upon the question whether a surety, who has paid off the first mortgage, can tack as against a puisne mortgagee the costs of defending proceedings brought by the first mortgagee, see *South* v. *Bloxam*, 2 H. & M. 457; *Dixon* v. *Steel*, [1901] 2 Ch., at pp. 605, 607.

(*x*) 2 P. W. 495.

(*y*) See also *Willoughby* v. *W.*, 1 T. R. 767; *Hiles* v. *Moore*, 15 B. 181.

(*z*) *Lloyd* v. *Attwood*, 3 De G. & J. 614; *Morret* v. *Paske*, 2 Atk. 52; *Willoughby* v. *W.*, 1 T. R. 763; *Shepherd* v. *Titley*, 2 Atk. 348; *Bedford* v. *Backhouse*, 2 Eq. C. Abr. 615; *Mumford* v. *Stohwasser*, 18 Eq. 556; *Harpham* v. *Shacklock*, 19 Ch. D. 207.

(*a*) *Freeman* v. *Laing*, [1899] 2 Ch. 355; Coote (9th ed.), p. 1246.

notice, if he takes from or under a person who bought without notice, will obtain the title of the purchaser without notice. Otherwise a *bona fide* purchaser would be unable to deal with his property fully : *Lowther* v. *Carlton* (*b*); and the converse case is the same, and if a purchaser who has notice sells to a *bona fide* purchaser without notice, the latter may protect his title (*c*). In *Re Stapleford Colliery Co.* (*d*), the Court of Appeal held that shares having been transferred to purchasers for value without notice of their not being fully paid up and being registered as fully paid up, such transferees could give a good title to them as fully paid up to a purchaser who had notice that they were not fully paid up (*e*).

Mortgage to secure further advances.—If the first mortgagee make a subsequent advance without notice of an intermediate mortgage, he can tack, and demand the payment of the whole amount of his advances in the first place (*f*). *Secus* where, after having made a second advance without notice of a second mortgage, he foregoes part thereof, and afterwards, with notice of the second mortgage, he advances an amount equal to that which he has foregone, inasmuch as evidence is not admissible to show the intention of the parties to continue the old debt (*g*).

And it has been held that, although the first mortgage was made to secure a sum and *further advances*, if the first mortgagee made a further advance with notice of a *mesne incumbrance*, he will not be entitled to priority in respect of such further advance. Thus in *Shaw* v. *Neale* (*h*) an estate was mortgaged to A to secure a sum of money and *further advances*. Afterwards Shaw, the plaintiff, obtained a charge on the estate by means of a Judge's order. It was held by Romilly, M.R., that further advances made to the mortgagor by A, after notice of the order, had no priority

(*b*) 2 Atk. 242; *Harrison* v. *Forth*, Pr. Ch. 51; and see *Wilkes* v. *Spooner*, [1911] 2 K. B. 473.

(*c*) *Brandlyn* v. *Ord*, 1 West. Rep. 512; 1 Atk. 571; *Ferrars* v. *Cherry*, 2 Vern. 383; *Mertins* v. *Jolliffe*, Amb. 313; *Sweet* v. *Southcote*, 2 Bro. Ch. 66; *M'Queen* v. *Farquhar*, 11 V. 467, 478; *Kettlewell* v. *Watson*, 26 Ch. D. 501; and see *Freer* v. *Hesse*, 4 De G. M. & G. 495; *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599.

(*d*) 14 Ch. D. 432.

(*e*) *Ledbrook* v. *Passman*, 59 L. T. 306; *Re Railway Time Tables Co.*, 42 Ch. D. 98; and see *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259; *Wilkes* v. *Spooner*, [1911] 2 K. B. 473.

(*f*) *Bedford* v. *Backhouse*, 2 Eq. Ca. Abr. 615; *Calisher* v. *Forbes*, L. R. 7 Ch. 109; *Re Weniger's Policy*, [1910] 2 Ch. 291.

(*g*) *Shepherd* v. *Titley*, 2 Atk. 350.

(*h*) 20 B. 157; 6 H. L. C. 581.

over Shaw's charge. His judgment was affirmed by the House of Lords (*i*), and was followed in *Hopkinson* v. *Rolt* (*k*), which is the case usually cited as establishing the rule. The rule applied even though the further advances were made by the first mortgagee in pursuance of a covenant entered into at the time of the first mortgage (*l*); but under the Law of Property Act, 1925, s. 94, sub-section 1 (c), a mortgagee, in such a case, will be able to tack his further advances to the original loan (*m*).

In *Deeley* v. *Lloyds Bank, Ltd.* (*n*), G mortgaged premises to the bank to secure an overdraft (not to exceed £2,500) on his current account, and subsequently mortgaged the same property to D, such mortgage being expressly subject to the mortgage to the bank. Notice of this second mortgage was given to the bank, but *they continued G's account as one unbroken account.* Later, the mortgagor became bankrupt and the bank realised their security, and the proceeds were just sufficient to satisfy the amount owing to the bank. It was held that the joint effect of the rule in *Clayton's Case* (*o*) and of the principle of *Hopkinson* v. *Rolt* (*p*) was to give the second mortgagee, D, priority over the bank (*q*). Under section 94, sub-section 2 of the Law of Property Act, 1925 (as amended by the Law of Property Act of 1926), where a mortgage is made for securing a current account, the mortgagee, in respect of further advances, is not to be deemed to have notice of a mortgage merely by reason that it was registered as a land charge or in a local deeds registry, if it was not so registered at the time when the original mortgage was created, or when the last search (if any) by or on behalf of the mortgagee was made (*r*).

In *Bradford Banking Co.* v. *Briggs & Co.* (*s*), the articles of association of a company, registered under the Companies Act,

(*i*) 6 H. L. Cas. 581.

(*k*) 25 B. 461; 3 De G. & J. 177; *S. C.*, 9 H. L. Cas. 514; *London & County Banking Co.* v. *Ratcliffe*, 6 A. C. 722; *Bradford Banking Co.* v. *Briggs & Co.*, *infra*; *Hughes* v. *Britannia Permanent Benefit Building Society*, [1906] 2 Ch. 607, where the principle was applied to limit consolidation, see *infra*, p. 129; *Deeley* v. *Lloyds Bank*, [1910] 1 Ch. 648; cf. *Gannon* v. *G.*, [1909] 1 Ir. R. 57.

(*l*) *West* v. *Williams*, [1899] 1 Ch. 132.

(*m*) See *supra*, p. 107.

(*n*) [1912] A. C. 756.

(*o*) 1 Mer. 572.

(*p*) 9 H. L. C. 514.

(*q*) See Coote (9th ed.), p. 1238.

(*r*) See *supra*, p. 108.

(*s*) 29 Ch. D. 149; 31 Ch. D. 19; 12 A. C. 29. Cf. *Re Brown & Gregory, Ltd.*, [1904] 1 Ch. 627; *Re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743.

1862, provided that the company should have a first and permanent lien and charge, available at law and in equity, on every share, for all debts due from the shareholder to the company. Shareholders in the company deposited certain certificates of shares in the company with the plaintiffs, their bankers, by way of equitable mortgage to secure advances on their current account. The plaintiffs gave the company notice of the deposit. The shareholders subsequently became indebted to the company. The certificates stated that the shares were held subject to the articles of association. It was held (reversing the judgment of the Court of Appeal and restoring that of Field, J.) that the company was not entitled to priority over the bankers in respect of moneys which became due to the company from the shareholders after notice of the deposit with the bank (*t*).

In *Daun* v. *City of London Brewery Co.* (*u*), on March 26, 1858, a publican deposited the lease of his public-house with the defendants—a brewery company—with a memorandum, stating that the deposit was to secure payment of a sum of £202, and interest, *as well as any other sums* in which the depositor might become indebted to the brewery company on any account, not exceeding £500. The brewery company, on July 7, 1865, made the publican a further advance of £100. On July 11, 1865, the publican signed to the plaintiffs—a firm of distillers—a memorandum whereby he declared that the documents deposited with the brewery company should, "subject to the security" to the brewery company, be a security to the distillers for a sum of £120 then due, and interest and all other sums that might thereafter become due to the distillers. *Notice of this second equitable mortgage was on the same day* given by the distillers to the brewers. After the date of this notice the publican became indebted to the brewers in a further sum of money—the price of beer supplied to the publican. The brewery company claimed to be entitled, *by virtue of a custom in the trade between brewers and publicans*, to add this further sum to the amount secured by the deposit of the lease, in priority to the distillers' charge. It was held, however, by James, V.-C., that the alleged custom was *bad in law* for want of mutuality, and for want of defined limits; and further that it was imperfectly supported by the evidence, and

(*t*) And see *Mackereth* v. *Wigan Coal, etc., Co.*, [1916] 2 Ch. 293.
(*u*) 8 Eq. 155.

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that consequently, according to the rule laid down in *Hopkinson* v. *Rolt* (*x*), the defendants, the brewery company, from and after the date of the second charge, were not entitled to any priority in respect of any goods supplied by them after the notice; and that with respect to such goods, both parties having notice of the securities, their priorities were to be according to the dates of their respective supplies.

The principle upon which these cases proceed is this, that the second charge was so framed as if it had said, "subject to the security as it stands at the moment," that is, to the amount of money now due on the security. If the parties wish to escape from this, they must say, "subject and without prejudice to the principal moneys now due from me, and to such sums as I may hereafter owe, not exceeding the sum of £——" (*y*).

Where, however, in such cases the further advance is made by the first mortgagee *without notice* of an intervening advance by the second mortgagee, the first mortgagee will have priority over the second mortgagee, not only in respect of his first, but also in respect of his second advance (*z*).

Seventh Rule.—The seventh rule laid down in *Brace* v. *The Duchess of Marlborough* (*a*) is "that when a puisne incumbrancer buys in a prior mortgage, in order to unite the same to the puisne incumbrance, but it is proved that there was a mortgage prior to that, the Court holds that the puisne incumbrancer, where he had not got the legal estate, or where the legal estate was vested in a trustee, could in such case make no advantage of his mortgage, but that in all *cases where the legal estate is standing out*, the several incumbrances must be paid according to their priority in point of time : *qui prior est tempore potior est jure*" (*b*).

And it is immaterial whether the outstanding legal estate is a fee or a term of years (*c*), or a term attendant upon the inherit-

(*x*) *Supra*, 9 H. L. Cas. 514.

(*y*) *Per* Romilly, M.R., in *Menzies* v. *Lightfoot*, 11 Eq., at p. 468.

(*z*) *Calisher* v. *Forbes*, L. R. 7 Ch. 109; and see now section 94, sub-section 1 (b) of the L. P. Act, 1925; and see *supra*, p. 108.

(*a*) 2 P. W. 495.

(*b*) See *Symmes* v. *Symonds*, 4 Bro. P. C. 328; *Earl of Bristol* v. *Hungerford*, 2 Vern. 524; 1 Eq. Ca. Abr. 142; *Turner* v. *Richmond*, 2 Vern. 81; *Beckett* v. *Cordley*, 1 Bro. Ch. 353; *Manningford* v. *Toleman*, 1 Coll. 670; *Phillips* v. *P.*, 4 De G. F. & J. 208; *Rooper* v. *Harrison*, 2 K. & J. 86; *Thorpe* v. *Holdsworth*, 7 Eq. 139; *Re Richards*, 45 Ch. D. 589; *Hopkins* v. *Hemsworth*, [1898] 2 Ch. 347; and see *Basset* v. *Nosworthy*, *post*.

(*c*) *Ex p. Knott*, 11 Ves. 618.

ance (*d*), which in equity, unless merged (*e*) under the Satisfied Terms Act (or under the Law of Property Act, 1925, s. 5, which takes the place of the Satisfied Terms Act), will follow all the estates created out of such inheritance and all incumbrances subsisting thereon (*f*).

Eighth Rule.—The eighth rule in *Brace* v. *Duchess of Marlborough* (*g*) is : " To complete the title to tack, the incumbrancer must either have *actual possession* of the legal estate, *or* the *best right to call for a conveyance or assignment* of it, for in such case the creditor having such right will, under certain circumstances, be placed in equity in the same position as if he had obtained an actual assignment." There are, it would appear, three possible grounds on which a claim to a better right might be set up : first, that the trustee of an outstanding legal estate had expressly declared himself trustee for the incumbrancer; secondly, that the mortgagor had constituted himself trustee for the incumbrancer; thirdly, that the incumbrancer held the title-deeds (*h*).

The law was stated by Wigram, V.-C., in *Wilmot* v. *Pike* (*i*) : " Now the general rule—the rule relied on by Mr. Wood as to equitable interests in land—is the rule ' *qui prior est in tempore potior est in jure*,' and I have, on the former point, decided that neither the omission of one mortgagee to give notice, nor the activity of the other, would, in the circumstances of that case, give the second mortgagee priority over the first. But if a first incumbrancer has a declaration of trust only by the borrower, and none by the trustee, and the second incumbrancer has a formal mortgage of the equity of redemption, and the trustee is a party to the deed, and declares himself a trustee for the second incumbrancer, will not that declaration by the trustee give the second priority over the first? I think the second would in that case have a better right to call for the legal estate than the first; and if it would be so in the case of a stranger, I think the trustee cannot be precluded by his situation as trustee from claiming the benefit of the legal estate without notice. . . . I have referred to the cases of *Stanhope* v.

(*d*) *Charlton* v. *Low*, 3 P. W. 330.
(*e*) Coote (9th ed.), p. 1241.
(*f*) *Charlton* v. *Low*, 3 P. W. 330; cf. *Shaw* v. *Johnson*, 1 Dr. & Sm. 412; *Plant* v. *Taylor*, 7 H. & N. 211; *Owen* v. *O.*, 3 H. & C. 88.
(*g*) 2 P. W. 495.
(*h*) See Coote (9th ed.), pp. 1242 *et seq.*
(*i*) 5 Ha. 22.

Verney (*k*) and *Maundrell* v. *M.* (*l*), from which it appears that, as to the trusts of a term, a declaration in form by a trustee, that he will stand possessed of the term, is held equivalent to an assignment, so as to give the preference to the party who gets the declaration over one who has a good equitable interest, but not in the same form."

It appears, therefore, that in such a case, while the trustee for one of the incumbrancers holds the legal estate it will be treated, as is reasonable, as being the same thing as if the incumbrancer himself held it. But the cases show that such a declaration of trust would not protect the person in whose favour it was declared as against any mortgagee or other person who obtained from the trustee an actual conveyance of the legal estate for valuable consideration and without notice (*m*).

It is further to be observed that the authorities above cited deal only with the case where the "better right" is obtained by the equitable incumbrancer contemporaneously with his advance. It would seem, however, on principle that an equitable incumbrancer who had made his advance without notice could rely on a "better right" subsequently acquired, provided that the conditions permitting him to rely on a legal estate actually acquired were fulfilled (*n*).

A common form of equitable mortgage to banks at the present day is by deposit of title-deeds accompanied by a memorandum, usually under seal, whereby the mortgagor undertakes to execute a legal mortgage when required, declares himself trustee for the mortgagee, in whose favour a power of attorney to deal with the legal estate is given, with authority for the mortgagee to remove the mortgagor from the trusteeship at pleasure and to appoint new trustees and make vesting declarations.

In *London & County Banking Co.* v. *Goddard* (*o*), the mortgagor by deposit had executed a memorandum of the above nature in favour of the defendant bank, and afterwards conveyed the fee by way of mortgage to X, who made his advance with notice of the bank's mortgage. The bank later appointed new trustees with a vesting declaration. North, J., held that the declaration vested

(*k*) 2 Eden, 81.
(*l*) 10 V. 271.
(*m*) See, *e.g.*, *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259; *Rooper* v. *Harrison*, 2 K. & J. 86.
(*n*) See *Taylor* v. *Russell*, [1891] 1 Ch., at p. 27; [1892] A. C., at p. 259.
(*o*) [1897] 1 Ch. 642.

the legal estate in the new trustees and divested the legal estate conveyed to X. Since X had taken with notice of the bank's mortgage, and therefore with notice of the trusts, the property was subject to the trusts, and so remained within the operation of the power of appointment and vesting declaration. If X had advanced his money and taken the legal estate without notice of the bank's mortgage, he would have been entitled to priority over the bank, and the vesting declaration could have had no divesting operation. The case of *Taylor* v. *London & County Banking Co.* (*p*) shows that, if the acquisition of the legal estate by an incumbrancer involves to his knowledge a breach of a trust in favour of a prior incumbrancer, he cannot rely on such legal estate.

In certain cases possession of the title-deeds has been held to give an equitable incumbrancer the "better right" to the legal estate (*q*). It will be borne in mind that by section 13 of the Law of Property Act, 1925, it is provided that the Act is not prejudicially to affect the right or interest of any person arising out of the possession of documents relating to a legal estate in land, nor to affect any question arising out of any omission to obtain, or any absence of possession of documents relating to a legal estate in land.

It will be observed that under section 94, sub-section 1, the right to tack further advances, where it is exercisable, appears to be independent of the possession of the legal estate (*r*). The provisions relating to notice and registration contained in sections 197 and 198 of the Law of Property Act, 1925, operate without prejudice to the provisions respecting the making of further advances contained in section 94 of that Act (*s*).

4. As to the time at which an incumbrance sought to be tacked can be Acquired.

A first mortgagee cannot tack a subsequent incumbrance taken *pendente lite*, the *lis pendens* being duly registered, because the suit would affect him with notice of the mesne incumbrance (*t*).

But a third mortgagee, who has advanced his money without

(*p*) [1901] 2 Ch. 231.

(*q*) See *Fourth City, etc., Society* v. *Williams*, 14 Ch. D. 140; *Crosbie-Hill* v. *Sayer*, [1908] 1 Ch. 866, at p. 879 (building society cases); and *per* Eldon, C., in *Ex p. Knott*, 11 V. 609; and cf. *Bank of Ireland* v. *Cogry Spinning Co.*, [1900] 1 Ir. R. 219; Coote (9th ed.), p. 1243.

(*r*) See *supra*, p. 108.

(*s*) See section 197, sub-section 3, and section 198, sub-section 2 of the L. P. Act, 1925.

(*t*) *Morret* v. *Paske*, 2 Atk. 52; Coote (9th ed.), p. 1329.

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notice, may get in and tack the first mortgage *pendente lite*, and up to the judgment (*u*).

But after a judgment to settle priorities, a party to the cause will not have the advantage of tacking his puisne incumbrance to a prior one taken since (*x*); for there is then a judgment for the creditors that they shall be paid according to their priorities (*y*).

5. Consolidation of Mortgages.

Though the doctrine of consolidation is quite distinct from, and depends on a different principle from, that which governs "tacking," consolidation has in some respects an effect similar to that of tacking, and it is often referred to inaccurately as a form of tacking (*z*). Tacking is the uniting of two debts charged on the same property; consolidation is the right of a person who has two or more mortgage debts respectively charged on different properties, under mortgages made by the same mortgagor (*a*), to refuse under certain circumstances to be redeemed as to one unless the other or others be redeemed also. A mortgagor cannot compel his mortgagee to consolidate (*b*).

Consolidation, as expressed by James, L.J., in *Cummins* v. *Fletcher* (*c*), "arises from the power of the Court of Equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor." In the same case Cotton, L.J., said (*d*), "Originally it was only, as against the mortgagor, an interference by the Court of equity with his right of redemption. The right to redeem was the creature of equity, and the Court of equity held that it was inequitable that the mortgagor should take from his creditor the sufficient estate, and leave him with an insufficient estate as a security for a different debt."

"Originally," said Lord Davey in *Pledge* v. *White* (*e*), "it may have been a right of a mortgagee, holding two separate mort-

(*u*) *Brace* v. *Duchess of Marlborough*, 2 P. W. 491; *Hawkins* v. *Taylor*, 2 Vern. 29; *Belchier* v. *Butler*, 1 Eden, 523; *Belchier* v. *Renforth*, 5 Bro. P. C. 292.

(*x*) *Bristol* v. *Hungerford*, 2 Vern. 525; *Wortley* v. *Birkhead*, 2 Ves. Sen. 574.

(*y*) *Ex p. Knott*, 11 V. 619; *Re Scott's Estate*, 14 Ir. Ch. R. 57.

(*z*) See *Selby* v. *Pomfret*, 3 De G. F. & J. 595; *Vint* v. *Padget*, 2 De G. & J. 611.

(*a*) *Sharp* v. *Rickards*, [1909] 1 Ch. 109.

(*b*) *Re Thomson's Estates*, [1912] 1 Ir. R. 194.

(*c*) 14 Ch. D., at p. 708.

(*d*) 14 Ch. D., at pp. 711—2.

(*e*) [1896] A. C. 187.

gages on estates originally belonging to the same mortgagor which had become absolute estates at law against the mortgagor and debtor, personally to refuse to be redeemed as regards one estate without having the debt charged on the other paid. But it has long been settled that the right of consolidation may be exercised in respect of equitable mortgages, as well as by a mortgagee holding the legal estate absolute at law; and on the other hand that it may be asserted against the assignee of an equity of redemption from the mortgagor as well as against the mortgagor himself."

The right of consolidation appears to be recognised in very early cases. See *Bovey* v. *Skipwith* (*f*) in the reign of Charles II; see also Lord Hardwicke's decision in 1743, in the case of *Titley* v. *Davies* (*g*).

" The equitable rule as to consolidation has not met with general approval, as regards at least its latest development " (*h*), and the doctrine is excluded (unless there is an express agreement to the contrary, or unless the mortgages were made before 1882) by section 93 of the Law of Property Act, 1925, which takes the place of section 17 of the Conveyancing Act, 1881, and is in the following terms :—

" (1) A mortgagor seeking to redeem any one mortgage is entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, solely on property other than that comprised in the mortgage which he seeks to redeem.

" This subsection applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

"(2) This section does not apply where all the mortgages were made before the first day of January, eighteen hundred and eighty-two.

" (3) Save as aforesaid, nothing in this Act, in reference to mortgages, affects any right of consolidation or renders inoperative a stipulation in relation to any mortgage made before or after the commencement of this Act reserving a right to consolidate."

Inasmuch as sub-section 3 enables mortgagees to contract out of and exclude the application of the section, and this is very commonly done in practice, the enactment has not prevented the doctrine of consolidation being of importance. The principal difficulty has

(*f*) 1 Ch. Ca. 201.
(*g*) 2 Y. & C. Ch. 399 (n.).
(*h*) *Per* Lord Davey in *Pledge* v. *White*, [1896] A. C. 187.

arisen where there has been an assignment of the equity of redemption in one or more of several properties which had been separately mortgaged.

The case which is most frequently commented on is that of *Vint* v. *Padget*, decided in 1858 (*i*). Two estates, subject respectively to distinct first mortgages vested in different mortgagees, were both again mortgaged to the same second mortgagees. Afterwards the two first mortgages were transferred to one person, with notice of the second mortgage. It was held that the transferee was, in a foreclosure suit instituted by him against the second mortgagee, entitled to consolidate the two first mortgages. The Court of Appeal considered the right to consolidate clear, subject only to the question whether it was material that notice of the second mortgage was given to the transferee of the first mortgages at the time he took his transfer. And they held that this did not affect the transferee's right. A doubt whether the judgment was in this respect justifiable was expressed by Lindley, L.J., in *Minter* v. *Carr* (*k*). But the decision in *Vint* v. *Padget* was recognised as binding by the same Judge and the other Judges of the Court of Appeal, and the House of Lords, in *Pledge* v. *White* (*l*).

In *Jennings* v. *Jordan* (*m*), the mortgagor of one property assigned the equity of redemption in it on a settlement for value, and after this assignment mortgaged another property to the mortgagee of the first. The assignee of the equity of redemption having brought an action to redeem the first property, the mortgagee claimed to consolidate the two mortgages. *Held* that he could not consolidate.

As stated by Lord Davey in *Pledge* v. *White* (*n*), the actual point decided in *Jennings* v. *Jordan* (*o*) was "that a mortgagee could not, as against the assignee of the equity of redemption of one property, consolidate with his original mortgage a mortgage on another property created by the same mortgagor after the assignment of the equity of redemption."

In *Harter* v. *Colman* (*p*), the facts were very similar to those in *Jennings* v. *Jordan*, but the mortgages were made to different

(*i*) 2 De G. & J. 611; and see *Tweedale* v. *T.*, 23 B. 341.
(*k*) [1894] 3 Ch. 498; see p. 501.
(*l*) [1896] A. C. 187; [1895] 1 Ch. 51.
(*m*) 6 A. C. 698. See also *Baker* v. *Gray*, 1 Ch. D. 491, and *White* v. *Hillacre*, 3 Y. & C. Ex. 597.
(*n*) [1896] A. C. 196, affirming Romer, J., [1894] 2 Ch. 328; [1895] 1 Ch. 51.
(*o*) 6 A. C. 698. (*p*) 19 Ch. D. 630.

persons before the equity of redemption in one property was assigned, and the union of the mortgages in the transferee was subsequent to such assignment. It was held by Fry, L.J., that the transferee could not consolidate them as against the assignee of the equity in one of them. The Judge considered "that the Courts have laid down the principle that the equities to be performed by the assignee of an equity of redemption are those to which his assignor was liable at the date of the assignment." He quotes from the judgment of Lord Selborne, in *Jennings* v. *Jordan*, the following passage: "The purchaser of an equity of redemption must take it as it stood at the time of his purchase, subject to all other equities which then affected it in the hands of his vendor, of which the right of the mortgagee to consolidate his charge on that particular property with other charges then held by him on other property at the same time redeemable under the same mortgagor was one." The cases of *Harter* v. *Colman* and *Jennings* v. *Jordan* must be taken to have overruled the case of *Beevor* v. *Luck* (*q*).

The cases of *Minter* v. *Carr* (*r*) and *Pledge* v. *White* (*s*) both arose out of mortgages by the same person (Banks) of eight different properties. Ultimately the equity of redemption in all had become vested in the same person, and the mortgages of all the properties had also become vested in another person. But in the first-mentioned case of *Minter* v. *Carr* it was held that the plaintiff, the assignee of the equity of redemption of one of the properties, had become entitled to a separate mortgage, or to the title by purchase through a separate mortgage, which had been made to his predecessor in title before the other mortgages were united in the defendants, and that he was entitled to redeem this mortgage alone without redeeming the others, because, although at the time when he claimed to redeem he had the equity of redemption in all the properties, he was to be treated as to this particular property as standing in the position of an assignee of the equity of redemption of it alone, before the union of the mortgages in the defendants.

In *Pledge* v. *White*, it appears that at the date of the action being commenced the plaintiff had become entitled to the equity of redemption in all the seven remaining properties which had been

(*q*) 4 Eq. 537; *Pledge* v. *White*, [1896] A. C. 195—6.
(*r*) Reported before Romer, J., [1894] 2 Ch. 321; [1894] 3 Ch. 498.
(*s*) [1896] A. C. 187; [1894] 2 Ch. 222; [1895] 1 Ch. 51.

mortgaged by Banks by several separate mortgages, and that these separate mortgages at the date of the action were vested in the defendants. The plaintiff claimed to redeem one of the properties (No. 2), without redeeming the others. It was held that he could not do so, and that *Vint* v. *Padget* (*t*) had been too long established to be overruled; and therefore it was held, following *Tweedale* v. *T.* (*u*) and *Vint* v. *Padget* (*t*), that the executor of the transferee was entitled to consolidate all the first mortgages.

The result of the cases seems to be that the *dictum* of Fry, L.J., in *Harter* v. *Colman*, must be modified so far as it purported to lay down that the equities were to be regulated at the date of the assignment of the equity of redemption.

It also appears that a mortgagee is not prevented from claiming the right to consolidate by reason that, at the time he pays his money and unites the mortgages by taking a transfer of one or more of them, he has notice of a second mortgage of all the properties vested in another mortgagee, whose right may be affected by the consolidation (*x*). But, on the other hand, he cannot consolidate against a second mortgagee or purchaser of the equity of redemption in one only of the properties who derives title before the union of the mortgages claimed to be consolidated (*y*).

The position is summed up by Lord Davey, towards the close of his speech in *Pledge* v. *White* (*z*) as follows :—"It appears to me, my Lords, that an assignee of two or more equities of redemption from one mortgagor stands in a widely different position from the assignee of one equity only. He knows, or has the opportunity of knowing, what are the mortgages subject to which he has purchased the property, and he knows that they may become united by transfer in one hand. If the doctrine of consolidation be once admitted, it appears to me not unreasonable to hold that a person in such a position occupies the place of the mortgagor or assignor to him towards the holders of the mortgages, subject to which he has purchased, although it may be unreasonable to hold that he can be affected by the transfer to such holders of mortgages to other persons by the same mortgagor on property which he has not purchased, and with the equity of redemption of which he has no concern. He

(*t*) 2 De G. & J. 611.
(*u*) 23 B. 341.
(*x*) *Vint* v. *Padget*, 2 De G. & J. 611. Cf. *Baker* v. *Gray*, 1 Ch. D. 491.
(*y*) *Jennings* v. *Jordan*, *supra*; *Harter* v. *Colman*, *supra*.
(*z*) [1896] A. C., at p. 198.

does not investigate the title to such other property, and cannot know in the latter case to what mortgages the property is subject. . . . It (the doctrine of consolidation) will be applicable where at the date when redemption is sought all the mortgages are united in one hand, and redeemable by the same person, or where, after that state of things has once existed, the equities of redemption have become separated."

Other Points connected with Consolidation.—It is plain on principle that the mortgages sought to be consolidated must have been originally created by the same mortgagor (*a*). The right of consolidation is merely the right of the holder of two mortgages to refuse to be redeemed as to one without the other being redeemed also. It does not effect a charge of the mortgage debt on the two properties, and in consequence it has been held—

(1) That it does not have the effect of making the mortgagee (who claims to consolidate), in respect of any right which he gains by it, a purchaser within the statute 27 Eliz. c. 4 (*b*), and that he cannot exercise it against persons claiming under a voluntary settlement of one property made before the execution of the mortgage (*c*);

(2) That it does not attach where one of the properties originally mortgaged has ceased to exist—*e.g.*, a lease which has become forfeited (*d*).

On the other hand, in *Cracknall* v. *Janson* (*e*), a mortgagee of two estates, A and B, of which A was subject to a first mortgage, in exercise of a power of sale in his mortage, sold the estate A. The first mortgagee, to whom another debt was due upon an equitable mortgage by deposit of a policy of assurance and other documents by the mortgagor, refused to join in the conveyance to the purchaser, unless he received out of the purchase-money the amount due on both his mortgages. That amount was paid to him accordingly, and the documents comprised in the equitable deposit were delivered to the second mortgagee. The balance of the proceeds of sale was insufficient to discharge what was due to the second mortgagee. It was held by the Court of Appeal that as the equitable mortgage was paid with money which, had the first

(*a*) *Sharp* v. *Rickards*, [1909] 1 Ch. 109.

(*b*) Repealed and replaced by section 173 of the L. P. Act, 1925.

(*c*) *Re Walhampton Estate*, 26 Ch. D. 391; and cf. *Cracknall* v. *Janson*, 11 Ch. D. 1.

(*d*) *Re Raggett*, 16 Ch. D. 117; *Re Gregson*, 36 Ch. D. 223; cf. *Watkins* v. *Lindsay*, 67 L. J. Q. B. 362.

(*e*) 11 Ch. D. 1.

mortgagee not claimed the right to consolidate, would have belonged to the second mortgagee, it was in fact paid by the second mortgagee, who, by the fact of such payment, became equitable transferee, and was entitled to consolidate that mortgage with his mortgage on estate B.

The case of *Cracknall* v. *Janson* was a foreclosure action, and shows that the doctrine applies when the mortgagee is suing for foreclosure as well as when the mortgagor is seeking redemption.

This case shows also that an equitable mortgage can be consolidated with a legal mortgage, and that the right applies to the proceeds of sale of the properties comprised in the two mortgages when sold by the mortgagee.

In *Marshall* v. *Shrewsbury* (*f*), a mortgagee having from the same mortgagor, who died, a legal mortgage on one property and an equitable mortgage on another, contracted to sell both, and then filed a bill for the administration of the estate of the deceased mortgagor, and praying for permission to carry out the sale and for payment of both debts out of the proceeds and the mortgagor's estate. It was held that he was entitled to do so.

In *Griffith* v. *Pound* (*g*), it was held that the right attached in the case of a mortgage after the Conveyancing Act, 1881 (section 17 being excluded), where the mortgagee had given notice under section 20 to pay off one mortgage, and the mortgagor had tendered the money, and that the doctrine of election did not apply (*h*).

Mortgages made in Different Rights.—In the case of *Cummins* v. *Fletcher* (*i*), it was laid down by James, L.J.—

(1) That the right of consolidation did not attach when the mortgages were made in different rights, as in the case of one being a mortgage by A for his own debt, and the other a mortgage by A and B of other property for a partnership debt.

(2) That consolidation only applies where default has been made on all the securities in respect of which it is claimed.

In *Neve* v. *Pennell* (*k*), it was held that a *puisne* mortgagee of lands in a register county, who had registered his mortgage before a mortgage prior in date, could consolidate against it.

(*f*) L. R. 10 Ch. 250.

(*g*) 45 Ch. D. 553.

(*h*) The C. A. 1881 has now been repealed, the corresponding provisions of the L. P. Act, 1925, being sections 93 and 102.

(*i*) 14 Ch. D. 699.

(*k*) 2 Hem. & M. 170.

NOTICE.

BASSET *v.* NOSWORTHY.

1673. Rep. Temp. Finch, 102.

Purchase for valuable Consideration without Notice.

A bill was filed by an heir-at-law against a person claiming as purchaser from the devisee under the will of his ancestor, to discover a revocation of the will. The defendant pleaded that he was a purchaser for valuable consideration, *bona fide*, without notice of any revocation, and the plea was allowed, and upon proof of it, the bill was dismissed.

Though lands by the falling in of several lives prove to be of much greater value than they were at the time of the purchase, if the consideration be such as will make the defendant a purchaser within the statute 27 Eliz., he will be considered as a purchaser for valuable consideration; for the question is, not whether the consideration be adequate, but whether it be valuable.

The plaintiff, Sir William Basset, entitled himself as son and heir of Elizabeth Seymour, who was the only daughter and heir of Sir Joseph Killegrew, who was brother and heir of Sir Henry Killegrew, whose estate the lands in the bill mentioned formerly were; the defendant's title being under (as the plaintiff alleged) a pretended purchase of these lands at Drury House, and under the will of Sir Henry Killegrew, the purchase being from Jane Davis (afterwards the wife of Mr. Berkley) and from Henry Hill, the pretended natural son of the said Sir Henry Killegrew, of which will the plaintiff alleged there was a revocation by some subsequent deed or will; and for a discovery thereof, and what Mr. Nosworthy really paid for the purchase, and what deeds and writings he had, and to set aside the incumbrances which he had bought to protect his purchase, and that Mrs. Seymour might try her title at law upon the supposed revocation

against the title of the defendant, as a purchaser under the said will, the now plaintiffs exhibited this bill (*a*).

To which the defendant pleaded a dismission of a bill in the Court of Exchequer (*b*), signed and enrolled, which bill was there brought for the same matter as in this bill, and fully examined and dismissed upon a full hearing, but without prejudice, and the dismission duly signed and enrolled.

The defendant further pleaded *that he was a purchaser for a valuable consideration*, bona fide *paid, without notice of any revocation*.

This cause being heard by the Lord Keeper Bridgman, he ordered precedents to be searched where a plaintiff, after a dismission of his bill on a judicial and formal hearing, and a full examination of witnesses in one Court of equity, and that without prejudice, had ever been admitted in another Court of equity to examine new witnesses to the same matter formerly in issue and examined (*c*).

Afterwards there being several orders made in this cause, and one by which the plea was overruled (*d*), the cause now came on to be heard.

Lord Keeper Finch (*e*) (having set the cause right, which had been perplexed with several extraordinary orders and not according to the usual course of proceedings) proceeded to consider the two chief points in the case.

First, What the law of this Court is concerning purchasers;

Second, Whether the defendant was a purchaser within that law.

As to the first point, a purchaser *bona fide*, without notice of any defect in his title at the time of the purchase made, may lawfully buy in a statute or mortgage, or any other incumbrance;

(*a*) A bill of revivor.

(*b*) See *Seymor* v. *Nosworthy*, Hard. 374, upon an issue directed by the Court of Exchequer, whether the will of Sir Henry Killegrew was revoked or not: Mich. 16 Car. 2.

(*c*) *Seymor* v. *Nosworthy*, before Lord Keeper Bridgman and Moreton, J., 1 Ch. Ca. 155, where, however, the name of the case is omitted, and the cause is said to have been on demurrer, whereas it appears from other parts of the report to have been on a plea.

(*d*) *Seymor* v. *Nosworthy*, Mich. Hil. 1669; 3 Ch. R. 40; Nels. 135; Freem. Ch. Rep. 128; 2 Eq. Ca. Abr. 69, nom. *Seymer* v. *Nosworthy*.

(*e*) Afterwards Lord Chancellor and Earl of Nottingham.

and if he can defend himself at law by any such incumbrances bought in, his adversary shall never be aided in a Court of equity by setting aside such incumbrances; for equity will not disarm a purchaser, but assist him. And precedents of this nature are very ancient and numerous, viz., where the Court hath refused to give any assistance against a purchaser either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another.

And this rule in a Court of equity is agreeable to the wisdom of the common law, where the maxims which refer to descents, discontinuances, non-claims, and to collateral warranties, are only the wise arts and intentions of the law to protect the possession, and to strengthen the rights of purchasers.

As to the second point, the Court declared that the defendant had sufficiently proved his plea, and himself to be a purchaser within the protection of this Court, because no fraud or circumvention appeared; and it was evident that the defendant had paid several great sums to discharge statutes, which incumbered those lands, over and above what was paid to Mrs. Jane Berkley for her estate for life and to Henry Hill for his reversion; and though the lands were proved to be of much greater value at this time, by the falling in of several lives, than what they were at the time of the purchase, yet that will not alter the case in equity, because *in purchases the question is not whether the consideration be adequate, but whether it be valuable* (*f*); *for if it be such a consideration as will make the defendant a purchaser within the statute* 27 *Eliz.* (*g*), *and bring him within the protection of that law, he ought not to be impeached in equity.*

And since Henry Hill had nothing to subsist on during his minority but this reversion, and, being a bastard, could have no kindred by the law, and probably but few friends, there was some hazard of the money which was advanced during his minority, if he died before the fine and recovery suffered.

Therefore the Court allowed the plea and dismissed the bill, and suppressed all the depositions taken in this cause before

(*f*) See *Copis* v. *Middleton*, 2 Madd. 410, 432.
(*g*) In the report by mistake cited as 21 Eliz.

April last, and all since but only such which relate to this plea of the defendant (*h*).

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1. Generally.

Basset v. *Nosworthy* is generally referred to as an application of what was called the auxiliary jurisdiction of the Court of Chancery to grant discovery in aid of an action at law; and so far as it relates to such an application the decision has ceased to be material by reason of the Judicature Act, 1873 (*i*). The actual judgment, however, went further, and laid down what was the general law of the Court as to purchasers for value without notice (*k*).

The rule applies to personal as well as real estate (*l*).

The defence has been set up not only by a purchaser without notice obtaining the legal estate from a person affected by notice (*m*), but also by a purchaser with notice obtaining the legal estate from a person who acquired it without notice (*n*). The

(*h*) Proceedings were afterwards taken at law in this long-contested case. See *Hitchins* v. *Basset*, 3 Mod. 203; Salk. 592; 1 Show. 537. And ultimately, upon a special verdict, the Court was of opinion that there was no revocation; and upon a writ of error the judgment in B. R. was affirmed by the House of Lords. See *Hungerford* v. *Nosworthy*, Show. P. C. 146; and see 1 Vern. 351.

(*i*) See *Ind, Coope, etc.* v. *Emmerson*, 12 A. C. 300; Dan. Ch. Pr. (8th ed.), pp. 427—8; Coote (9th ed), p. 1813. The Jud. Act, 1873, is now replaced by the Supreme Court of Judicature (Consolidation) Act, 1925.

(*k*) For the form of the plea see Mitford's Chancery Pleadings (5th ed.), p. 319.

(*l*) *Dawson* v. *Prince*, 2 De G. & J. 41; *Taylor* v. *Blakelock*, 32 Ch. D. 560; and see *Cloutte* v. *Storey*, [1911] 1 Ch. 18; Coote (9th ed.), p. 1245.

(*m*) *Harrison* v. *Forth*, Pr. Ch. 51; 1 Eq. Ca. Abr. 331, r.

(*n*) See *Lowther* v. *Carlton*, 2 Atk. 242; *Wilkes* v. *Spooner*, [1911] 2 K. B. 473; and see note to *Le Neve* v. *Le N.*, *post*.

defence does not, however, avail for one who, being a trustee or having notice, first conveys and then takes a reconveyance of the legal estate from another who had taken the conveyance without notice (*o*).

Where the consideration is valuable, equity has never inquired whether it was adequate, because, as was laid down in the principal case, "the question is not whether the consideration be adequate, but whether it be valuable; for, if it be such a consideration as will make the defendant a purchaser within the statute 27 Eliz. c. 4 (*p*), and bring him within the protection of that law, he ought not to be impeached in equity" (*q*).

It has been held that the consideration money must have been actually paid without notice; it is not sufficient that payment was secured before notice (*r*). Past consideration is insufficient (*s*).

The defence of purchase for value without notice will not prevent the Court exercising jurisdiction to preserve the property in question during litigation (*t*). It may be used as a shield and not as a sword. Lord Rosslyn expressed his opinion that the plea was a shield *to the possession*, and that he found it very difficult to imagine a case in which it could be used for any other purpose than to defend the *actual possession* (*u*). But in *Wallwyn* v. *Lee* (*x*) Eldon, C., held that it could be set up by a defendant claiming under a legal mortgage in fee, made by a life tenant alleging himself to be seised in fee against the plaintiff, the legal remainderman *in possession*. The Court of Chancery would not exercise its *ordinary* jurisdiction of compelling the defendant to make discovery, or deliver up the title-deeds to the plaintiff, but would leave the latter to his remedy at law to recover the deeds or their value in detinue or trover.

(*o*) See *Re Stapleford Colliery Co.* (*Barrow's Case*), 14 Ch. D. 432, at p. 445.

(*p*) This Act was amended by the Voluntary Conveyances Act, 1893, and both Acts were repealed by the L. P. Act, 1925, s. 173 of that Act taking their place.

(*q*) *More* v. *Mayhow*, 1 Ch. Ca. 34; *Wagstaff* v. *Read*, 2 Ch. Ca. 156; *Bullock* v. *Sadlier*, Amb. 764; *Townend* v. *Toker*, L. R. 1 Ch. 446; *Bayspoole* v. *Collins*, L. R. 6 Ch. 228; *Price* v. *Jenkins*, 4 Ch. D. 483; 5 Ch. D. 619; *Teasdale* v. *Braithwaite*, 4 Ch. D. 85; 5 Ch. D. 630; *Re Foster and Lister*, 6 Ch. D. 87.

(*r*) *Hardingham* v. *Nicholls*, 3 Atk. 304; *Molony* v. *Kernan*, 2 Dr. & War. 31; *Tourville* v. *Naish*, 3 P. W. 307; *Rayne* v. *Baker*, 1 Gif. 241; *Tildesley* v. *Lodge*, 3 Sm. & Gif. 543; and see *Sharpe* v. *Foy*, L. R. 4 Ch. 35; *Bateman* v. *Faber*, [1898] 1 Ch. 144.

(*s*) *Aldritt* v. *Maconchy*, [1906] 1 Ir. R. 416.

(*t*) *Greenslade* v. *Dare*, 17 B. 502; 20 B. 284.

(*u*) *Strode* v. *Blackburne*, 3 V. 222.

(*x*) 9 V. 24; *Joyce* v. *De Moleyns*, 2 Jo. & Lat. 374. In both these cases full equitable relief was asked for; see *per* Selborne, C., in *Ind, Coope, etc.* v *Emmerson*, 12 A. C., at p. 307.

Basset v. Nosworthy.

When used as a shield, as in the case of *Wallwyn* v. *Lee*, and in the principal case, and in other cases before the Judicature Acts (*y*) where there was an application to what was called the auxiliary jurisdiction of the Court of Chancery, the plea was allowed against a plaintiff claiming the legal title and beneficial ownership, apparently contrary to the maxim on which the Court of Chancery generally acted, "When equities are equal the law shall prevail."

As this only applied in cases of application to the "auxiliary" jurisdiction of Chancery, and has ceased to have importance since the Judicature Act, 1873 (*z*), the principle on which the rule in these cases was grounded is now only of historical interest; but the reason is indicated by Lord Eldon in *Wallwyn* v. *Lee* (*supra*): "I apprehend there is sufficient ground for saying, *a man who has honestly dealt for valuable consideration without notice shall not be called upon, by confessions wrung from his conscience, to say he has missed his object in the extent in which he meant to acquire it.*"

The Judges seem to have treated the exercise of the auxiliary jurisdiction as discretionary, exercising it when they considered that there was some equity which made it against conscience for the defendant to refuse discovery to the legal owner, and considering that the latter showed no such equity when the defendant purchased without notice (*a*).

The subject afterwards met with full consideration by Sugden, L.C., in *Joyce* v. *De Moleyns* (*b*), where the doctrine laid down in *Wallwyn* v. *Lee* was approved of and acted upon. And in *Bowen* v. *Evans* (*c*) the same learned Judge said that, in his opinion, whether the purchaser has the legal estate, or only an *equitable* interest, he may, by way of defence, avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title.

(*y*) See *Heath* v. *Crealock*, 18 Eq. 215, 242; L. R. 10 Ch. 22, 34. Cf. *The Horlock*, 2 P. D. 249.

(*z*) Now replaced by the Supreme Court of Judicature (Consolidation) Act, 1925.

(*a*) *Parker* v. *Blythmore*, Pr. Ch. 58; *Burlace* v. *Cooke*, Freem. Ch. R. 24; *Rogers* v. *Seale*, *ibid.* 84. (*b*) 2 Jo. & Lat. 374.

(*c*) 1 Jo. & Lat. 178, at p. 264; and see Sug. V. & P. (14th ed.), ch. 25, pp. 787—798; and also *Payne* v. *Compton*, 2 Y. & C. Ex. 457; *Att.-Gen.* v. *Wilkins*, 17 B. 285; *Lane* v. *Jackson*, 20 B. 535; *Penny* v. *Watts*, 2 De G. & Sm. 501, at p. 521; 1 Mac. & G. 150; *Colyer* v. *Finch*, 5 H. L. C. 905, at p. 920; *Ernest* v. *Vivian*, 33 L. J. Ch. 513.

But, in considering the opinion and decision of Lord St. Leonards, it must be remembered that he insisted that the plea was available not only in the case of an application to the auxiliary jurisdiction as against the legal owner, but also in favour of persons acquiring equitable estates where the Court was exercising its ordinary jurisdiction (*d*). But this view is inconsistent with later authorities (*e*).

Who are Purchasers.—The word "purchaser" is extended in many cases beyond the meaning of purchaser in ordinary parlance. Thus lessees (*f*), and parties within the marriage consideration, claiming under an ante-nuptial settlement (*g*), are included in the term. In cases where a trustee has made good a breach of trust with regard to one trust fund by the application for that purpose of funds belonging to another trust, there is purchase for value without notice, and the *cestuis que trust* of the second fund will not be able to reclaim any part of it so applied in making good the breach of trust. Thus, in *Thorndike* v. *Hunt* (*h*), a trustee of two different settlements, called the Thorndike and Linzee settlements, having applied to his own use a fund subject to the Thorndike settlement, replaced it by funds which, under a power of attorney from his co-trustee under the Linzee settlement, he transferred into the names of himself and his co-trustee in the Thorndike settlement; and, under an order made on motion in a suit in respect of breaches of trust of the Thorndike settlement, the trustees of it transferred the fund thus replaced into Court. It was held by the Lords Justices, reversing the decision of Romilly, M.R., that the transfer was equivalent to an alienation for value without notice, there being a debt due from the Thorndike trustees which, if not paid, would have rendered them liable to an execution, and that the *cestuis que trust* under the Linzee settlement could not follow the trust fund. See also *Taylor* v. *Blakelock* (*i*), where in a similar case the Court of Appeal affirming Bacon, V.-C., held that the innocent trustee accepting the transfer of stock, without notice of

(*d*) Sug. V. & P. (14th ed.), pp. 787—798.

(*e*) See *infra*, p. 144.

(*f*) *Re King*, 16 Eq. 525. As to the assignee of a lessee being a purchaser by reason of undertaking the obligations under the lease, see *Price* v. *Jenkins*, 5 Ch. D. 619; *Harris* v. *Tubb*, 42 Ch. D. 79.

(*g*) *Harding* v. *Hardrett*, Rep. t. Finch, 9; *Vane* v. *V.*, L. R. 8 Ch. 383; and see *Lord Keeper* v. *Wyld*, 1 Vern. 139.

(*h*) 3 De G. & J. 563; and see *Taylor* v. *London & County Banking Co.*, [1901] 2 Ch. 231, at p. 257.

(*i*) 32 Ch. D. 560.

the breach of trust, gave up the right to sue the fraudulent trustee for his debt to the trust, and was on this ground entitled to be treated as a purchaser for value without notice (*k*).

The defence should be pleaded.—By the Rules of the Supreme Court, notice where material must be pleaded (*l*); and in like manner, where the absence of notice is material—*e.g.*, under the defence of purchaser for value without notice—it must, it seems, be specifically pleaded (*m*).

2. Of this Defence before and since the Judicature Acts.

In the earlier cases expressions will be found which would in terms seem to imply that, in every case, a Court of equity would refuse to entertain any jurisdiction against a defendant who could maintain the plea of purchaser for value without notice (*n*). But many of the cases, taken with the facts, only amounted to decisions that the plaintiff applying to the *auxiliary* jurisdiction for discovery or delivery of title-deeds (which seems to have been treated as an application to the auxiliary jurisdiction), must be left to his remedy at law, or that relief was refused to a plaintiff applying to enforce some *equity* as distinguished from establishing his right to some estate. But taking the decision of Lord Westbury, in *Phillips* v. *P.* (*o*), as a correct exposition of the law as existing before the Judicature Acts the doctrine was not so wide as apparently implied in the cases above cited. It is necessary to bear in mind that before the Judicature Acts the Court of Chancery only entertained claims by *legal* owners claiming under a *legal* title in certain cases—

(1) Under what was called the "auxiliary jurisdiction," *i.e.*, where a plaintiff suing at law on a legal title, *e.g.*, in ejectment, which could not have been maintained in Chancery, applied to Chancery for assistance, *e.g.*, in ordering discovery in aid of the action, which the common law Court could not grant;

(*k*) *Case* v. *James*, 3 De G. F. & J. 256; *Taylor* v. *London & County Banking Co.*, [1901] 2 Ch., at p. 257. Cf. *Cloutte* v. *Storey*, [1911] 1 Ch. 18.

(*l*) Order 19, r. 23.

(*m*) *Att.-Gen.* v. *Biphosphated, etc., Co.*, 11 Ch. D. 327; and see *Nisbet & Potts' Contract*, [1905] 1 Ch., at p. 402, and the notes to Order 19, r. 15, in An. Pr. Cf. *Taylor* v. *Blakelock*, 32 Ch. D., at p. 564, where Bacon, V.-C., considered the just inference from the admitted facts to be that the defendant was a purchaser for value without notice, although this had not been pleaded.

(*n*) See the principal case and *Stanhope* v. *Verney*, 2 Eden, 81; *Wallwyn* v. *Lee*, 9 V. 24; *Bowen* v. *Evans*, 1 Jo. & Lat. 178, at p. 264; *Strode* v. *Blackburne*, 3 V. 222; *Jerrard* v. *Saunders*, 2 V. 454, 458.

(*o*) 4 De G. F. & J. 208, 215—219.

(2) In cases where Chancery had concurrent jurisdiction with Courts of law, so that the action might be brought either at law or in equity, as in matters of dower (*p*) or tithes (*q*);

(3) Where Chancery had exclusive jurisdiction, as in foreclosure.

In the case of *Phillips* v. *P.* (*r*), in 1862, Lord Westbury specifies three classes of cases in which the defence of purchaser for value without notice was familiar in Chancery—

(i) Applications to the auxiliary jurisdiction in aid of an action at law;

(ii) Cases of a purchaser or mortgagee paying his purchase-money without notice of some prior equitable interest, and subsequently getting the legal estate (*s*);

(iii) Defences against "an equity" as distinguished from an estate.

It is impracticable to keep the decisions distinct; there is necessarily overlapping, the same case coming under more than one of the above headings.

Applications to the auxiliary jurisdiction may, it seems, be ranged under the heads of bills by a legal owner for discovery in aid of proceedings at law (*t*), for the delivery up of the title-deeds (*u*), for the removal of terms, and bills to perpetuate testimony (*x*). As to the first class of these, Lord Westbury says: "Where an application is made to an auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law (which was the case in *Basset* v. *Nosworthy*), or by a tenant for life (*y*) for the delivery of title-deeds (which was the case of *Wallwyn* v. *Lee*), and the defendant pleads *that he is a* bona fide *purchaser for valuable consideration without notice.* In such a case the defence is good; and the reason given is, that as against a purchaser for valuable consideration without notice the Court gives no assistance—that is, no assistance to the legal title. But this rule does not apply where the Court exercises a legal jurisdiction concurrently with the Courts of law. Thus it was decided by Lord Thurlow, in *Williams* v. *Lambe* (*z*), that the defence could not be pleaded to a bill for

(*p*) *Williams* v. *Lambe*, 3 Bro. Ch. 264.
(*q*) *Collins* v. *Archer*, 1 Russ. & M. 284.
(*r*) 4 De G. F. & J. 208.
(*s*) See notes to *Marsh* v. *Lee*, *supra*.
(*t*) See the principal case.
(*u*) *Infra*, p. 146; and *Jerrard* v. *Saunders*, 2 V. 187, 454.
(*x*) *Jerrard* v. *Saunders*, *supra*; *Bechinall* v. *Arnold*, 1 Vern. 354.
(*y*) Should be "tenant in tail."
(*z*) 3 Bro. Ch. 264.

dower, and by Sir J. Leach, in *Collins* v. *Archer* (*a*), that it was no answer to a bill for tithes. In those cases the Court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief " (*b*).

Since the Judicature Act, 1873 (*c*), came into force, each division of the High Court can and must administer both law and equity, and the distinction of auxiliary and concurrent jurisdiction has ceased. On these enactments a difficulty arose on the question how far this defence of " purchase for value without notice " should now be allowed. In *Ind, Coope, etc.* v. *Emmerson* (*d*), an action was brought in the Chancery Division to recover possession of land and claiming production and delivery of documents alleged to be material to the plaintiff's title. The defendants pleaded that *they were purchasers for valuable consideration without notice* and on this ground objected to the discovery and production of certain documents of title. It was objected that under section 24, sub-section 2 of the Judicature Act, 1873 (*e*), the Court was bound to give effect to every equitable defence; but it was held by the House of Lords, affirming the decision of the Court of Appeal, that the objection was invalid for the following reason : before the Judicature Act, 1873, a plea of purchase for valuable consideration without notice was not available against either discovery or relief claimed in those cases in which the Court of Chancery had concurrent jurisdiction with the common law Courts upon legal titles. Section 24, sub-section 2 of the Act of 1873 therefore gave no protection to the defendants, the Court having now complete jurisdiction over the whole action. Lord Selborne, referring to cases where the auxiliary aid of the Court of Chancery was asked for, said (p. 305) : " But in the present case there is no suit in any other jurisdiction. The High Court of Justice is asked, and is competently asked, to exercise a principal and not an auxiliary jurisdiction, and to give effect to the legal title, which the plaintiff alleges to be in herself. If a like suit had formerly been brought in the Court of Chancery it would have been demurrable, not because there was an equitable defence, but because the title was legal and the plaintiff stated no equity.

" To abolish that division of jurisdictions was the very object of

(*a*) 1 Russ. & M. 284.

(*b*) 4 De G. F. & J., at p. 217.

(*c*) Now replaced by the Supreme Court of Judicature (Consolidation) Act, 1925.

(*d*) 12 A. C. 300.

(*e*) Replaced by section 38 of the Jud. Act, 1925.

the Judicature Act. As against the claim of the plaintiff in this suit, it is not, and it cannot be pretended, that purchase for valuable consideration is a good equitable defence. Why, then, should it be an equitable defence against the discovery which is sought only as incident to, and as evidence in support of, the claim? In the class of cases referred to, the separation and division of jurisdictions between the Courts of equity and the Courts of common law was the real and only ground on which such a defence was admitted. As against an innocent purchaser, sued at law, the Court of Chancery (having no jurisdiction itself to try the title) found no equity requiring it to give assistance to a proceeding brought elsewhere for that purpose. . . . And in those cases, in which the Court of Chancery had concurrent jurisdiction with the common law Courts upon legal titles, it was not available against either discovery or relief."

Applications for Delivery of Title-deeds.—It has long been settled that as a rule "the right to the estate confers the right to the possession of the title-deeds" (*f*). Notwithstanding this, the defence of purchaser for value without notice was, in many cases, allowed in equity to a claim by the legal owner for delivery of deeds. This is put by Lord Westbury in *Phillips* v. *P.* (*g*) as coming like discovery under the head of an application to the auxiliary jurisdiction. The leading case on the subject is *Wallwyn* v. *Lee* (*h*), which was a bill by a tenant in tail in possession against persons claiming under a mortgage by a tenant for life, who had died, for discovery and delivery of title-deeds. Lord Eldon, after observing that the jurisdiction of Courts of equity to decree delivery probably was grounded on the imperfection of the common law remedies of trover and detinue, allowed the plea of purchaser for value without notice as a bar to the claim for delivery of title-deeds. *Joyce* v. *De Moleyns* (*i*) was a somewhat similar case. If these decisions or other applications for delivery of deeds are to be treated, as intimated by Lord Westbury, simply as cases of application to the auxiliary jurisdiction, they would in future be governed by the decision in *Ind, Coope, etc.* v. *Emmerson* (*k*).

In *Newton* v. *N.* (*l*), where a trustee had deposited by way of

(*f*) *Per* Lord St. Leonards in *Smith* v. *Chichester*, 2 Dr. & War. 402; *per* Lord Hatherley in *Newton* v. *N.*, L. R. 4 Ch. 145.

(*g*) 4 De G. F. & J. 208.

(*h*) 9 V. 24.

(*i*) 2 Jo. & Lat. 374.

(*k*) 12 A. C. 300; *supra*, p. 144.

(*l*) L. R. 4 Ch. 143, at p. 145.

equitable mortgage a mortgage deed forming part of the trust property, Hatherley, C., delivering the judgment of the Court of Appeal, says : "There appears to us to be a material distinction between such a case as *Wallwyn* v. *Lee* and cases in which either in consequence of the fund being in Court, as in *Stackhouse* v. *Countess of Jersey* (*m*), or in consequence of the legal estate being outstanding in a trustee, and the beneficial interest being claimed by several adverse but equally innocent purchasers for value without notice, the Court is called upon to declare, and does declare, the right to the fund or estate in question," and goes on to explain that delivery must be ordered or the decree would be incomplete (*n*). Since the Judicature Acts delivery of the deeds will be ordered (*o*). In *Re Cooper* (*p*), an action by trustees of a will for a declaration that certain mortgages executed by the testator's son, who, in executing the same, personated his deceased father, were void, and for delivery up of the deeds, it was pleaded by the defendants that they were purchasers for value without notice. The Court held that the mortgage deeds were void, except as to any beneficial interest taken by the son under his father's will, and ordered the deeds to be delivered up to the plaintiffs. "I am rightly reminded," said Kay, J., "that I am not administering equity only. . . . If there could be any ground for the defendants urging a Court of equity to leave the plaintiffs to their legal remedy as to the deeds, I am to give that legal remedy also. I must therefore order that the title-deeds should be delivered up" (*q*). "The legal title is shown to be in the plaintiffs," said Cotton, L.J. (*r*), "and then, not merely as a Court of equity, but as a Court of law, we ought to make the order which has been made in the Court below for the delivery up of the title-deeds to the legal owners of the property." In *Manners* v. *Mew* (*s*) North, J., held that, according to *Newton* v. *Beck* (*t*), trover or detinue would lie at law; that section 25, sub-section 11 of

(*m*) 1 John. & H. 721.

(*n*) See *contra*, before the Judicature Acts, *Heath* v. *Crealock*, 18 Eq. 215; L. R. 10 Ch. 22; *Waldy* v. *Gray*, 20 Eq. 238; *Thorpe* v. *Holdsworth*, 7 Eq. 139; *Colyer* v. *Finch*, 19 B. 500 (see p. 509); 5 H. L. Cas. 905; *Frazer* v. *Jones*, 17 L. J. Ch. 353; *Stackhouse* v. *Countess of Jersey*, 1 John. & H. 721; *Smith* v. *Chichester*, 2 Dr. & War. 393; *per* Kay, J., in *Taylor* v. *Russell*, [1891] 1 Ch., at p. 19.

(*o*) See Seton (7th ed.), at p. 2043; *Re Cooper*, 20 Ch. D. 611.

(*p*) 20 Ch. D. 611.

(*q*) 20 Ch. D., at p. 624.

(*r*) 20 Ch. D., at p. 632.

(*s*) 29 Ch. D. 725.

(*t*) 3 H. & N. 220.

the Judicature Act, 1873 (*u*), did not apply when equity could give legal as well as equitable relief, and that he was bound to give legal relief and therefore order a delivery of deeds. In *Re Ingham* (*x*) Stirling, J., made a similar order for delivery of the deeds by an equitable mortgagee pleading purchase for value without notice. It is to be observed that the ground taken in modern cases is that Courts of equity should exercise their jurisdiction as to the delivery of deeds because they are sitting to administer the legal relief which might have been given in trover or detinue, while in the older cases (see *Wallwyn* v. *Lee* (*y*)) the assumption by equity of the jurisdiction to order specific delivery was put on the ground of the imperfection of the common law remedy in trover or detinue. But it seems to be settled by these modern cases that, where the jurisdiction is of practical importance for the purpose of carrying into effect a decree for sale or other relief, the plea will not be allowed, but delivery of deeds ordered. These were cases, however, when either delivery of the deeds was necessary for the relief granted, or the holder had no interest; and it seems doubtful whether they affect the doctrine that in cases where the holder has some interest in the land the Court will not order him to give up the title-deeds (*z*).

Plea allowed as a Defence to an Equity.—The third class put by Lord Westbury in *Phillips* v. *P.* (*a*), which seems more similar to the first of the three classes than to the second, and is therefore taken most conveniently in connection with the first, is as follows: "Thirdly, where there are circumstances that give rise to an *equity* as distinguished from an *equitable estate*—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere" (*b*).

The distinction between an "equity" and an "equitable estate" was discussed in *Cave* v. *C.* (*c*). There A, a trustee, had

(*u*) Now replaced by section 44 of the Judicature Act, 1925.

(*x*) [1893] 1 Ch. 352.

(*y*) 9 V. 24.

(*z*) See *Newton* v. *N.*, 6 Eq., at p. 141; and see *Thorpe* v. *Holdsworth*, 7 Eq. 139.

(*a*) *Supra*, p. 143.

(*b*) See *Garrard* v. *Frankel*, 30 B. 445; *Bainbridge* v. *Browne*, 18 Ch. D. 188; *Hunter* v. *Walters*, L. R. 7 Ch. 75; *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 Ch. D. 327; *Graham* v. *Drummond*, [1896] 1 Ch. 968; *Hobson* v. *Gorringe*, [1897] 1 Ch., at p. 192; *Cloutte* v. *Storey*, [1911] 1 Ch. 18.

(*c*) 15 Ch. D., at pp. 647—649.

improperly invested trust money in the purchase of land; the legal estate was conveyed to his brother, B, for whom A acted as solicitor and who made legal mortgages to C and equitable mortgages to D. Fry, J., held that the mortgagees took without notice, and that the first mortgagee, as a purchaser for value without notice, and having the legal estate, had priority over all (*d*), but that, as between the *cestuis que trust* and the equitable mortgagees, the *cestuis que trust* money having been invested in the land, they had an *equitable estate* as distinguished from a mere equity, and therefore the rule "*Qui prior est tempore potior est jure*" applied, and they took priority over the equitable mortgagees (*e*).

Plea disallowed where an Equitable Remedy was incidental to a Legal Right.—The cases of *Williams* v. *Lambe* as to dower (*f*), and *Collins* v. *Archer* as to tithes (*g*), are treated by Lord Westbury in *Phillips* v. *P.* (*h*), as showing that the plea was not allowed as a defence to a claim by a legal owner in cases where the Court of Chancery had *concurrent* jurisdiction with Courts of law, and he further explains that "in these cases a Court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief" (*i*).

So also, where, as in foreclosure, the Court of Chancery had *exclusive* jurisdiction and was giving an equitable remedy incidental to the legal title, the plea of purchaser for value without notice was not allowed as an answer. In *Colyer* v. *Finch* (*k*), Finch, the plaintiff in the first suit, in 1842 became first legal mortgagee of an estate of the defendant Shaw, and Colyer, the plaintiff in the second suit, became purchaser of the estate in 1849. It was held by Romilly, M.R., that Colyer could not set up, as a defence to a bill of foreclosure by the first mortgagee, that he was a purchaser for valuable consideration without notice of the mortgage. And after noticing the above-cited cases of *Williams* v. *Lambe* and *Collins* v. *Archer*, his Honour added, "The distinction I apprehend

(*d*) Cf. *Pearce* v. *Bulteel*, [1916] 2 Ch. 544.

(*e*) See *Bell* v. *Cundall*, Amb. 101; *Malden* v. *Menill*, 2 Atk. 8; *Bowen* v. *Evans*, 1 Jo. & Lat. 178; *Marshall* v. *Collett*, 1 Y. & C. Ex. 232, 237; *Sturge* v. *Starr*, 2 My. & K. 195; *Penny* v. *Watts*, 1 Hall & Twells, 266; *Harvy* v. *Woodhouse*, Select Ch. Ca. 80.

(*f*) 3 Bro. Ch. 264.

(*g*) 1 Russ. & M. 284.

(*h*) 4 De G. F. & J. 217.

(*i*) Lord St. Leonards criticises the cases mentioned in the text: Sug. V. & P. (14th ed), p. 797.

(*k*) 19 B. 500.

to be this :—if the suit be for the enforcement of a legal claim, or the establishment of a legal right, then, although this Court may have jurisdiction in the matter, it will not interfere against a purchaser for valuable consideration without notice, but leave the parties to law; if, on the other hand, the legal title is perfectly clear, and attached to that legal title there is an equitable remedy or an equitable right, which can only be enforced in this Court, I have not found any case, nor am I aware of any, where this Court will refuse to enforce the equitable remedy which is incidental to the legal right." The case of *Colyer* v. *Finch* was on appeal affirmed by the House of Lords (*l*); and Lord Cranworth, C., observed that the reasons of the Master of the Rolls were no doubt perfectly satisfactory, but that he should proceed on a shorter ground. " For the purpose of the question, whether the Court would interfere against a purchaser for valuable consideration without notice, a foreclosure is not relief at all. The mortgagee who seeks foreclosure stands in such a position to the mortgagor, or the purchaser from the mortgagor for valuable consideration without notice, that that purchaser can at any time file a bill to redeem the mortgage; and, that being so, it would be most unjust if there was not a correlative right on the part of the mortgagee to say, 'You shall redeem now, or you shall never redeem ' " (*m*).

3. Where Purchaser for Value Without Notice has obtained the Legal Estate.

We now come to the second class of cases put by Lord Westbury (*n*), " where there are several purchasers or incumbrancers each claiming in equity, and one who is later in time succeeds in obtaining an outstanding legal estate, or some other legal advantage; . . . the principle is that a Court of equity will not disarm a purchaser, which is the common doctrine of the *tabula in naufragio*." The law as stated in the passages referred to includes and is most commonly applied in what is called " tacking " mortgages in the cases where an equitable incumbrancer, who has paid his money without notice of a prior equitable incumbrance, " *subsequently* " gets in a legal mortgage or legal estate, and this is the subject of the principal case of *Marsh* v. *Lee*, and the notes thereto, *ante*. But the principle applies with greater force to

(*l*) 5 H. L. C. 905.
(*m*) See also *Burlace* v. *Cooke*, Freem. Ch. Ca. 24.
(*n*) *Phillips* v. *P.*, 4 De G. F. & J. 208; see *supra*, at p. 143.

protect a purchaser or mortgagee *who obtains the legal estate at the time that he pays or advances his money*, a case which is not usually included in the word "tacking." The only cases of tacking with which it is proposed to deal in this note, are those where the mortgagee has advanced or paid a further sum to the mortgagor *at the same time* that he pays off and takes a transfer or conveyance from a legal mortgagee or trustee.

But there are some points common both to the case here discussed, of moneys paid *at the time when* the legal estate is obtained, and the case treated under *Marsh* v. *Lee*, where the money is paid *before* the legal estate is obtained. In both cases, to the words "purchaser for value without notice," must be added "*having the legal estate.*"

Legal estate outstanding.—As against any equitable estate, it is necessary that the legal estate should be vested in the person raising the defence, or in a trustee for him. If the legal estate is outstanding, and the parties have all equitable estates, the rule will apply *qui prior est in tempore potior est in jure* (*o*). So restrictive covenants binding the land under the doctrine of *Tulk* v. *Moxhay* (*p*) are regarded as creating equitable easements, and will bind subsequent purchasers for value without notice of the restrictive covenants unless they have the legal estate (*q*). Lord Hardwicke, in one of the early cases (*r*), explains that the legal estate is the foundation of the rule; that "though Courts of Equity would break in upon the common law where necessity and circumstances require it, . . . still they allow superior force and strength to a legal title, and that the rule could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different Courts." In *Phillips* v. *P.* (*s*), A, being entitled to the equity of redemption in certain lands, by a deed of family arrangement dated in February, 1820, granted to his brother B an annuity of £20 charged on these lands, payable on the death of his

(*o*) *Re Richards*, 45 Ch. D. 589.

(*p*) 2 Ph. 774.

(*q*) *Per* Jessel, M.R., in *L. & S. W. Ry. Co.* v. *Gomm*, 20 Ch. D. 562, at p. 583; *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, 406; *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386, where the Court of Appeal, affirming Farwell, J., [1905] 1 Ch. 391, held that such covenants were binding upon a purchaser for value with notice deriving title under a disseisor who had acquired a statutory title to the land under the Statute of Limitations.

(*r*) *Wortley* v. *Birkhead*, 2 Ves. Sen. 571; and see *per* Wood, V.-C., in *Rooper* v. *Harrison*, 2 K. & J. 108, 109; and *per* Lord Blackburn in *Jennings* v. *Jordan*, 6 A. C. 714.

(*s*) 4 De G. F. & J. 208: see *Cloutte* v. *Storey*, [1911] 1 Ch. 18.

mother, C. By a settlement made on his marriage in May, 1821, A settled the above lands subject to the mortgage existing thereon, and he at the same time covenanted that they were not otherwise incumbered. A died in 1825, and C died in 1839. The first payment of the annuity became due in March, 1840. In 1859, B filed a bill against those claiming under the settlement for payment of the annuity. The defendants pleaded orally at the bar the defence that they were purchasers for valuable consideration without notice of B's annuity. It was held by Westbury, C., that, even assuming such defence could be set up orally at the hearing (and he held it could not (*t*)), it was not available, inasmuch as the defendant was only the purchaser of an equitable interest. "I take it," said his Lordship, "to be a clear proposition, that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can only grant to the purchaser that which he has, namely, the estate subject to the annuity or mortgage, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities, and the maxim applies *qui prior est in tempore potior est in jure*. The first grantee is *potior*, that is, *potentior*. He has a better and superior, because a prior, equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers, at the time they took their securities and paid their money, had notice of the first incumbrance or not. These elementary rules are recognised in the case of *Brace* v. *The Duchess of Marlborough* (*u*), and they are further illustrated by the familiar doctrine of this Court as to the tacking securities. It is well known that if there are three incumbrancers, and the third incumbrancer, at the time of his incumbrance and payment of his money, had no notice of the second incumbrance, then, if the first mortgagee or incumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third

(*t*) See R. S. C., Order 19, r. 23; *Att.-Gen.* v. *Biphosphated, etc., Co.*, 11 Ch. D. 327; *Taylor* v. *Blakelock*, 32 Ch. D. 560.

(*u*) 2 P. W. 491.

mortgage to the first mortgage he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title, for if the first mortgagee has not the legal title, the third mortgagee, by payment off of the first, acquires no priority over the second " (*x*). It will be borne in mind that in the cases of mortgages prior to the Law of Property Act, 1925, the practice was to vest (where possible) the legal estate in the mortgagee.

In *Brace* v. *Duchess of Marlborough* (*y*), it is stated " in all cases where the legal estate is outstanding the several incumbrancers must be paid according to their priority in point of time " (*z*). In *Rooper* v. *Harrison* (*a*), a legal first mortgage and a third mortgage became vested in A, as to the legal mortgage as trustee of the will of the original mortgagee, and as to the third mortgage in his own right. A sold under the power of sale in the first mortgage, and it was held that as he had parted with the legal estate, the proceeds of sale must be applied in satisfying the different mortgages according to their priority in date.

The case of *Phillips* v. *P.* and other cases, showing that the doctrine of purchase for value will not be applied to give priority as between owners of equitable estates, are disapproved by Lord St. Leonards (*b*). But the doctrine may be taken to be established, the only exception being, that if the mortgagee, advancing his money without notice, acquired at the same time power to complete his legal title without any further act to be done by the trustee or holder of the legal estate, or, in the case of shares, any act to be done by the company, except some mere ministerial act, he has been treated as having acquired the estate at the time of his advance (*c*).

Legal estate obtained by the Purchaser contemporaneously with Payment of Purchase-money.—When money is paid or consideration given, and contemporaneously (*d*) the legal estate is obtained as part of the transaction, it is only necessary that the purchaser should not be affected with notice, actual or constructive, of any trust or equity affecting the legal estate; it is immaterial that the trustee or person

(*x*) See also *Cave* v. *C.*, 15 Ch. D. 639; *Eyre* v. *Burmester*, 10 H. L. Cas. 90.
(*y*) 2 P. W. 491.
(*z*) See also *Willoughby* v. *W.*, 1 T. R. 763.
(*a*) 2 K. & J. 86, 108; and see the cases on consolidation, *ante*, p. 129 *et seq.*
(*b*) Sug. V. & P. (14th ed.), 798.
(*c*) *Dodds* v. *Hills*, 2 Hem. & M. 424; and see *Powell* v. *London and Provincial Bank*, [1893] 1 Ch. 610; [1893] 2 Ch. 555; Buckley (10th ed.), pp. 49—50.
(*d*) Past consideration is insufficient; see *Aldritt* v. *Maconchy*, [1906] 1 Ir. R. 416.

conveying may have notice and be knowingly committing a breach of trust or fraud. In *Pilcher* v. *Rawlins* (*e*), a trustee holding a legal mortgage fraudulently released to the mortgagor, and the mortgagor, concealing both the trust mortgage and release, mortgaged to a legal mortgagee; such mortgagee was held entitled to priority over the *cestuis que trust*. In the same case the mortgagor executed a fictitious conveyance, as on a sale, to the survivor of three legal trustee mortgagees, who, concealing the original trust mortgage, mortgaged by a legal mortgage to a mortgagee without notice; the latter was held entitled to priority over the *cestuis que trust*. In both instances the title of the innocent mortgagee was actually derived through documents which disclosed the trust; but, as they were suppressed, and a due investigation of title made, the Court of Appeal held the mortgagee's title was not affected, overruling on this point the decision in *Carter* v. *C.* (*f*).

In *Jones* v. *Powles* (*g*), M, claiming title under an instrument proved as a will, but in reality a forgery, borrowed money on the security of the property, and the mortgagee advancing his money obtained contemporaneously with his advancing, and as part of the transaction, a conveyance of the legal estate under a mortgage by a deceased owner, which had been paid off without a reconveyance. There were other advances, some before and some after the discovery of the forgery, and in an action by the plaintiff, who claimed under a true title, it was held that the defendant's plea of purchase for value without notice was good, both as to the advances he made contemporaneously with the conveyance of the legal estate and the advances subsequently made before notice that the will was a forgery. In this case the legal mortgage was a satisfied mortgage. The case in one respect is not so strong as *Pilcher* v. *Rawlins*, as neither the satisfied mortgagee conveying the legal estate nor the mortgagee who took it had notice that the will was a forgery.

In *Sharpe* v. *Foy* (*h*), a mortgagee paid his money and took a conveyance of real estate of the wife before notice of an agreement for a settlement of it on marriage made by the husband while the wife was an infant. The conveyance by the wife was not perfected by acknowledgment until after notice to the mortgagee. It was held that he was protected against the agreement for settlement,

(*e*) L. R. 7 Ch. 259. See also *Willoughby* v. *W.*, 1 T. R. 763.
(*f*) 3 K. & J. 617.
(*g*) 3 My. & K. 581; and see *Robinson* v. *Briggs*, 1 Sm. & G. 188.
(*h*) L. R. 4 Ch. 35; cf. *Bateman* v. *Faber*, [1898] 1 Ch. 144.

but so far as regards the wife's interest, which did not pass till after notice, the decision was grounded on the fraud of the wife, she representing that there was no settlement.

Effect of Receipt by Building Society Mortgagee.—The effect of the statutory receipt indorsed on a mortgage to a building society is to vest the legal estate in the person having the best right to call for a conveyance (*i*). It is settled by the decision of the House of Lords in *Hosking* v. *Smith* (*k*), that mortgagees without notice of subsequent incumbrances, paying off a legal mortgage to a building society, and getting the statutory receipt indorsed on it, and at the same time advancing further money to the mortgagor and taking a formal mortgage from him, are protected by the legal estate as to all the money (both the payments to the building society and the further advance to the mortgagor) against intermediate incumbrances of which they had no notice.

In considering the cases above stated, establishing the doctrine that a purchaser for value without notice obtaining the legal estate at the time of his purchase obtains priority over all prior equitable interests and rights, it must be remembered that this is subject to the assumption that such purchaser has not been guilty of anything which would be sufficient to give priority to some equitable interest, as, *e.g.*, leaving the mortgagor in possession of the deeds without reason (*l*). As a rule, negligence in not inquiring for the deeds, or other omission postponing a purchaser, is held to amount to "constructive notice," and therefore to exclude the plea discussed in this note.

4. Protection by Statute to Purchaser for Value without Notice.

The equitable doctrine above discussed as depending on possession of the legal estate must of course be distinguished from cases in which a statute gives protection to a purchaser for value without notice, in which the terms may be sufficient to include equitable estates, as for instance section 5 of 13 Eliz. c. 5 (*m*). In the case of a settlement void against creditors under section 2 of this Act, a reversionary life interest was reserved to the settlor which he subsequently charged by way of equitable mortgage to a person who advanced his money without notice that the settlement

(*i*) *Hosking* v. *Smith*, 13 A. C. 582; *Crosbie-Hill* v. *Sayer*, [1908] 1 Ch. 866.
(*k*) 13 A. C. 582.
(*l*) See *Russell* v. *R.*, *ante*; *Le Neve* v. *Le N.*, *post*.
(*m*) Now replaced by section 172 of the L. P. Act, 1925.

was fraudulent. It was held that section 5 protected a subsequent purchaser who without notice purchased any interest under such a settlement, whether the interest were legal or equitable, and that the deed impeached was not void in respect of his interest (*n*).

Section 28 of the Solicitors Act, 1860, contains a provision avoiding conveyances defeating a charging order in favour of the solicitor "unless made to a *bona fide* purchaser without notice"; this is wide enough to apply to equitable interests (*o*). The words "without notice" in this section mean without notice of the solicitor's right to a lien, and are not confined to notice of the existence of a charging order (*p*).

The Bankruptcy Act, 1914, s. 45 (*q*), contains a protection of *bona fide* transactions by or with the bankrupt for valuable consideration, without notice of any available act of bankruptcy (*r*).

Section 26 of the Statute of Limitations (*s*), enacting that in case of concealed fraud, time should begin to run from the date when the fraud was discovered, or might with reasonable diligence have been discovered, provides that nothing in the clause "shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bona fide* purchaser for valuable consideration who has not aided in the commission of such fraud, and who at the time he made his purchase did not know and had no reason to believe that any such fraud had been committed" (*t*).

For other cases in which protection is expressly given by statute to purchasers for value, see section 3 (3), section 5, section 13 (2), and section 14 (2) of the Land Charges Act, 1925, and section 2 (1), section 94 (2) and (5), and section 199 (1), of the Law of Property Act, 1925.

(*n*) *Halifax Joint Stock Bank* v. *Gledhill*, [1891] 1 Ch. 31; and see *Harrods, Ltd.* v. *Stanton*, [1923] 1 K. B. 516.

(*o*) *Faithfull* v. *Ewen*, 7 Ch. D. 495; see also *Macfarlane* v. *Lister*, 37 Ch. D. 88; *Ross* v. *Buxton*, 42 Ch. D. 190; *Scholey* v. *Peck*, [1893] 1 Ch. 709; *Ridd* v. *Thorne*, [1902] 2 Ch. 344.

(*p*) *Cole* v. *Eley*, [1894] 2 Q. B. 180; [1894] 2 Q. B. 350; *Ridd* v. *Thorne*, [1902] 2 Ch. 344. But see *The Birnam Wood*, [1907] P. 1, 13.

(*q*) Replacing section 49 of the Bankruptcy Act, 1883.

(*r*) See also section 42, and *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776; *Re Hart*, [1912] 3 K. B. 6.

(*s*) 3 & 4 Will. 4, c. 27.

(*t*) See *Vane* v. *V.*, L. R. 8 Ch. 383; *Att.-Gen.* v. *Duke of Richmond*, [1908] 2 K. B. 729; [1909] A. C. 466.

LE NEVE *v.* LE NEVE.

1747. Amb. 436 (*a*).

Notice.

Lands in a register county, settled by a deed which is not registered, are settled upon a second marriage, with notice of the former settlement, and the second settlement is registered pursuant to the statute 7 Anne, c. 20. The former settlement shall be preferred in equity. Notice to agent or trustee is notice to the principal.

Lord Chancellor Hardwicke.—The bill was brought by the plaintiffs, Peter Le Neve and Hugh Pigott and Elizabeth his wife, late Elizabeth Le Neve, as the only surviving children of the defendant Edward Le Neve, by Henrietta, his late wife.

The end of the bill in general is, to have the execution of a trust of leasehold estates settled upon the late wife of Edward Le Neve and the issue of that marriage, by articles previous to the marriage, dated July 1, 1718; and that the conveyance made by the defendant Edward Le Neve and the defendant Mary, his now wife, to trustees, may be set aside and delivered up, being made after notice of the articles of July 1, 1718, or of the other conveyance made in pursuance thereof; and to have the leasehold exonerated and disincumbered.

The facts are that, in 1718, the defendant Edward Le Neve intermarried with his first wife, Henrietta Le Neve, who had a considerable fortune; and articles were executed previous to the marriage, dated July 1, 1718, whereby the father of Edward, in consideration of Henrietta's fortune, etc., covenanted with trustees to convey to them several estates, and some leasehold amongst the rest, near Soho Square, in the county of Middlesex; to permit Edward Le Neve the younger to receive the rents and profits during his own life, and after his death to pay to Henrietta £250 a year in case she survived Edward; and after the decease

(*a*) *S. C.*, 3 Atk. 646; 1 Ves. Sen. 64.

of Edward and Henrietta, then the said estates should remain to their issue in such manner as Edward the younger should by will or otherwise appoint; and, for want of such issue, to the use of Edward Le Neve the father, and his heirs.

June 16, 1719, a settlement was made in pursuance of the articles.

The marriage took effect; and Edward and Henrietta had issue, plaintiffs Peter and Elizabeth. Henrietta died July, 1740, leaving no other children.

Twenty-five years after the first marriage, Edward Le Neve entered into a treaty of marriage with the defendant Mary, and by articles dated November 16, 1743, previous to the marriage, Edward, in consideration of such marriage, covenanted with the trustees, the defendants Dandridge and Norton, to convey these very leasehold estates near Soho Square to them, their executors, etc., within three months after the marriage, in trust to pay to defendant Mary, out of the rents of these messuages, in case she survived him, a clear annuity of £150 for her life, for her jointure, etc.

The marriage took effect, and three months after, on January 20, 1744, a settlement was made pursuant to the articles.

The settled estate, being houses in Middlesex, was subject to the Register Act, 7 Anne, c. 20.

The second articles and settlement were registered, but not the first.

Edward has mortgaged the houses likewise.

The bill is brought in order to set the second articles and settlement out of the way, and that they may be postponed to the first articles and settlement; upon this equity, that the defendant Mary Le Neve had notice of them.

The counsel for the plaintiffs admit that the registering of the second articles and settlement has, in point of law, affected the leasehold estates, as 7 Anne, c. 20, gives the legal estate where the effect of the registering has placed it.

The question is, Whether equity will enable the children of the first marriage to get the better of the defendant's legal right? And this will depend upon the question of notice: —

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First, Whether it appears sufficiently that Joseph Norton was attorney for the defendant Mary in the transaction of her marriage?

Secondly, Whether Norton himself had sufficient notice of the first articles and settlement?

Thirdly, Whether that will affect Mary as a purchaser, and postpone her articles and settlement, notwithstanding the Register Act?

First, it will depend on the answer of the defendant Mary.

She has in general denied any notice of the first articles and settlement till six months after the marriage, and says "that the defendant Joseph Norton was so far from being employed as solicitor for her, in transacting the business of the marriage articles and settlement, that he had been for a considerable time before employed as attorney for the defendant Edward Le Neve, her husband; that, being at the time of the marriage concerned for her husband, she was thereupon induced to place confidence in him, and her husband assured her he would take care there should be a handsome provision made for her, and recommended Norton as a proper person to prepare the deeds whereby such settlement was to be made upon her, to which she consented: and that Norton assured her that he had taken care to secure for her £150 a year by way of jointure, and did not then, or at any time before her intended marriage, give her any notice of any former settlement."

It is insisted by the defendant Mary's counsel that Joseph Norton was not her attorney or agent, but her husband's, and that the attorney for one party having notice will not affect her with notice.

I am of opinion she has admitted enough on her side to make him attorney or agent for her. If she placed confidence in Joseph Norton, no matter on whose recommendation, if she relied enough on her husband to take his recommendation, it is sufficient; or otherwise it would be mischievous and inconvenient if this Court was to take into their consideration from whom the recommendation comes; for in purchases, and more especially in mortgages, very frequently the same counsel and agents are employed on both sides, and therefore each side is affected with

notice as much as if different counsel and agents had been employed.

It is material to see how far the cases have gone on this point. Two have been cited: *Brotherton* v. *Hatt* (*b*), and *Jennings* v. *Moore, Blincorne and others* (*c*). The first was shortly this:—A makes three several mortgages to B, C and D, and in the last mortgage B is a party, and agrees, after he is paid, he will stand a trustee for D. Decreed, that C shall be paid before D, for, all the securities being transacted by the same scrivener, notice to him was notice to D.

See how far this goes:—The same scriveners were witnesses, and engrossed all the securities, and were in the nature of agents for all the lenders, and very likely for the borrower himself; and notwithstanding it does not appear Mrs. Hatt had personal notice, "yet notice to the agent is notice to the party, and, consequently, they that lend last must come last, having notice of what was before lent; and if any one after notice lend more money, although he should obtain the legal estate, yet he would in equity stand affected with the notice, and be bound thereby."

The second case was no more than this:—Blincorne having notice of an incumbrance, purchases in the name of Moore, and then agrees that Moore shall be the purchaser, and he accordingly pays the purchase-money without notice of the incumbrance. Though Moore did not employ Blincorne, nor know anything of the purchase till after it was made, yet Moore, approving of it afterwards, made Blincorne his agent *ab initio*, and therefore shall be affected with the notice to Blincorne.

The last goes a great way, for Moore knew nothing of the transaction, and yet the Court held that his approving it afterwards made Blincorne his agent *ab initio*. This carries it further than the present case; but the first is a clear authority.

These cases, therefore, sufficiently prove that it is not at all material to the plaintiffs on whose advice or recommendation the defendant Mary intrusted Norton; nor does it make any difference that it is the recommendation of the husband, any more than of any other person.

(*b*) 2 Vern. 574.
(*c*) 2 Vern. 609. [*S. C.*, 2 Bro. P. C. 278.]

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The second consideration is (as it appears clearly that Norton was employed for defendant Mary), whether there is sufficient evidence of notice to him?

An objection has been taken by defendant Mary's counsel that as notice had been denied by her answer, if it be sworn to by one witness only, that being but oath against oath, cannot prevail to establish the fact.

The general rule, to be sure, is so, but it admits of this distinction: where the denial of a defendant is clear, it has been adhered to; but where the answer is not a positive denial of the same fact, but only as to part, as in the present case, as to the notice to herself only, it makes a difference. And there are many cases where the Court, upon the testimony of one witness, whose credit is unimpeached, and what he swears is uncontradicted by the answer, have decreed upon this single evidence.

The defendant Mary denies notice to herself; but whether there was notice to another person, her agent, she passes by without giving any answer. This is a denial, indeed, as to herself, but it is at the same time what is called at law a negative pregnant, that there was notice to her agent.

As to the evidence of notice to Norton, it is extremely strong; for he swears that he had notice of the first articles some time before the second marriage, and *that he had then a copy thereof from the defendant Edward Le Neve, in order to take counsel's opinion thereon, how to secure against the effect of them, and to contrive in what manner they might get the better of these articles*; and, therefore, as to Norton, there cannot be a stronger notice.

The third and last general question is whether the notice to Norton will affect the defendant Mary, as a purchaser, and postpone her articles and settlement, notwithstanding the Register Act?

This depends on two things:—

First, Whether any notice whatsoever would be sufficient to take from the defendant the benefit of the Register Act?

Second, Whether personal notice to the defendant Mary is requisite to postpone her?—or whether notice to her agent is sufficient to do it likewise?

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As to the first, it is a question of great extent and consequence.

The preamble of the statute of 7 Anne, c. 20, is in substance:—"Whereas, by the different and secret ways of conveying lands, etc., such as are ill disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons have been undone in their purchases and mortgages, *by prior and secret conveyances*, and fraudulent incumbrances." Then comes the enacting clause:—"That a memorial of all deeds and conveyances which, after the 27th of September, 1709, shall be made and executed, and of all wills and devises in writing, whereby any honours, manors, lands, etc., in the county of Middlesex, may be any way affected in law or equity, may be registered in such manner as is after directed; and that every such deed or conveyance that shall, at any time after, etc., be made and executed, shall be *adjudged fraudulent and void against any subsequent purchaser or mortgagee* for valuable consideration, unless such memorial be registered as by this Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim," etc.

What appears, by the preamble, to be the intention of the Act?

Plainly, to secure subsequent purchasers and mortgagees against *prior secret conveyances* and fraudulent incumbrances. Where a person had no notice of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but if he had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced. The enacting clause says *that every such deed shall be void against any subsequent purchaser or mortgagee*, unless the memorial thereof be registered, etc.; that is, it gives him the legal estate, but it does not say that such subsequent purchaser is not left open to any equity which a prior purchaser or incumbrancer may have; for he can be in no danger when he knows of another incumbrance, because he might then have stopped his hand from proceeding.

This case has been very properly compared to cases on the 27 Hen. 8, c. 16, for enrolment of bargains and sales. That Act

is formed pretty much in the same manner with this. The words of the enacting clause:—"That from, etc., no manors, lands, tenements, etc., shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made, or take effect in any person or persons, *or any use thereof* to be made thereof, by reason only of any bargain and sale thereof, except the same bargain and sale be by writing, indented, sealed, and inrolled in one of the King's Courts of Record at Westminster, or else within the same county, etc., where the same manors, etc., so bargained and sold do lie, etc.; and the same inrolment to be had and made within six months next after the date of the same writings, indented, etc. *Nor any use shall pass thereof from one to another.*" What is the meaning of this? Before the making of the Act, any paper writing passed the use from the bargainor to the bargainee, whereby great mischief arose; for it entangled the purchasers, affected and injured the Crown, and was contrary to the rule of law, which required notoriety in purchases by feoffment and livery, etc.

But what has been the construction of this statute ever since? Why, if a subsequent bargainee has notice of a prior, he is equally affected with that notice as if the prior purchase had been a conveyance by feoffment and livery, etc.

The operation of both Acts of Parliament and the construction of them is the same; and it would be a most mischievous thing if a person, taking that advantage of the legal form appointed by an Act of Parliament, might under that protect himself against a person who had a prior equity, of which he had notice.

The cases put by the Attorney-General are very material:—

"Suppose," said he, "the defendant Mary had, by letter of attorney, empowered Norton to transact the affair with her husband, and he by means of this agency comes to the knowledge of the prior articles and settlement, would not this affect the principal? Or suppose a purchaser of lands in a register county orders his attorney to register it, and he neglects to do it, and then buys the estate himself, and registers his own conveyance, shall this be allowed to prevail?" It certainly shall not; for such a purchaser is out of the consequences which the Register

Act guards against, of opposition from a prior secret conveyance, as he had personal knowledge of the first.

[His Lordship then cited *Lord Forbes* v. *Deniston* (*d*), *Blades* v. *B.* (*e*), and *Chivall* v. *Nicholls* (*f*), being cases on the Register Act.]

* * * * * * *

Consider therefore what is the ground of all this, and particularly of those cases which went on the foundation of notice to the agent.

The ground of it is plainly this: That the *taking of a legal estate after notice of a prior right, makes a person a* mala fide *purchaser*; and not that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself: for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate.

And this exactly agrees with the definition of the civil law of *dolus malus* (*g*): "*Dolum malum Servius quidem ita definiit, machinationem quandam alterius decipiendi causa, cum aliud simulatur, et aliud agitur. Labeo autem, posse et sine simulatione id agi, ut quis circumveniatur: posse et sine dolo malo aliud agi, aliud simulari: sicuti faciunt, qui per ejusmodi dissimulationem deserviant et tuentur vel sua vel aliena. Itaque ipse sic definiit dolum malum* esse omnem calliditatem fallaciam machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. *Labeonis definitio vera est.*"

Now if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum.* It is a maxim, too, in our law, that *fraus et dolus nemini patrocinari debent* (*h*).

Fraud, or *mala fides*, therefore, is the true ground on which the Court is governed in the cases of notice; and it is a consequence of the decision of the former question, that notice to the agent is sufficient; for if the ground is the fraud, or *mala*

(*d*) 4 Bro. P. C. 189.
(*e*) 1 Eq. Ca. Abr. 358, pl. 12.
(*f*) 1 Stra. 664.
(*g*) Dig. 4, 3, 1, 2.
(*h*) *Vide* Co., 3 Rep. 78; 7 Rep. 38.

fides, of the party, then it is all one, whether by the party himself or his agent: still it is a *machinatio ad circumveniendum*, and the putting *a copy of the first articles and settlement into Norton's hands, to take the opinion of counsel in what manner they could be set aside, is a contrivance to circumvent.*

It has been said, if this woman has been imposed on by her husband, she, instead of cheating, has been cheated. But, then, who ought to suffer, the person entrusting an agent, or a stranger who did not employ him? He, certainly, who trusts most ought to suffer most.

Mrs. Hatt, the third mortgagee in the case in 2 Vern. 574, mentioned before, was imposed on; and so was Moore, in the other case reported there (*i*), clearly imposed on; and yet, if this was to be any excuse, it would make all the cases of notice very precarious; for it seldom happens but the agent has imposed on his principal; and notwithstanding that, the person trusting ought to suffer for his ill-placed confidence.

Therefore, in both respects, as agent and trustee, notice to Joseph Norton is notice to defendant Mary likewise. And as to the Registry Act, here is sufficient equity in the plaintiff to postpone the second articles and settlement, notwithstanding those only have been registered.

And decreed accordingly.

NOTES.

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9. Notice under Land Transfer Acts, p. 210.

1. Generally.

The principal case of *Le Neve* v. *Le N.* decided :—

(1) That the beneficial interests of persons taking land in Middlesex under a settlement in consideration of marriage, and therefore in the position of purchasers for value, the deed of settlement being registered in the Registry, but executed by all parties to it with notice of a prior unregistered settlement, must be postponed in equity to the prior settlement, though the trustees of the second settlement took the legal estate.

(2) That the enactment in the Middlesex Registry Act (*k*), "Every such deed shall be void against any subsequent purchaser or mortgagee unless a memorial be registered," etc., had the effect of giving the legal estate to the trustees of the second settlement which was registered.

(3) That notice to an agent or trustee is notice to the principal. Lord Hardwicke lays down as the ground for giving the first settlement priority, notwithstanding the express terms of the Act, "that the taking of a legal estate after notice of a prior right makes a person a *mala fide* purchaser, and not that he is not a purchaser for valuable consideration in every other respect."

The observations of Lord Hardwicke are made with reference to a case in which there was *notice at the time when the consideration was given*, so that the persons against whom judgment was given were not in the position of purchasers for value without notice, as to which see *Basset* v. *Nosworthy*, *ante;* nor is the decision a decision on the question particularly discussed in the note to *Marsh* v. *Lee*, *ante*, whether, if a person gives consideration without notice, he can protect himself by the legal estate acquired after he has been affected with notice.

(*k*) 7 Anne, c. 20 (1708).

Le Neve v. Le Neve.

Apart from any question arising under the Register Acts, it had been settled long before the principal case, that a purchaser paying his purchase-money and taking a conveyance, with notice of an equity binding his vendor, was bound to give effect to it (*l*), and that notice to the agent conducting the sale was the same as notice to the purchaser.

Thus, in *Merry* v. *Abney* (*m*), in 1669, A contracted with B to purchase lands of him; and afterwards C, on behalf of his son, purchased the same lands, and took a conveyance from B to his (C's) son in fee. On a bill by A to be relieved against this conveyance, the son pleaded himself to be a purchaser *bona fide*, without any notice of B's contract with the plaintiff, and without any trust for his father. But, it appearing that C, the father, had notice of the plaintiff's contract before he purchased for his son, the Court decreed in favour of the plaintiff (*n*).

So, in an old case, a purchaser with notice of a prior defective mortgage was ordered either to pay the mortgagee his money, or to surrender to him the legal estate (*o*). In like manner, a mortgagee of the legal estate, with notice of an equitable mortgage by deposit of title-deeds takes subject thereto (*p*); and a purchaser with notice of a lien for unpaid purchase-money was held bound by it (*q*).

So also, a purchaser with notice of a trust will be bound in the same manner as the person from whom he purchased by all the subsisting trusts (*r*), including incumbrances of which the trustees had notice (*s*).

(1) If a person purchases for valuable consideration with notice,

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(*l*) For a modern instance of this rule, see *Jared* v. *Clements*, [1903] 1 Ch. 428; and see *Craddock Bros.* v. *Hunt*, [1922] 2 Ch. 809; [1923] 2 Ch. 136, in which case the defendant, having taken with knowledge of an error in the plaintiffs' conveyance entitling them to rectification, was held a trustee of the legal estate for the plaintiffs.

(*m*) 1 Ch. Ca. 38.

(*n*) See also *Ferrars* v. *Cherry*, 2 Vern. 384; *Jackson's Case*, Lane, 60; *Earl Brooke* v. *Bulkeley*, 2 Ves. Sen. 498; *Daniels* v. *Davison*, 16 V. 249; *Crofton* v. *Ormsby*, 2 S. & L. 583; *Kennedy* v. *Daly*, 1 S. & L. 355; *Field* v. *Boland*, 1 Dr. & Walsh, 37; *Potter* v. *Sanders*, 6 Ha. 1; *Holmes* v. *Powell*, 8 De G. M. & G. 572.

(*o*) *Jennings* v. *Moore*, 2 Vern. 609; *S. C.*, 2 Bro. P. C. 278.

(*p*) *Birch* v. *Ellames*, 2 Anst. 427.

(*q*) *Mackreth* v. *Symmons*, 15 V. 349; *Grant* v. *Mills*, 2 V. & B. 306.

(*r*) *Dunbar* v. *Tredennick*, 2 Ball & B. 319; *Pawlett* v. *Att.-Gen.*, Hard. 465; *Burgess* v. *Wheate*, 1 Eden, 195; *Bovey* v. *Smith*, 1 Vern. 149; *Mansell* v.

(*s*) See note (*s*), p. 168.

from a person who bought without notice, the second purchaser may shelter himself under the first (*t*).

(2) If a person who has notice sells to a *bona fide* purchaser for valuable consideration without notice, and at the same time conveys to him the legal estate, the latter may protect his title (*u*).

(3) If the right in question were a mere equity, as distinguished from an equitable estate, the defence of purchaser for value without notice might be good even without the legal estate, but in other cases the defence could not be supported without the legal estate (*x*).

Before the passing of the Voluntary Conveyances Act, 1893 (*y*), under the construction put on the statute 27 Eliz. c. 4, as a settlement of land was void against the purchaser for value, notice of it did not affect him (*z*).

Contracts for Purchase.—The general rule in equity is that after a contract for sale of land the vendor is constructively a trustee for the purchaser, subject to the vendor's lien for his purchase-money, and to his interest as vendor (*a*). But it does not follow that, after the assignment of a contract, and notice of the assignment given to the vendor by the assignee, the notice will have the effect of making the vendor trustee for the assignee. Thus in *Shaw* v. *Foster* (*b*), F. contracted to sell leaseholds to P., who paid part of the purchase-money and subsequently deposited the contract by way of mortgage with his bankers, together with a memorandum agreeing on "request" to execute an assignment. Notice of the memorandum to assign on "request" was given to the vendor. The bankers never agreed to undertake the burden of the contract.

M., 2 P. W. 681; *Phayre* v. *Peree*, 3 Dow. 116, 129; *Adair* v. *Shaw*, 1 S. & L. 243, 262; *Wigg* v. *W.*, 1 Atk. 382; *Mead* v. *Lord Orrery*, 3 Atk. 238; *Mackreth* v. *Symmons*, 15 V. 349; *Saunders* v. *Dehew*, 2 Vern. 271; *Mumford* v. *Stohwasser*, 18 Eq. 562; *Harpham* v. *Shacklock*, 19 Ch. D. 207; *London, etc. Banking Co.* v. *Goddard*, [1897] 1 Ch. 642.

(*s*) *Perham* v. *Kempster*, [1907] 1 Ch. 373. Cf. *Pearce* v. *Bulteel*, [1916] 2 Ch. 544.

(*t*) *Lowther* v. *Carlton*, 2 Atk. 242; *Wilkes* v. *Spooner*, [1911] 2 K. B. 473; and see notes to *Marsh* v. *Lee*, *ante*.

(*u*) *Basset* v. *Nosworthy*, *Marsh* v. *Lee*, *ante*.

(*x*) *Basset* v. *Nosworthy*, *ante*.

(*y*) Now replaced by section 173 of the L. P. Act, 1925.

(*z*) *Buckle* v. *Mitchell*, 18 V. 100.

(*a*) See *per* Lord Cairns in *Shaw* v. *Foster*, L. R. 5 H. L. 338; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506; cf. *Golden Bread Co.* v. *Hemmings*, [1922] 1 Ch. 162.

(*b*) L. R. 5 H. L. 338; *Crabtree* v. *Poole*, 12 Eq. 13.

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It was held that nothing had occurred which prevented the vendor from completing his contract, and conveying the property to P.

The Rule in Tulk v. *Moxhay* (*c*).—The rule deals with the conditions under which a covenant by a former owner of land restricting its user will be enforceable against a subsequent holder of the land. The rule laid down in *Tulk* v. *Moxhay* (*c*) may be thus stated : A person who holds land with notice, actual or constructive (*d*), of a valid restrictive covenant, not to use that land in a particular manner, which covenant was entered into by the late or former owner, through whom the holder derives title, will be bound by it. In *London & S. W. Ry. Co.* v. *Gomm* (*e*), Jessel, M.R., referring to *Tulk* v. *Moxhay*, said (*f*) : "The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." This statement of the law was approved by the Court of Appeal in *Re Nisbet and Potts' Contract* (*g*). Accordingly (except so far as altered by statute, as to which see *infra*, p. 175), a restrictive covenant will bind any holder of the land originally subject to it, unless the holder can maintain the defence that he was a purchaser of the legal estate for value without notice.

The rule applies only to *restrictive* covenants; a subsequent holder of the land will not be bound under this rule by a positive covenant (*h*). Since the Court enforces the covenant by injunction, it is only the person who is in possession of the land and who has it in his power to observe the covenant without taking positive action, who can be proceeded against. Thus in *Hall* v. *Ewin* (*i*)

(*c*) 2 Ph. 774; and see *Duke of Bedford* v. *Trustees of British Museum*, 2 My. & K. 552; *White* v. *Southend, etc. Co.*, [1897] 1 Ch. 767; *Osborne* v. *Bradley*, [1903] 2 Ch. 446; *Holloway* v. *Hill*, [1902] 2 Ch. 612; *Graham* v. *Craig*, [1902] 1 Ir. R. 264; *Teape* v. *Douse*, 92 L. T 319.

(*d*) See, *e.g.*, *Rowell* v. *Satchell*, [1903] 2 Ch. 212.

(*e*) 20 Ch. D. 562.

(*f*) *Ib.* p. 583.

(*g*) [1906] 1 Ch. 386, 405; *Rogers* v. *Hosegood*, [1900] 2 Ch. 388.

(*h*) *Austerberry* v. *Oldham*, 29 Ch. D. 750; *Haywood* v. *Brunswick, etc., Building Soc.*, 8 Q. B. D. 403.

(*i*) 37 Ch. D. 74; *Powell* v. *Hemsley*, [1909] 1 Ch. 680; [1909] 2 Ch. 252; *Berton* v. *Alliance, etc., Co.*, [1922] 1 K. B. 742; cf. *Atkin* v. *Rose*, [1923] 1 Ch. 522.

the under-lessee in possession was held liable to an injunction to restrain breach of a restrictive covenant in a lease as to carrying on trade, while an injunction was refused against Ewin, his lessor, the under-lessee of the whole term of 80 years (less three days), he not being in possession, on the ground that it would have been necessary to hold that he was bound to take legal proceedings against his tenant, contrary to the true principle, that the duty cast upon a person who takes with notice of a restrictive covenant is a purely negative one. The holder of the land can raise any objection which would prevent the person entitled to the benefit of the covenant from insisting on it—*e.g.*, material alterations in the property or acquiescence in breaches of the covenant (*k*). When a vendor, on a sale of the whole of his land, takes a restrictive covenant from the purchaser, that covenant is not enforceable by the covenantee or his executors, under the rule in *Tulk* v. *Moxhay*, against subsequent purchasers of the land (*l*).

As to the Time at which Notice is Given (*m*).—1. If notice of a prior equity or equitable incumbrance is received before payment (*n*) of the money or giving the consideration, the purchaser will be bound by it, except in cases where some special statute excludes this doctrine, *e.g.*, section 69 of the Merchant Shipping Act, 1854 (*o*), and the Yorkshire Registries Act, 1884, s. 14, or where the prior equity is impeachable for fraud (*p*).

2. If the purchaser pays his money without notice, and at the same time gets the legal estate, he is protected by the legal estate against prior equities or incumbrances of which he may subsequently acquire notice (*q*), except as otherwise provided by statute (*r*).

3. If the purchaser had no notice at the time of payment of his

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(*k*) *Duke of Bedford* v. *Trustees of Brit. Museum*, 2 My. & K. 552; *Sayers* v. *Collyer*, 28 Ch. D. 103; *Knight* v. *Simmonds*, [1896] 2 Ch. 294; *Craig* v. *Greer*, [1899] 1 Ir. R. 258; and see *Swan* v. *Sinclair*, [1925] A. C. 227.

(*l*) *Formby* v. *Barker*, [1903] 2 Ch. 539; *Chambers* v. *Randall*, [1923] 1 Ch. 149.

(*m*) See *Basset* v. *Nosworthy*, *ante*; *Marsh* v. *Lee*, *ante*.

(*n*) As to what is payment within the rule, see cases cited in *Basset* v. *Nosworthy*, *ante*, p. 140; *Tourville* v. *Naish*, 3 P. W. 307; as to part payment, *Rayne* v. *Baker*, 1 Gif. 241.

(*o*) *Liverpool Borough Bank* v. *Turner*, 1 J. & H. 159; 2 De G. F. & J. 502; *Black* v. *Williams*, [1895] 1 Ch. 408; *Barclay & Co., Ltd.* v. *Poole*, [1907] 2 Ch. 284, decision on Merchant Shipping Act, 1894, s. 56.

(*p*) *Battison* v. *Hobson*, [1896] 2 Ch. 403.

(*q*) *Pilcher* v. *Rawlins*. L. R. 7 Ch. 259; and *Basset* v. *Nosworthy*, *ante*.

(*r*) See the L. C. Act, 1925, s. 10, and sections 197 and 198 of L. P. Act, 1925.

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purchase-money or giving consideration, then if the legal estate is not affected with any trust for the mesne incumbrancer, the subsequent incumbrancer may protect himself by obtaining the legal estate after notice; but if the legal estate is subject to a trust the subsequent incumbrancer will not, it seems, improve his position by obtaining the legal estate from the trustee (*s*).

4. Where, however, the legal estate, or a declaration of trust of it, is not obtained, and there is a conflict between equitable estates, then, as a general rule, all the estates being equitable, they will take effect according to priority of date, except as affected by the statutory provisions relating to registration (*u*).

This subject, "time of notice," also involves the question whether notice to affect a purchaser or mortgagee must be in the same transaction in which it is claimed to be imputed. In the old cases there were conflicting decisions and *dicta* on this question, when the notice was imputed through a *solicitor* (*x*); but the question is now settled by statute, as shown below (*y*).

It should be observed that in the case of restrictive covenants entered into after 1925, the rule in *Tulk* v. *Moxhay* has been materially affected by the Law of Property Act, 1925, and the Land Charges Act, 1925. A restrictive covenant affecting land is a land charge which if entered into after 1925 comes within Class D (ii) mentioned in section 10, sub-section 1 of the Land Charges Act, 1925, and may be registered under the Act; and by section 13, sub-section 2, of the Land Charges Act, 1925, it is provided (so far as material) that a land charge of Class D arising after the Act, is to be void against a purchaser (of the legal estate for money or money's worth) unless the land charge is registered before the completion of the purchase. Accordingly, a purchaser, although having notice of a restrictive covenant created after 1925 will not be affected by it unless registered as a land charge (*z*). On the other hand, section 198 of the Law of Property Act, 1925, makes registration of any instrument under the Land Charges Act, 1925, notice of the same for all purposes connected with the land affected, so long as the registration continues in force. Accordingly, it will not be open to a

(*s*) See *Marsh* v. *Lee* and notes, *ante*.
(*u*) See *ante*, pp. 94, 95.
(*x*) Sug. V. & P. (14th ed.), p. 757.
(*y*) See *infra*, p. 176.
(*z*) See also section 199, sub-section 1 of the L. P. Act, 1925.

defendant in proceedings to enforce a restrictive covenant which has been registered as a land charge, to plead that he is a purchaser of the legal estate without notice.

2. Of Actual or Constructive Notice.

Generally.—It is commonly said that notice is either actual or constructive and the expression "constructive notice" is used in two senses :

(1) As denoting notice implied by reason of some omission, as default in making either proper investigation of title, or inquiries as to deeds or facts which would set reasonable purchasers on inquiry; and this kind of notice may be implied by the omissions either of a solicitor or agent, or of the client or principal himself.

(2) As denoting notice *imputed* to the client or principal by reason of notice to the solicitor or agent. In *Espin* v. *Pemberton* (*a*) Lord Chelmsford suggested that the proper name for this would be "imputed" notice. It is evident that notice may, so far as regards solicitor or agent, be either actual or constructive, as when notice is implied from omissions; and the division into "actual or constructive" is, in effect, a cross division. The word "constructive" has, however, been so constantly applied to the notice imputed to the client or principal by reason of notice to the solicitor or agent, that it would be misleading to speak of it as not constructive; but it is necessary to bear in mind, in considering the cases, that the word "constructive" is used in these two different senses, and that *actual* notice, if given to the agent or solicitor, may be *constructive* in the second sense as notice *imputed* to the principal.

Actual Notice.—Questions as to what constitutes actual notice have most frequently arisen in the case of trustees and of purchasers. In a question as to actual notice to a trustee by conversation, Lord Cairns, in *Lloyd* v. *Banks* (*b*), said, "I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice, but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension, etc." In *Williams* v. *W.* (*c*), it was laid down that notice to raise a con-

(*a*) 3 De G. & J. 547.
(*b*) L. R. 3 Ch. 488, 490; *Saffron Walden, etc.* v. *Rayner*, 14 Ch. D. 406.
(*c*) 17 Ch. D. 437.

structive trust is different from notice to an actual trustee. In *Hallows* v. *Lloyd* (*d*), Kekewich, J., said that new trustees "ought to look into the trust documents and papers, to ascertain what notices appear among them of incumbrances and other matters affecting the trust"; but held that they are not fixed with notice through a retiring trustee, of incumbrances affecting the trust estate of which no notice appears among the trust documents, and the existence of which, though known to the retiring trustee, is not disclosed to them.

Constructive Notice.—Constructive notice is a doctrine that will not be extended. Esher, M.R., in an often quoted case (*e*), said: "In a series of cases Lords Cottenham, Lyndhurst and Cranworth, Turner, L.J., and Jessel, M.R., have said that the doctrine ought not to be extended one bit farther; all the Judges seem to have agreed upon that. In *Allen* v. *Seckham* (*f*) I pointed out that the doctrine was a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts, and yet it is said that constructively he does know them." In *Benham* v. *Keane* (*g*), Lord Hatherley said: "The hardship which sometimes arises springs from the difficulty of drawing the nice distinction between cases of fraud and cases of implied notice." The cases in which this doctrine has been applied have generally been cases of fraud or negligence so gross as to amount to evidence of fraud—*i.e.*, that the purchaser purposely avoided inquiry in order to avoid discovery (*h*). In *Northern Counties, etc.*, v. *Whipp* (*i*), the judgment of the Court of Appeal treats constructive notice as based on fraud; but this will not meet all the cases: see the cases referred to in *Bailey* v. *Barnes* (*k*), and the cases as to investigation of title, *infra*, pp. 182 *et seq.*

Eyre, C.B., in *Plumb* v. *Fluitt* (*l*), defined it as follows:—"Constructive notice I take to be in its nature no more than evidence of

(*d*) 39 Ch. D. 686.

(*e*) *English and Scottish, etc., Co.* v. *Brunton*, [1892] 2 Q. B., at p. 708; and see *Re Castell and Brown, Ltd.*, [1898] 1 Ch. 315; *Re Valletort Sanitary Steam Laundry Co., Ltd.*, [1903] 2 Ch. 654; *Re Bourne*, [1906] 1 Ch. 113; *Re Standard Rotary Co.*, 95 L. T. 829; *Wilson* v. *Kelland*, [1910] 2 Ch. 306.

(*f*) 11 Ch. D. 790.

(*g*) 1 J. & H. p. 702.

(*h*) See *Jones* v. *Smith*, 1 Ha. 43; *Re Valletort Sanitary Steam Laundry Co., Ltd.*, [1903] 2 Ch. 654.

(*i*) 26 Ch. D. 482.

(*k*) [1894] 1 Ch. 31; and see *Walker* v. *Linom*, [1907] 2 Ch. 104, 113; cf *Hudston* v. *Viney*, [1921] 1 Ch. 98.

(*l*) 2 Anst. 438.

notice, the presumptions of which are so violent that the Court will not allow even of its being controverted."

In *Espin* v. *Pemberton* (*m*), Chelmsford, C., said : " Constructive notice, properly so called, is the knowledge which the Courts impute to a person upon a presumption so strong of the existence of the knowledge, that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry or from his wilfully abstaining from inquiry, to avoid notice."

In *Ware* v. *Egmont* (*n*), Lord Cranworth said : " Where a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence." And the same learned Judge in *Montefiore* v. *Browne* (*o*), said : " In my opinion, every purchaser and mortgagee must be considered as having notice, not merely if he might have obtained, but if he ought to have obtained a knowledge of that with which he is to be affected." In this case it was held that a recital of a judgment had put the mortgagees on inquiry which would have disclosed another incumbrance.

In *Bailey* v. *Barnes* (*p*), Lindley, L.J., after reading the extract from Lord Cranworth's judgment in *Ware* v. *Egmont*, says : " ' Gross or culpable negligence ' in this passage does not import any breach of a legal duty, for a purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way. In the celebrated judgment of

(*m*) 3 De G. & J. 554.
(*n*) 4 De G. M. & G. 460, 473.
(*o*) 7 H. L. Cas. 241; see p. 269.
(*p*) [1894] 1 Ch. 35.

Wigram, V.-C., in *Jones* v. *Smith* (*q*), the cases of constructive notice are reduced to two classes : the first comprises cases in which a purchaser has actual notice of some defect, inquiry into which would disclose others; and the second comprises cases in which a purchaser has purposely abstained from making inquiries for fear he should discover something wrong."

The result of the cases would seem to be that (apart from statute) constructive notice will be implied where there is—(1) notice of any fact which would put a reasonable man on such an inquiry as would have led to discovery; *or* (2) notice of any deed necessarily forming part of the title, and within the usual distance back for investigation of title, which deed, if examined, would have disclosed the objection or right; or (3) such negligence in making inquires as to deeds, or as to title, as the Court considers gross negligence in a man of business.

In the cases of constructive or imputed notice through notice to the solicitor or agent, the ground taken seems to have been somewhat similar to that on which mere negligence was treated as fraud —*viz.*, that if evidence were admitted of non-disclosure by the solicitor, it would be almost impossible to detect cases of collusion between solicitor and client; and hence the rule that the imputation of notice through the solicitor should not be rebutted, either by evidence that it was against his interest to disclose, or evidence that he did not in fact disclose.

3. The Law of Property Act, 1925.

Statutory notice may perhaps be regarded as a form of constructive notice. In this connection, it should be observed that section 198 of the Law of Property Act, 1925, contains the important provision that the registration of any instrument or matter under the Land Charges Act, 1925, or any enactment which it replaces (*r*), is to be deemed to constitute actual notice of such instrument or matter, to all persons and for all purposes connected with the land affected, so long as the registration continues in force.

Section 199 of the Law of Property Act, 1925, is in the following terms :—

" (1) A purchaser shall not be prejudicially affected by notice of—

" (i) Any instrument or matter capable of registration

(*q*) 1 Ha. 43.

(*r*) These words refer to the Land Charges Acts, 1888 and 1900.

under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, which is void or not enforceable as against him under that Act or enactment, by reason of the non-registration thereof;

" (ii) Any other instrument or matter or any fact or thing unless—

" (a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

" (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

" (2) Paragraph (ii) of the last sub-section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if that paragraph had not been enacted.

" (3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

" (4) This section applies to purchases made either before or after the commencement of this Act."

Paragraph (i) of sub-section 1 of section 199 is new, but the rest of the section is a reproduction of section 3 of the Conveyancing Act, 1882.

In *Bailey* v. *Barnes* (*s*) it was said that section 3 of the Conveyancing Act, 1882, " really does no more than state the law as it was before, but its negative form shows that a restriction rather than an extension of the doctrine of notice was intended." The section was intended " for the protection of purchasers to some

(*s*) [1894] 1 Ch. 35.

extent * * * against that refined doctrine of imputed notice which had been found to work very grievous injustice to honest men" : *per* Chitty, J., in *Re Cousins* (*t*).

4. First Condition of Notice under section 199, sub-section 1 (ii) of the Law of Property Act, 1925.

Unless "the instrument, fact, or thing is within his (the purchaser's) own knowledge." These words do not seem to affect the old law with respect to actual notice. It had been held before the Conveyancing Act, 1882, that mere vague reports from strangers or mere general assertions that some other persons claimed title were not sufficient to affect the person with actual notice (*u*).

In *Barnhart* v. *Greenshields* (*x*), Lord Kingsdown (then Pemberton Leigh) said :— "We now come to the parol evidence of notice. Upon this subject the rule is settled that a purchaser is not bound to attend to vague rumours, to statements by mere strangers, but that a notice, in order to be binding, must proceed from some person interested in the property" (*y*).

Notwithstanding, however, the strong terms in which these *dicta* are expressed, it is submitted that it would not be prudent or safe in practice for a purchaser to rely upon them in any case in which he had, even from a person not interested in the property, reasonably clear information of some prior equity or incumbrance, nor is it clear that, if such information gave notice of a deed, the purchaser would not be affected by it (*z*).

The Act of 1882 uses the word "knowledge" and leaves the question open whether previous knowledge would be held to imply actual knowledge of the purchaser at the date of purchase, while the Act limits the case of notice to counsel, solicitor, or agent to notice received in the transaction (*a*). It was said in the case of *Hamilton* v. *Royse* (*b*), "If a man purchases an estate under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands to which an apparent title is made, independent of that deed, the former notice

(*t*) 31 Ch. D. 671, 676; and see *Hunt* v. *Luck*, [1902] 1 Ch. 428, at p. 435; *Molyneux* v. *Hawtrey*, [1903] 2 K. B., at p. 497.

(*u*) *Wildgoose* v. *Wayland*, Gould, 147; *Jolland* v. *Stainbridge*, 3 V. 478; *Butcher* v. *Stapely*, 1 Vern. 363.

(*x*) 9 Moo. P. C. 36.

(*y*) See also *Hine* v. *Dodd*, 2 Atk. 275; Sug. V. & P. (14th ed.), p. 755.

(*z*) But see *Rowell* v. *Satchell*, [1903] 2 Ch. 212.

(*a*) Section 199 (i) (ii) is a re-enactment of section 3, sub-section 1 of the Act of 1882.

(*b*) 2 Sch. & L. 327.

of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase."

5. Second Condition of Notice under the Section.

The second condition in sub-section 1 (ii) (a) of the L. P. Act, 1925, is, " or " unless such instrument, fact, or thing " would have come to his knowledge if such inquiries and inspections had been made as *ought* reasonably to have been made by him." This is in effect constructive notice proper, as distinguished from the third condition in sub-section 2, which relates to notice to the solicitor or agent *imputed* to the client or principal. The word " ought " does not imply that a purchaser is under any duty towards a third person to make any inquiries or inspection. It has reference to that which a reasonable man would do, having regard to that which men of business usually do under similar circumstances (*b*).

Condition of Estate.—It has been laid down in old cases that whatever is sufficient to put a person upon inquiry is good notice; that is, where a man has sufficient information to lead him to a fact, he shall be deemed cognisant of it. Thus if a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice of what the trust is (*c*).

So the *state of the property* may be such as to put a purchaser upon inquiry. Upon this principle it was held that the purchaser of land below the level of the sea, was bound to inquire how all sea-walls, necessary for the protection of the property against the encroachments of the sea, were maintained, and had therefore constructive notice of all provisions for such purpose (*d*). So where a mortgagee of a burial ground had notice of the purposes to which it was devoted, he was held to be bound by rights of burial, temporary or in perpetuity, granted by the mortgagor while in possession (*e*). So the existence of an archway at the time of the

(*b*) See *per* Lindley, L.J., in *Bailey* v. *Barnes*, [1894] 1 Ch., at p. 35.

(*c*) *Anon.*, Freem. Ch. Ca. 137, c. 171.

(*d*) *Morland* v. *Cook*, 6 Eq. 252; cf. *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557. This principle seems to have been pressed too far in the case of *Hervey* v. *Smith*, 22 B. 299; 1 K. & J. 389; see Sug. V. & P. (14th ed.), p. 765. See the comments on *Morland* v. *Cook* in *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750, 782.

(*e*) *Moreland* v. *Richardson*, 24 B. 33.

purchase, with knowledge that the adjoining land was to be built upon so as to leave the archway the only access to the vendor's mews, was held to be sufficient to affect the purchaser with constructive notice of a right of way thereunder (*f*).

The existence of windows is, according to *dicta* of Lord Chelmsford, constructive notice of a right of access of light to them (*g*). It was held in *Allen* v. *Seckham* (*g*) (dissenting from *dicta* of Lord Chelmsford in *Miles* v. *Tobin* (*h*)) that the mere fact of there being windows in an adjoining house which overlook a purchased property, is not constructive notice of any agreement giving a right to the access of light to them, because windows are frequently made in situations where they are liable to be obstructed, the owner being in hopes of coming to some arrangement about lights, or being disposed to take his chance of acquiring a right by lapse of time. In a recent case (*i*), in which the property purchased was so situated and laid out that even a cursory inspection would put a purchaser upon inquiry as to the existence of easements over the drive and through the gates in favour of the owners and occupiers of other houses in the terrace of which the property purchased formed part, it was held by P. O. Lawrence, J., that the purchaser could not rely upon the plea of purchase for value without notice.

Not Inquiring for Title-deeds.—Notice that the title-deeds are in another man's possession may be held to be notice of any claim which he has upon the estate, especially if the person having such notice appears studiously to have avoided inquiry for what purposes they were deposited, or the conveyance to him is to secure an antecedent debt (*k*). A mortgagor, on paying off a part of his mortgage debt, is not, however, bound to inquire for the deeds, and apparently is not affected with constructive notice of an equitable sub-mortgage by deposit of deeds by his mortgagee (*l*).

And it has been held that where the holder of the deeds is also the largest co-owner and the person in whose possession, independently of any mortgage, the deeds should be, notice of his possession is not notice of an equitable mortgage to him (*m*).

(*f*) *Davies* v. *Sear*, 7 Eq. 427; cf. *Cory* v. *Davies*, *infra*.
(*g*) 11 Ch. D. 790. (*h*) 16 W. R. 465.
(*i*) *Cory* v. *Davies*, [1923] 2 Ch. 95, 113.
(*k*) *Birch* v. *Ellames*, 2 Anst. 427; *Hiern* v. *Mill*, 13 V. 114; *Dryden* v. *Frost*, 3 My & C. 670, 673; *Maxfield* v. *Burton*, 17 Eq. 15; cf. *Hudston* v. *Viney*, [1921] 1 Ch. 98. (*l*) *Berwick & Co. v. Price*, [1905] 1 Ch. 632.
(*m*) *Ex p. Hardy*, 2 D. & C. 393, 394.

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Notice that the deeds are in the possession of a person other than the vendor, though notice of that person's rights is not notice to the purchaser of a fraud committed by the vendor in mortgaging by a false and spurious deed (*n*).

Notice that the solicitor of the vendor or mortgagor has possession of the title-deeds is not notice of an equitable mortgage to the solicitor (*o*).

The *mere absence* of the title-deeds has never been held sufficient *per se* to affect a party with notice, if he has *bona fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; for in that case the Court cannot impute fraud, or gross or wilful negligence to him (*p*).

But the Court will impute notice on the ground of fraud, or gross and wilful negligence showing "that he wilfully shuts his eyes to the facts" (*q*), to a person dealing with an estate, and not obtaining possession of the title-deeds, if he *omits all inquiries as to them*, or neglects to call for an abstract of title, and will hold him to have notice of those circumstances which, had he not neglected his duty, would have come to his knowledge (*r*).

In *Northern Counties of England, etc. Co.* v. *Whipp* (*s*), Fry, L.J., in delivering the judgment of the Court of Appeal, defined the classes of cases in which the priority of a legal mortgagee may be affected by reason of his not inquiring for the title-deeds :—

(1) Where the legal mortgagee or purchaser has made no inquiry for the title-deeds and has been postponed, either to a prior

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(*n*) *Hipkins* v. *Amery*, 2 Gif. 292, 301.

(*o*) *Bozon* v. *Williams*, 3 Y. & J. 150; but see *Richards* v. *Platel*, Cr. & Ph. 79.

(*p*) *Hewitt* v. *Loosemore*, 9 Ha. 449, 458; *Finch* v. *Shaw*, 19 B. 500; *S. C.*, *nom. Colyer* v. *Finch*, 5 H. L. Cas. 905; *Jones* v. *Williams*, 24 B. 47; *Roberts* v. *Croft*, 24 B. 223; 2 De G. & J. 1; *Perry-Herrick* v. *Attwood*, 2 De G. & J. 37; *Hunt* v. *Elmes*, 28 B. 631; 2 De G. F. & J. 578; *Espin* v. *Pemberton*, 4 Drew. 333; 3 De G. & J. 547; *Atterbury* v. *Wallis*, 8 De G. M. & G. 454; *Dixon* v. *Muckleston*, L. R. 8 Ch. 155; *Re Valletort Steam Laundry Co.*, [1903] 2 Ch. 654; *Grierson* v. *Nat. Prov. Bank*, [1913] 2 Ch. 18; *Hudston* v. *Viney*, [1921] 1 Ch. 98.

(*q*) *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652; *Oliver* v. *Hinton*, [1899] 2 Ch. 264; *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632, 640; *Walker* v. *Linom*, [1907] 2 Ch. 104.

(*r*) *Worthington* v. *Morgan*, 16 Si. 547; *Hewitt* v. *Loosemore*, 9 Ha. 458; *Finch* v. *Shaw*, 19 B. 511; *Allen* v. *Knight*, 5 Ha. 272; 11 Jur. 527; *Ladbroke* v. *Lee*, 4 De G. & Sm. 106; *Broadbent* v. *Barlow*, 3 De G. F. & J. 570; *Jones* v. *Williams*, 24 B. 47; *Peto* v. *Hammond*, 30 B. 495; and see *Jones* v. *Smith*, 1 Ha. 64; 1 Ph. 255; *Spencer* v. *Clarke*, 9 Ch. D. 137; *Re Morgan*, 18 Ch. D. 93; *Oliver* v. *Hinton*, *supra*; *Re Alms Corn Charity*, [1901] 2 Ch. 750; *Rainford* v. *James Keith and Blackman Co., Ltd.*, [1905] 2 Ch. 147; *Walker* v. *Linom*, [1907] 2 Ch. 104.

(*s*) 26 Ch. D. 482.

equitable estate (*t*), or to a subsequent equitable owner who used diligence in inquiring for the title-deeds (*u*). In cases of the former nature the Courts have considered the conduct of the mortgagee in making no inquiry to be evidence of a fraudulent intent to escape notice of a prior equity, and in the latter cases have held that a subsequent mortgagee, who was, in fact, misled by the mortgagor taking advantage of the conduct of the legal mortgagee, could as against him take advantage of the fraudulent intent (*x*).

(2) Where the legal mortgagee has made inquiry for the deeds, and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority (*y*).

(3) Where a legal mortgagee has received *part* of the deeds only, under a reasonable belief that he was receiving all, and has accordingly not lost his priority (*z*).

With reference to class (1) it may be added that the negligence of a trustee may postpone his innocent *cestuis que trust*. Thus in *Lloyds Banking Co.* v. *Jones* (*a*), it was held that the neglect of the trustee of a marriage settlement to inquire for the deeds postponed him and the infant *cestuis que trust* to a subsequent mortgagee by deposit.

In *Re Ingham* (*b*), the Court held that one executor was not postponed by the negligence of his co-executor. In that case a mortgagee of leaseholds died, leaving two executors, C and D. C had possession of the mortgage deeds, and was guilty of negligence sufficient, if he had been sole mortgagee in his own right, to postpone him to subsequent mortgagees. C died. D (the co-executor), who had been guilty of no negligence, was not postponed.

Notice of Lessor's Title.—Apart from the alteration made by section 44, sub-section 5 of the Law of Property Act, 1925, a

(*t*) *Worthington* v. *Morgan*, 16 Si. 547.

(*u*) *Clarke* v. *Palmer*, 21 Ch. D. 124.

(*x*) 26 Ch. D. 491. See the nature of this "*fraudulent* intent" discussed in *Oliver* v. *Hinton*, [1899] 2 Ch. 264; *Walker* v. *Linom*, [1907] 2 Ch. 104.

(*y*) *Barnett* v. *Weston*, 12 V. 130; *Hewitt* v. *Loosemore*, 9 Ha. 449; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652, 654; *Kettlewell* v. *Watson*, 21 Ch. D. 685; 26 Ch. D. 501; *Oliver* v. *Hinton*, [1899] 2 Ch. 264; cf. *Grierson* v. *Nat. Prov. Bank*, [1913] 2 Ch. 18; *Hudston* v. *Viney*, [1921] 1 Ch. 98.

(*z*) *Hunt* v. *Elmes*, 2 De G. F. & J. 578; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652; *Colyer* v. *Finch*, 5 H. L. Cas. 905.

(*a*) 29 Ch. D. 221, followed in *Walker* v. *Linom*, [1907] 2 Ch. 104.

(*b*) [1893] 1 Ch. 352.

lessee (*c*), sub-lessee (*d*), or tenant from year to year (*e*), has constructive notice of his lessor's title, and, if he enters without inquiries, he will be taken to have notice of that which he would have found out if he had made proper inquiries (*f*).

Notice from Not Investigating Title.—The following is a summary of the law as stated by Turner, L.J., in *Wilson* v. *Hart* (*g*) : " It cannot, I think, be denied that, generally speaking, a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire; nor can it, I think, be disputed that this rule applies to a purchaser or mortgagee of leasehold estates, as much as it applies to a purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years; and I cannot see my way to hold that a rule which applies in all these cases, ought not to be held to apply in the case of a tenant from year to year. The difference in the cases seems to me to be only in the quantum of injury which falls upon the party to whom the rule is applied " (*g*).

In *Robson* v. *Flight* (*h*), Westbury, C., said : " An attempt is made by the defendant, the assignee of the lease, to set up the defence of a purchaser for valuable consideration without notice, but as he bought under an engagement not to ask for the lessor's title, he must have imputed to him the knowledge which on prudent inquiry he would have immediately obtained."

In *Peto* v. *Hammond* (*i*) Lord Romilly held that special conditions of sale limiting the extent of title were no excuse for a purchaser not insisting on the production of a deed beyond those limits of which he had notice. In *Hunter* v. *Walters* (*k*), however, Lord Hatherley observed : " There is no such doctrine as that if a man, who is purchasing or taking a mortgage over a large estate as to which the title is furnished to him, chooses, as to a small portion, to be content with a short title, then *as to all the rest of the estate*

(*c*) *Feilden* v. *Slater*, 7 Eq. 523; *Holloway Bros., Ltd.* v. *Hill*, [1902] 2 Ch. 612.

(*d*) *Parker* v. *Whyte*, 1 Hem. & M. 167.

(*e*) *Wilson* v. *Hart*, L. R. 1 Ch. 463; 2 Hem. & M. 551.

(*f*) And see *Clements* v. *Welles*, 1 Eq. 200; 35 B. 513; *Patman* v. *Harland*, 17 Ch. D. 353; *Imray* v. *Oakshette*, [1897] 2 Q. B. 218; Wolstenholme & Cherry (11th ed.), pp. 201—3.

(*g*) L. R. 1 Ch., at p. 467.

(*h*) 4 De G. J. & S. 608. See also *Parker* v. *Whyte*, 1 Hem. & M. 171.

(*i*) 30 B. 495.

(*k*) L. R. 7 Ch. 75, at p. 83.

he is to be affected with notice of something which he might have found out if he had investigated the earlier title to the small portion." And where the purchase-money was extremely small—£42—and no investigation of the title was made, the property being in a register county—Yorkshire—Fry, J., held that the purchaser was not postponed (*l*).

Abstaining from any investigation of title will not affect a purchaser or mortgagee with notice of a fact which would not have become apparent had the title been properly investigated (*m*).

It was held in *Re Cox and Neve's Contract* (*n*) that a purchaser who agrees to take less than the full forty years' title (being the period required by the Vendor and Purchaser Act, 1874, for the commencement of title under an open contract), has constructive notice of all facts which would have been shown on a proper abstract of the forty years' title. And in *Patman* v. *Harland* (*o*) Jessel, M.R., held that the rule that a lessee had constructive notice of the lessor's title, has not been altered by section 2, sub-section 1, of the Vendor and Purchaser Act, 1874, but that a lessee is now in the same position with regard to notice as if he had, before the Act, stipulated not to inquire into his lessor's title (*p*). Jessel, M.R., observed that it had been settled for more than a century that a lessee has constructive notice of his lessor's title; that, as a purchaser of the fee-simple is bound to look into the title, so is the lessee bound to make reasonable inquiry; and proceeded: "As to what is reasonable inquiry, it has been held that he must require the usual title, whatever the usual title may be."

The period of forty years for the commencement of title has been reduced to thirty years by section 44, sub-section 1 of the Law of Property Act, 1925, and by sub-section 8 it is provided that a purchaser shall not be deemed to be affected with notice of any matter or thing of which, if he had investigated the title or made inquiries

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(*l*) *Kettlewell* v. *Watson*, 21 Ch. D. 685, at p. 708; 26 Ch. D. 502; *Sed quære*.

(*m*) *Gainsborough (Earl of)* v. *Watcombe, etc., Co.*, 53 L. T. 116; 54 L. J. Ch. 991; and see *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231.

(*n*) [1891] 2 Ch. 109, 118; *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386; and cf. *Gainsborough (Earl of)* v. *Watcombe Terra Cotta, etc.*, 53 L. T. 116.

(*o*) 17 Ch. D. 353.

(*p*) And see *Mogridge* v. *Clapp*, [1892] 3 Ch. 382, 397; *Imray* v. *Oakshette*, [1897] 2 Q. B. 218; *Thornewell* v. *Johnson*, 50 L. J. Ch. 641; 44 L. T. 768; 29 W. R. 677; *Nicoll* v. *Fenning*, 19 Ch. D. 258. These cases are now overruled by section 44, sub-section 5 of the L. P. Act, 1925, set out *infra*.

in regard to matters prior to the period of commencement of title fixed by that Act, or by any other statute or rule of law, he might have had notice, unless he actually makes such investigation or inquiries.

By the Law of Property Act, 1925, s. 44, sub-s. 2, under a contract to grant or assign a term of years, the intended lessee or assign is not to be entitled to call for the title to the freehold; and by sub-section 3, under a contract to sell and assign a term of years derived out of a leasehold interest, the intended assign is not entitled to call for the title to the leasehold reversion. By sub-section 4, on a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee is not entitled to call for the title to that reversion. And by sub-section 5 it is provided that where by reason of any of the three last preceding sub-sections, an intending lessee or assign is not entitled to call for the title to the freehold or to a leasehold reversion, as the case may be, he shall not, *where the contract is made after the commencement of the Act*, be deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice.

A purchaser, including a lessee, is in some cases expressly protected from the application of the doctrine of notice by reason of not making inquiries. The Law of Property Act, 1925, s. 104, sub-s. 2 (which takes the place of section 21, sub-section 2 of the Conveyancing Act, 1881, as amended by Conveyancing Act, 1911, s. 5, sub-s. 1) protects purchasers under a conveyance in professed exercise of the powers of sale conferred on a mortgagee by the Act (*q*); and section 107 makes the receipt of the mortgagee selling a sufficient discharge (*r*). Section 68 of the Law of Property Act, 1925 (which takes the place of section 55 of the Conveyancing Act, 1881) makes the receipt in the body of a deed sufficient evidence of payment (*s*). Before this Act, if there had been a receipt only in the body of the

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(*q*) *Bailey* v. *Barnes*, [1894] 1 Ch. 25; *Life, etc. Corporation* v. *Hand-in-Hand, etc., Society*, [1898] 2 Ch. 230. A purchaser buying with express notice of the impropriety of the sale would not be protected. See *Bailey* v. *Barnes*, *supra*; *Selwyn* v. *Garfit*, 38 Ch. D. 273, 283; *Re Thompson and Holt*, 44 Ch. D. 492.

(*r*) Cf. *Dicker* v. *Angerstein*, 3 Ch. D. 600.

(*s*) *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192; *Saunders* v. *Kent*, [1885] W. N. p. 147; *Bateman* v. *Hunt*, [1904] 2 K. B. 530; *Powell* v. *Browne*, 97 L. T. 854; *Rimmer* v. *Webster*, [1902] 2 Ch. 163.

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deed and not endorsed, or if endorsed, but not in the form usual in practice, and the purchase-money, or any part of it, had not been paid, the purchaser would have been held to have notice of this (*t*).

By section 2 of the Law of Property Act, 1925, a conveyance to a purchaser of a legal estate in land overreaches any equitable interest, whether or not he has notice thereof, in (*inter alia*) the following cases, that is to say, if—(1) the conveyance is made under the powers conferred by the Settled Land Act, 1925, and the equitable interest is capable of being overreached thereby, and the statutory requirements respecting the payment of capital money arising under the settlements are complied with; (2) the conveyance is made by trustees for sale and the equitable interest is capable of being overreached by such trustees, and the statutory requirements respecting the payment of capital money arising under a disposition upon trust for sale are complied with; (3) the conveyance is made by a mortgagee or personal representative in the exercise of his paramount powers, and the equitable interest is capable of being overreached by such conveyance, and any capital money arising from the transaction is paid to the mortgagee or personal representative. As to the overreaching effect of a conveyance under the Settled Land Act, 1925, see section 72 of that Act. By section 101, sub-section 5 of the same Act (re-enacting section 45, sub-section 3 of the Settled Land Act, 1882) it is provided that a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of notice under the section (*u*).

Anything *out of the ordinary course*, such as, before the Conveyancing Act of 1881, the unusual position of the indorsed receipt, may be held to affect a person with notice of a fraud affecting the deed, as it ought to have induced his solicitor to have made further inquiries, which would have led to its discovery (*x*).

If, however, the peculiarity in a deed is not in any way connected with the circumstances under which the deed might be set aside, it will not affect a purchaser with notice of such circumstances. Thus, the absence in a deed of the receipt for the consideration, although it was formerly notice of its non-payment, was not constructive notice of other irregularities in the transaction, *e.g.*, as notice that

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(*t*) *Kennedy* v. *Green*, 3 My. & K. 699; *Greenslade* v. *Dare*, 17 B. 502; 20 B. 284; *Robinson* v. *Briggs*, 1 Sm. & G. 188.

(*u*) See *Mogridge* v. *Clapp*, [1892] 3 Ch. 382; *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599; *Hurrell* v. *Littlejohn*, [1904] 1 Ch. 689; *Marlborough* v. *Sartoris*, 32 Ch. D. 623; *Selwyn* v. *Garfit*, 38 Ch. D. 273.

(*x*) *Kennedy* v. *Green*, 3 My. & K. 699; *Robinson* v. *Briggs*, 1 Sm. & G. 188.

the grantor was of unsound mind, or that he was induced to execute the deed under undue influence (*y*).

A director of a company is not bound to examine entries in any of the company's books; hence it has been held that in the absence of actual fraud on his part, the doctrine of constructive notice ought not to be extended so as to impute to him a knowledge of the contents of the books, and thus render him liable equally with co-directors guilty of fraud (*z*).

Notice of a Deed.—It may be laid down generally that a purchaser with notice of a deed necessarily forming part of the chain of title of a vendor or lessor, and therefore *necessarily* affecting the property, has constructive notice of and is bound by its contents (*a*), and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains nothing in any way affecting the title.

But the position is different where the deed is not one *necessarily* affecting the title, and the purchaser is informed that in fact it does not affect the title. Lord Esher, M.R., in *English and Scottish, etc., Co.* v. *Brunton* (*b*), adopted on this point the statement of the law as given in former editions of this work as follows: "I think the doctrine . . . is accurately stated in the Notes to *Le Neve* v. *Le N.*: 'Although, as we have already seen, where a party has notice of a deed which, from the nature of it, must affect the property, or is told at the time that it does not affect it, he is considered to have notice of the contents of that deed and of all other deeds to which it refers; nevertheless, where a party has notice of a deed which does not necessarily affect the property, and is told that in fact it does not affect it, but relates to some other property, and such party acts fairly in the transaction, believing the representation to be true, he will not be fixed with notice of the contents of the instrument.' Now that is the doctrine formulated in equity. It is not to be carried farther; it is to be construed according to its true meaning, and not to be added to or diminished." In this case it was held that debentures of a company came within the class

(*y*) *Greenslade* v. *Dare*, 20 B. 284.

(*z*) *Re Denham & Co.*, 25 Ch. D. 752; *Re Hampshire Land Co.*, [1896] 2 Ch. 743; *Re National Bank of Wales*, [1899] 2 Ch. 629; [1901] A. C. 477; *Re Coasters, Ltd.*, [1911] 1 Ch. 86. Cf. *Re City Equit. F. I. Co.*, [1925] Ch. 407.

(*a*) *Jones* v. *Smith*, 1 Ha. 43; 1 Ph. 244, 253; *Davis* v. *Hutchings*, [1907] 1 Ch. 356.

(*b*) [1892] 2 Q. B. 700, at p. 709.

of documents that do not necessarily affect the property, and that the mortgagee was not affected with notice when his solicitor had notice that debentures had been issued, but was told they did not affect the property.

Debentures creating a floating charge frequently contain a proviso forbidding the creation of mortgages or charges in priority to or ranking *pari passu* with those debentures. A subsequent mortgagee from the company of specific property who has notice of the proviso will be postponed to the debenture holders; but notice that the debentures have been issued is not notice of the proviso, and registration of the debentures under the Companies Act is notice only of the existence of the debentures and not of the proviso (*c*). Where there is no notice of the proviso, such a mortgagee, whether legal or equitable of specific property, is not postponed to the debenture holders (*c*).

The law is put in the same way by Jessel, M.R., in *Patman* v. *Harland* (*d*): "Where you know of a deed it is no answer to be told that it does not prejudicially affect the title, as if it does affect the title you are bound by its contents. There is a class of cases, of which I think *Jones* v. *Smith* (*e*) is the most notorious, where the purchaser was told of a deed which might *or might not* affect the title, and was told at the same time that it did not affect the title. Supposing you are buying land of a married man, as in *Jones* v. *Smith*, and you are told at the same time that there is a marriage settlement, but the deed does not affect the land in question, you have no constructive notice of its contents, because, although you know there is a settlement, you are told it does not affect the land. * * * But that line of cases has no bearing at all on a case *where you know the deed does affect the land*, and the question as to the extent to which it does affect the land is to be ascertained only by looking at the deed itself" (*f*).

(*c*) *Re Castell and Brown*, [1898] 1 Ch. 315; *Re Valletort Sanitary Steam Laundry Co., Ltd.*, [1903] 2 Ch. 654; *Re Standard Rotary, etc., Co.*, 95 L. T. 829; *Re Bourne*, [1906] 1 Ch. 113; *Wilson* v. *Kelland*, [1910] 2 Ch. 306, 313; and see Vol. I, notes to *Ryall* v. *Rowles*.

(*d*) 17 Ch. D. 353, at p. 357.

(*e*) 1 Ha. 43; 1 Ph. 244, 253.

(*f*) See *Jones* v. *Smith*, *supra*; *Allen* v. *Knight*, 5 Ha. 272; 11 Jur. 527; *Bird* v. *Fox*, 11 Ha. 40; *Ware* v. *Egmont*, 4 De G. M. & G. 460, 473, 474; *Coles* v. *Sims*, 5 De G. M. & G. 1; *Williams* v. *W.*, 17 Ch. D. 437; *Carter* v. *Williams*, 9 Eq. 678; *Banco de Lima* v. *Anglo-Peruvian Bank*, 8 Ch. D. 160; *Harryman* v. *Collins*, 18 B. 11; *Re Bright's Trust*, 21 B. 430; *Holloway* v. *Hill*, [1902] 2 Ch. 612; *Re Alms Corn Charity*, [1901] 2 Ch. 750; *A. L. Underwood, Ltd.* v. *Bank of Liverpool*, [1924] 1 K. B. 775, 789.

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Notice from Recital, Reference, etc., etc.—It was well established by old cases—and appears to be still the law, except so far as altered by statutory provisions relating to notice—that where the purchaser cannot make out a title but by a deed which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognisant thereof; for it is *crassa negligentia* that he sought not after it (*g*); and that it is immaterial whether the deed leads him to the knowledge of that fact by the description of the parties, or the recitals, or otherwise. In *Bisco* v. *Earl of Banbury* (*h*), a party purchased with actual notice of a specific mortgage. The deed creating this mortgage referred to other incumbrances. The question was, whether the purchaser was to be affected with notice of the incumbrances which the deed creating the mortgage disclosed. The Lord Chancellor laid down as a rule, " that the purchaser could not be ignorant of the mortgage, and ought to have seen that, and that would have led him to the other deeds, in which, pursued from one to another, the whole case must have been discovered to him." So, in *Coppin* v. *Fernyhough* (*i*), the mortgagee of a lease which recited the surrender of a former lease, which was in consideration of the surrender of a previous lease, in which the plaintiff's title appeared, was held to have notice of that title. This case decides, in effect, that a purchaser who has actual notice of one instrument affecting an estate, has constructive notice of all other instruments to which an examination of the first could have led him (*k*).

Notice of a trust has been held to be notice of all the particulars of the trust (*l*); but the usual recital in transfers of mortgages on appointment of new trustees, that the transferees have become entitled in equity, does not give notice of the trust: see *infra*, p. 193.

A general recital in a deed that there were mortgages on the estate was held to affect parties claiming under the deed with

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(*g*) *Moore* v. *Bennett*, 2 Ch. Ca. 246; *Bacon* v. *B.*, Tothill, 133; and see Seton (7th ed.), p. 2034.

(*h*) 1 Ch. Ca. 287.

(*i*) 2 Bro. Ch. 291.

(*k*) And see *Nixon* v. *Robinson*, 2 Jo. & Lat. 14; *Roddy* v. *Williams*, 3 Jo. & Lat. 1; *Hope* v. *Liddell*, 21 B. 183; *Barber* v. *Brown*, 3 Jur. (N.S.) 18; and see *Davies* v. *Thomas*, 2 Y. & C. Ex. 234; Sug. V. & P. (14th ed.), p. 775.

(*l*) *Malpas* v. *Ackland*, 3 Russ. 273; *Perham* v. *Kempster*, [1907] 1 Ch. 373; cf. *Pearce* v. *Bulteel*, [1916] 2 Ch. 544; *Chafer and Randall's Contract*, [1916] 2 Ch. 8.

notice (*m*). And a purchaser will be affected with notice of incumbrances by a recital which describes them inaccurately (*n*). So, *inaccurate recitals* of an instrument, as a will, affect a purchaser with notice of its true contents (*o*), and a recital that a person was seised "for the term of his life with the power of jointuring" was held to affect a purchaser with notice of the settlement (*p*).

In *Penny* v. *Watts* (*q*), on the marriage of the defendant with A, who, under the will of her former husband, was entitled to certain real estates, charged with a legacy of £2,000, payable to B, a *feme sole*, the defendant had notice that B, while sole, had released this legacy to A, and that A had in consequence devised to B a certain part of the real estates; it was held by Lord Cottenham, that the knowledge of these facts rendered it incumbent on the defendant to have made further inquiries, and affected him with constructive notice of an equitable title acquired by the husband of B, under a subsequent agreement with A to have the devised estate conveyed to him (*r*).

Upon the same principle it was held that notice of a charge to an *indefinite amount*, although inaccurate as to the particulars or extent of the charge, was sufficient to put a purchaser upon inquiry (*s*).

The circumstance that upon a renewal of a lease, the lessors are not the same persons who were lessors in the original lease, is one which ought to lead the lessee to inquire into their title, and may be sufficient to fix him with notice of a trust (*t*). Except in cases to which section 44, sub-section 5 of the Law of Property Act, 1925, applies, notice of a lease imparts notice of the covenants, usual or unusual, restrictive or otherwise, contained in it to any person

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(*m*) *Farrow* v. *Rees*, 4 B. 18; *Lacey* v. *Ingle*, 2 Ph. 413; *Gibson* v. *Ingo*, 6 Ha. 124; and see *Eland* v. *E.*, 1 B. 235; *Hamilton* v. *Royse*, 2 Sch. & L. 327; *Mertins* v. *Jolliffe*, Amb. 311; *Ingram* v. *Pelham*, Amb. 153.

(*n*) *Taylor* v. *Baker*, 5 Price, 306.

(*o*) *Hope* v. *Liddell*, 21 B. 183; and see *Trinidad Asphalte Co.* v. *Coryat*, [1896] A. C. 587.

(*p*) *Bury* v. *B.*, reported in Sug. V. & P. Append. xxv (11th ed.).

(*q*) 1 Hall & T. 266; 2 De G. & Sm. 501; 1 Mac. & G. 150. But see *Abbott* v. *Geraghty*, 4 Ir. Ch. R. 15, 23; *Stephenson* v. *Royce*, 5 Ir. Ch. R. 401; Sug. V. & P. (14th ed.), p. 766.

(*r*) And see *Heathorn* v. *Darling*, 1 Moo. P. C. 5; *Ladbroke* v. *Lee*, 4 De G. & Sm. 106; *Tildesley* v. *Lodge*, 3 Sm. & Gif. 543.

(*s*) *Gibson* v. *Ingo*, 6 Ha. 112, 124. And see *Gurney* v. *Lord Oranmore*, 5 Ir. Ch. R. 436; *Jones* v. *Williams*, 24 B. 47; *Armstrong* v. *Lynn*, 9 Ir. R. Eq. 186; *Re The Alms Corn Charity*, [1901] 2 Ch. 750.

(*t*) *Att.-Gen.* v. *Hall*, 16 B. 388; *Att.-Gen.* v. *Backhouse*, 17 V. 283; *sed vide Howorth* v. *Deem*, 1 Eden, 355.

claiming under the lease (*u*). This doctrine, however, that notice of a lease gives notice of its contents, cannot be relied upon by a vendor seeking specific performance, where the particulars are misleading (*x*).

In *Redgrave* v. *Hurd* (*y*), Jessel, M.R., said: "If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'if you had used due diligence you would have found out that the statement was untrue. You had the means of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer."

Moreover, a vendor seeking to enforce a contract of sale of a lease containing unusual or onerous covenants, must show that the purchaser had a fair opportunity of acquainting himself with the terms of the lease under such circumstances that he might reasonably have done so. The vendor cannot rely simply upon the constructive notice arising from the fact that the purchaser knew there was a lease (*z*). It has been held that, in the case of an agreement for purchase of a lease, or an underlease, the purchaser is not so affected with constructive notice of the covenants in the lease as to be bound to *complete* his contract if the lease be subject to onerous covenants of an unusual character, *unless* before the agreement was made he had fair opportunity of ascertaining for himself the terms of such covenants (*a*).

The rule that notice of occupation or tenancy affects a purchaser with notice of the claims of the tenant as between him and the

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(*u*) *Taylor* v. *Stibbert*, 2 V. 437; see also *Hall* v. *Smith*, 14 V. 426; *Pope* v. *Garland*, 4 Y. & C. Exch. 394; *Spunner* v. *Walsh*, 10 Ir. R. Eq. 386, 400; *Lewis* v. *Bond*, 18 B. 85; *Wilbraham* v. *Livesey*, *ibid.* 206; *Cosser* v. *Collinge*, 3 My. & K. 283; *Grosvenor* v. *Green*, 5 Jur. (N.S.) 117; *Vignolles* v. *Bowen*, 12 Ir. R. Eq. 194; *Vaughan* v. *Magill*, *ibid.* 200; *Drysdale* v. *Mace*, 2 Sm. & G. 225; *Cox* v. *Coventon*, 31 B. 378; *Clements* v. *Welles*, 1 Eq. 200; 35 B. 513; *Re Earl of Derby and Ferguson's Contract*, [1912] 1 Ch. 479; *Patman* v. *Harland*, 17 Ch. D. 353.

(*x*) *Jones* v. *Rimmer*, 14 Ch. D., at p. 590. See *Cox* v. *Coventon*, 31 B. 378; *Allen* v. *Smith*, [1924] 2 Ch. 308. Cf. *Melzak* v. *Lilienfeld*, [1926] Ch. 480.

(*y*) 20 Ch. D. 13.

(*z*) *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487; and see *Hyde* v. *Warden*, 3 Ex. D. 72; *Reeve* v. *Berridge*, 20 Q. B. D. 523; *Re White & Smith's Contract*, [1896] 1 Ch. 637; *Allen* v. *Smith*, *supra*; *Melzak* v. *Lilienfeld*, *supra*.

(*a*) *Reeve* v. *Berridge*, 20 Q. B. D. 523; *Re White & Smith*, [1896] 1 Ch. 637; *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487; *Re Davis and Cavey*, 40 Ch. D. 601; *Smith* v. *Capron*, 7 Ha. 185; *Hyde* v. *Warden*, 3 Ex. D. 72; *Allen* v. *Smith*, [1922] 2 Ch. 308; *Melzak* v. *Lilienfeld*, [1926] 1 Ch. 480.

tenant does not apply as between vendor and purchaser *while the matter rests in contract* (*b*).

Notice of an intention to prepare a deed will not, it seems, be notice of the deed if afterwards executed. Thus, in *Cothay* v. *Sydenham* (*c*), a purchaser had notice that a *draft* of a deed was prepared, but not that a deed was executed; and it was held that he was not bound by notice of the deed, although in fact it was executed.

In *Graham* v. *Drummond* (*d*) it was held that the rule that a purchaser for value of an asset of the testator, from an executor who is also residuary legatee, acquires a title free from the claims of unsatisfied debts, or of anything which made it improper for the executor so to deal with the asset, applies in the case of equitable as well as legal assets; provided that neither the executor nor the Court administering the testator's estate still retains control over the asset, as, *e.g.*, in *Noble* v. *Brett* (*e*) and *Hooper* v. *Smart* (*f*).

In *Cole* v. *Eley* (*g*) it was held that the assignee for value of money payable on the compromise of an action took, subject to the right of the solicitor of the assignor to obtain a charging order under section 28 of the Solicitors Act of 1860, it being proved that the assignee had been a witness in the action and had thus notice, though he had not express notice, of the solicitor's claim.

Under the old law, the question whether a purchaser from an heir-at-law, with notice of a will by the ancestor, under whom the heir claimed, would be affected with notice of the contents of that will, although he was ignorant of such contents, and even misled by the heir at the time of his purchase, would depend upon circumstances. If the testator had been long dead, and the heir long in possession, and the other circumstances of the case such as to leave the purchaser in credit for perfect good faith, a Court of equity would not interfere against the legal title, only because the purchaser had notice of a will, respecting which he was misled. If the death of the testator were recent, other considerations might arise affecting the purchaser with the imputation of a fraudulent

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(*b*) *Caballero* v. *Henty*, L. R. 9 Ch. 447. Cf. *Re Earl of Derby and Ferguson's Contract*, [1912] 1 Ch. 479.

(*c*) 2 Bro. Ch. 391; and see *Jones* v. *Smith*, 1 Ph. 244, 256; cf. *Shaw* v. *Foster*, L. R. 5 H. L. 321.

(*d*) [1896] 1 Ch. 968. (*e*) 24 B. 499.

(*f*) 1 Ch. D. 90.

(*g*) [1894] 2 Q. B. 180, 350. See also *Faithfull* v. *Ewen*, 7 Ch. D. 495; *Ridd* v. *Thorne*, [1902] 2 Ch. 344; *The Birnam Wood*, [1907] P. 1.

blindness (*h*). Under the present law such questions could hardly arise, as the legal estate, upon an intestacy, does not vest in the heir but in the deceased's legal personal representative.

The purchaser from the assignees of an insolvent debtor was held not to be affected by constructive notice of circumstances of negligence in the conduct of the sale—such circumstances being collateral to any question of title (*i*). The Bankruptcy Act, 1914, s. 55, provides that subject to the provisions of the Act, the trustee may sell all or any part of the property of the bankrupt by public auction or private contract, and may give receipts for money received, which will be an effectual discharge to the person paying the same.

The purchaser of a charity lease which carries on the face of it notice of facts from which its invalidity in equity might be inferred takes subject to such equity. Thus where a lease had been granted to certain charity lands for a term of 200 years at a stationary rent of £14 3s. 0d., it was set aside after many years (*k*). So also, where half an acre of freehold land in Norwich was leased for a term of 999 years subject to a fixed rent of £10 and to a covenant to lay out £300 in building, the lease was set aside after 150 years (*l*). But it is otherwise where the facts creating the invalidity depend on circumstances *dehors* the lease (*m*).

Speaking generally, where a purchaser takes with notice of an instrument, he takes with notice of whatever equity affects the property under that instrument (*n*). But in *Hipkins* v. *Amery* (*o*), where a purchaser did not call for the deeds, he was held to be affected with notice of a mortgage by deposit, but not with notice of an equitable mortgage made fraudulently on the security of a spurious lease of the property to another person, though it gave such person an equitable charge as against the mortgagor; and in *Greenslade* v. *Dare* (*p*), the notice of non-payment of purchase-

(*h*) *Per* Wigram, V.-C., in *Jones* v. *Smith*, 1 Ha. 60; and see *West* v. *Reid*, 2 Ha. 257; *Jones* v. *Williams*, 24 B. 47; *sed vide Broadbent* v. *Barlow*, 3 De G. F. & J. 570; 7 Jur. (N.S.) 479; *Burgoyne* v. *Hatton*, Barn. Ch. 237.

(*i*) *Borell* v. *Dann*, 2 Ha. 440.

(*k*) *Att.-Gen.* v. *Pargeter*, 6 B. 150.

(*l*) *Att.-Gen.* v. *Pilgrim*, 12 B. 57.

(*m*) *Att.-Gen.* v. *Backhouse*, 17 V. 293; cf. *Kenney* v. *Browne*, 3 Ridg. P. C. 512.

(*n*) *Hamilton* v. *Royse*, 2 Sch. & L. 315. But see as to this case 3 Sug. V. & P. (10th ed.), p. 475; and see *Averall* v. *Wade*, Ll. & G. *temp.* Sugd. 252; Sug. V. & P. (14th ed.), p. 776; *Tighe* v. *Dolphin*, [1906] 1 Ir. R. 305.

(*o*) 2 Gif. 292; cf. *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632; *Hudston* v. *Viney*, [1921] 1 Ch. 98.

(*p*) 20 B. 284.

money by the absence of an endorsed receipt, was held not to give notice of other irregularities in the transaction, *e.g.*, that the vendor was of unsound mind or subject to undue influence.

The mere attestation of a deed by a witness will not, it seems, fix the witness with notice of the provisions in the deed; for, as observed by Lord Thurlow, " a witness in practice is not privy to the contents of a deed " (*q*).

It seems that a purchaser is bound by notice of articles for a settlement according to their true construction, although such construction may be ambiguous (*r*).

Notice of Trusts in ordinary Trust Mortgages.—There is a very important exception to the doctrine that notice of a trust is notice of all particulars of the trust (*s*). When trust money is invested on mortgage it has long been the practice of conveyancers for the mortgage to be made to the trustees as joint tenants without disclosing the trust, and on the appointment of new trustees to transfer the mortgage by a separate deed, with a recital that the transferees have become entitled to the mortgage in equity. Where this practice has been followed, it has been held—in spite of the fact that the transfer being without consideration was made by a deed bearing only a 10s. stamp, so that it was obvious the transferors were trustees—a purchaser was not affected by notice of a trust and could not go behind the recital. " Everyone knows," said Pearson, J. in *Re Harman and Uxbridge Ry. Co.* (*t*), " that, when in a mortgage deed the mortgage money is stated to belong to several persons on a joint account, those persons are in ninety-nine cases out of a hundred trustees of the money, and yet the Court has always resolutely refused to go behind the recital, or to inquire what the trusts are. . . . The object of such recital being to keep the trusts off the face of the deed, the Court has always said that the persons to whom the conveyance is made can deal with the property as absolute owners " (*u*).

Where, however, by inadvertence it was disclosed to purchasers that mortgage moneys were held on the trusts of a settlement of

(*q*) *Beckett* v. *Cordley*, 1 Bro. Ch. 357; *Welford* v. *Beezely*, 1 Ves. Sen. 6; *Colman* v. *Sarrel*, 1 V. 55; *Biddulph* v. *St. John*, 2 Sch. & L. 532; *Rancliffe* v. *Parkyns*, 6 Dow, 149, 224; *sed vide Mocatta* v. *Murgatroyd*, 1 P. W. 393.

(*r*) See *Senhouse* v. *Earle*, Amb. 285; *Davies* v. *D.*, 4 B. 54; *Thompson* v. *Simpson*, 1 Dr. & W. 459; *Abbott* v. *Geraghty*, 4 Ir. Ch. R. 15, 24, 25.

(*s*) See *Malpas* v. *Ackland*, 3 Russ. 273; and *supra*, p. 188.

(*t*) 24 Ch. D. 720; and see *Re West & Hardy's Contract*, [1904] 1 Ch. 145.

(*u*) And see *Carritt* v. *Real, etc., Advance Co.*, 42 Ch. D. 263; *London & County Banking Co.* v. *Goddard*, [1897] 1 Ch. 649.

which the mortgagees were not the original trustees, then, though, the mortgage deed contained the usual joint account clause, the purchasers were held entitled to proof that the mortgagees had been duly appointed trustees of the settlement (*x*).

By the Law of Property Act, 1925, s. 111 (which takes the place of section 61 of the Conveyancing Act, 1881), it is provided (in effect) that where in a mortgage or transfer the sum advanced is expressed to be owing to more persons than one on a joint account, or where a mortgage or transfer is made to more persons than one jointly, the mortgage money, as between those persons and the mortgagor, shall be deemed to belong to those persons on a joint account, and the receipt of the survivors or survivor of them, or of the personal representative of the last survivor, will be a good discharge for the money owing. And by section 112 (which reproduces, in substance, section 13 of the Conveyancing Act, 1911) it is provided (in effect) that where, on the transfer of a mortgage, the stamp duty, if payable according to the amount of the debt transferred, would exceed 10s., a purchaser is not, by reason only of the transfer bearing a 10s. stamp, to be deemed to have notice of any trust (*y*).

By section 113, sub-section 1 of the Law of Property Act, 1925—which is *not* a reproduction of any previous enactment, and which removes such difficulties as that which arose in *Re Blaiberg & Abrahams* (*z*), referred to above—it is provided, in substance, that a person dealing in good faith with a mortgagee, or with the mortgagor if the mortgage has been discharged "shall not be concerned with any trust at any time affecting the mortgage money or the income thereof, *whether or not he has notice of the trust*, and may assume unless the contrary is expressly stated in the instruments relating to the mortgage," that the mortgagees are or were entitled to the mortgage money on a joint account, and that the mortgagee has or had power to give valid receipts for the purchase or mortgage money, without investigating the equitable title to the mortgage debt or the appointment or discharge of trustees in reference thereto. This section applies to mortgages made before or after the commencement of the Act, but only as respects dealings after such commencement (*a*).

Notice from Occupation or Tenancy.—As a general rule if a person purchases and takes a conveyance of an estate which he

(*x*) *Re Blaiberg & Abrahams*, [1899] 2 Ch. 340.
(*y*) Cf. *Soden* v. *Alexander*, [1918] 2 Ch. 258.
(*z*) [1899] 2 Ch. 340.
(*a*) Sub-section 2.

knows to be in the occupation of another than the vendor, he is bound by all the equities which the *person in such occupation* may have in the land; for possession is *prima facie* seisin, and the purchaser has, therefore, actual notice of a fact by which the property is affected, and he is bound to ascertain the truth. Thus, if a person purchases property in the occupation of one whom he supposes to be only a tenant from year to year, he will be held to have notice of a lease under which he holds, and of the contents of it (*b*). But such occupation affects the purchaser only with constructive notice of the tenant's rights, not with notice of the lessor's title or rights; mere knowledge that the rents are paid to an estate agent affects the purchaser with no notice at all (*c*). The rule is thus stated by Farwell, J. (*d*) : (1) " A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; (2) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights."

The rule has no application, as between *vendor and purchaser*, where the matter rests in contract (*e*).

The rule extends not only to interests connected with the tenancy of the occupier, but also to interests which he may have under collateral agreements. Thus in *Daniels* v. *Davison* (*f*), the tenant in possession had entered into a *contract for the purchase* of the estate, and a subsequent purchaser was held to have had constructive notice of the contract, as he was bound to make inquiry from the tenant which would have led him to a knowledge of it; and the same rule applies although the interests which the tenant may have were posterior to the lease under which he holds (*g*). But now such a contract is an " estate contract," and the provisions of the Land Charges Act, 1925, as to registration and notice would apply (*h*). It would appear to be still necessary, however,

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(*b*) *Taylor* v. *Stibbert*, 2 V. 437, 440; *Jones* v. *Smith*, 1 Ha. 60; *Holmes* v. *Powell*, 8 De G. M. & G. 572; *Mumford* v. *Stohwasser*, 18 Eq. 556; *Carroll* v. *Keayes*, 8 Ir. R. Eq. 97; *Reilly* v. *Garnett*, 7 Ir. R. Eq. 1.

(*c*) *Hunt* v. *Luck*, [1901] 1 Ch. 45; [1902] 1 Ch. 428.

(*d*) *Hunt* v. *Luck*, [1901] 1 Ch., p. 51.

(*e*) *Caballero* v. *Henty*, L. R. 9 Ch. 447, *infra*, p. 197.

(*f*) 16 V. 249; *Lewis* v. *Bond*, 18 B. 85; *Wilbraham* v. *Livesey*, *ibid.*, 206; *Crofton* v. *Ormsby*, 2 Sch. & L. 583; *Meux* v. *Maltby*, 2 Swans. 281; *Powell* v. *Dillon*, 2 Ball & B. 416; *Bailey* v. *Richardson*, 9 Ha. 734; *Barnhart* v. *Greenshields*, 9 Moo. P. C. 33, 34; *Thomas* v. *Davies*, 9 W. R. 831. Cf. *L. & N. W. Ry. Co.* v. *Boulton*, 62 L. T. 393.

(*g*) *Allen* v. *Anthony*, 1 Mer. 282; and see *Hunt* v. *Luck*, [1901] 1 Ch., p. 49.

(*h*) L. C. Act, 1925, s. 10, Class C (iv); s. 13, sub-s. 2.

for a purchaser to make inquiries as to who is in possession and to whom the rent is paid; and it is prudent to ascertain from any person in actual occupation what interest he claims (*i*).

Where two persons who are tenants in common of property are carrying on business upon it, it has been held that their possession will be constructive notice of the title of the partnership (*k*).

Although the case of *Daniels* v. *Davison* (*l*) has been followed, it has always been considered an extreme case beyond which the doctrine ought not to be extended. Accordingly it was said by Lord Cottenham, then Master of the Rolls, that although it was true that where a tenant was in possession of the premises a purchaser had implied notice of the nature of his title; yet if, at the time of the purchase, the tenant in possession was not the original lessee, but merely *held under a derivative lease*, and had no knowledge of the covenant contained in the original lease, it had never been considered want of due diligence in the purchaser, which was to fix him with implied notice if he did not pursue his inquiries through every derivative lessee, until he arrived at the person entitled to the original lease, which could alone convey to him information of the covenant (*m*).

Notice that an occupier holds as tenant of a particular person has been held notice of the title of the latter (*n*). And notice that the tenants paid their rents to anyone (not being a mere estate agent (*o*)) is notice of the instrument under which they were compelled to pay them, and of the rights of all parties thereunder : also notice of the title of the " tenant " is not confined to the terre-tenant, but extends to the person who receives the rent (*p*).

Where a man is of right in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held, nor is it necessary that such possession should be continually visible or actively asserted. Thus in *Holmes* v. *Powell* (*q*), the purchasers

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(*i*) See section 14 of the L. P. Act, 1925, and section 205, sub-section 1 (xix).

(*k*) *Cavander* v. *Bulteel*, L. R. 9 Ch. 79. (*l*) *Supra.*

(*m*) *Hanbury* v. *Litchfield*, 2 My. & K., p. 633. And see the judgment of Wigram, V.-C., in *Jones* v. *Smith*, 1 Ha. 62.

(*n*) *Bailey* v. *Richardson*, 9 Ha. 734; see *Barnhart* v. *Greenshields*, 9 Moo. P. C. 34; *Hunt* v. *Luck*, [1901] 1 Ch. 45; [1902] 1 Ch. 428.

(*o*) See *Hunt* v. *Luck*, *supra.*

(*p*) *Knight* v. *Bowyer*, 2 De G. & J. 421; 23 B. 609. See also *Att.-Gen.* v. *Stephens*, 1 K. & J. 750, reversed on other grounds, 6 De G. M. & G. 111.

(*q*) 8 De G. M. & G. 572.

of mines took possession under the agreement for purchase without any conveyance. Afterwards a person purchased the land without any exception of the mines. It was held that the purchaser of the land took with notice of the agreement, and was bound specifically to perform it (*r*).

The possession, however, by a vendor of an estate which he has sold will not be constructive notice of any lien he may have for unpaid purchase-money, if he has signed the usual receipt on the conveyance for the whole purchase-money; for, after that, no man could be expected to inquire whether the purchase-money had been paid (*s*). If the possession is vacant, the purchaser is not bound to inquire as to the title of the last occupier, and will, therefore, not have constructive notice of the information he might have obtained by such inquiry (*t*).

The doctrine laid down in *Daniels* v. *Davison*, *supra*, does not apply where the matter rests in contract. In *Caballero* v. *Henty* (*u*) the conditions of sale of a public-house stated that it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term, of which eight years were unexpired. It was held by the Lords Justices, affirming the decision of Jessel, M.R., that the purchaser was not bound to ascertain from the tenant the terms of his tenancy, and that in such a case the vendor could not enforce specific performance. "There is no pretence," said James, L.J., "for the case made by the plaintiff, that a person who wants to buy such property, and has notice of the occupation of the tenant, is bound to go and inquire of the tenant what is the nature of his tenancy. For this proposition *James* v. *Lichfield* (*x*) was cited as an authority. In that case there certainly are some *dicta* which nearly go to that extent, and which support the notion that the doctrine of *Daniels* v. *Davison* (*y*) applies as between vendor and purchaser, and whilst the matter still rests in contract. It is not necessary now to deal with that case, but I am

(*r*) But see the remarks upon this case of James, L.J., in *Cavender* v. *Bulteel*, L. R. 9 Ch., at p. 82.

(*s*) *White* v. *Wakefield*, 7 Si. 401. And see *Rice* v. *R.*, 2 Drew. 73; *Muir* v. *Jolly*, 26 B. 143; *Wilson* v. *Keating*, 4 De G. & J. 588; and the notes to *Mackreth* v. *Symmons*, *infra*; cf. *Rimmer* v. *Webster*, [1902] 2 Ch. 163.

(*t*) *Miles* v. *Langley*, 1 Russ. & M. 39; 2 Russ. & M. 626; see also *Jones* v. *Smith*, 1 Ha. 62; *Martyr* v. *Lawrence*, 2 De G. J. & S. 261.

(*u*) L. R. 9 Ch. 447, 449.

(*x*) 9 Eq. 51.

(*y*) 16 V. 249.

not at present prepared to assent to any such proposition. The doctrine in question seems to me to refer to equities between the purchaser and the tenant *when the legal estate has passed*, and to have nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold, and the vendor cannot afterwards say to the purchaser, 'If you had gone to the tenant and inquired you would have found out all about it'" (*z*).

Notice in Commercial Transactions.—In the important case of *Manchester Trust* v. *Furness* (*a*), the Court of Appeal laid down broadly that the doctrine of constructive notice does not apply to commercial transactions, though, taken with the facts, this only amounted to a decision that constructive notice would not be implied of all provisions of a document referred to. There bills of lading were signed by the captain for goods to be delivered to the holders, the bills expressly containing the words "they paying freight and other conditions as per charterparty." The charterparty provided expressly that the captain should be the servant of the charterers and should only sign bills of lading as agent for the charterers, and that the charterers should indemnify the owners against all liability from such bills of lading. The goods being misdelivered, and the holders bringing an action against the owners, it was held that the special clause in the charterparty was binding only between the owners and the charterers, and did not affect the liability of the owners to the holders of the bills of lading, who were entitled to consider the captain as the agent of the owners; and that the reference to the charterparty in the bills of lading did not give the holders constructive notice of the contents of the charterparty, the equitable doctrine of constructive notice not being applicable in general to mercantile transactions (*b*).

Even in mercantile transactions, however, actual knowledge that the person dealing is an agent with a limited authority, puts the person dealing with the agent upon inquiry as to the extent of such authority (*c*).

(*z*) See *Martyr* v. *Lawrence*, 2 De G. J. & S. 261; *Hughes* v. *Jones*, 3 De G. F. & J. 307; Sugd. (14th ed.), p. 774; cf. *Earl of Derby and Fergusson's Contract*, [1912] 1 Ch. 479. (*a*) [1895] 2 Q. B. 539.

(*b*) See the *Manchester Trust* v. *Furness*, [1895] 2 Q. B. 539, 545; *Greer* v. *Downs Supply Co.*, [1927] 2 K. B. 28.

(*c*) *London J. S. Bank* v. *Simmons*, [1892] A. C. 201, 229; *Cooke* v. *Eshelby*,

Le Neve v. Le Neve.

In *Cooke* v. *Eshelby* (*d*), the Court acted on the admission of the buyer that he had no belief one way or the other whether the seller was acting as principal or agent, and he was on this held to have notice that the seller might be an agent with limited authority. In the absence of a positive belief that the seller was selling as a principal, the buyer was held *not* to be entitled to set off a debt due to him from the seller.

The common law Courts have recognised in commercial transactions the consequences of gross negligence, the result being much the same as imputing constructive notice. Thus in *Solomons* v. *Bank of England* (*e*), it was held that in taking a negotiable instrument there might be negligence so gross that as to show *mala fides*, and that the taker had notice of a fraud, and in *May* v. *Chapman* (*f*), Parke, B., said: "I agree that notice and knowledge mean not merely express notice, but knowledge or the means of knowledge to which the party wilfully shuts his eyes," which seems to be extremely similar to the doctrine of constructive notice in equity; and in *Re Gomersall* (*g*), Lord Blackburn says: If the facts and circumstances are such that the jury, or whoever is to try the question, come to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong * * * I think that was dishonesty (*h*). In *London Joint Stock Bank* v. *Simmons* (*i*), Lord Herschell says, "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him" (*k*). As to a bank having notice that a

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12 A. C. 271; *Sheffield* v. *London, etc. Bank*, 13 A. C. 333; *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487; *A. L. Underwood, Ltd.* v. *Bank of Liverpool*, [1924] 1 K. B. 774. See as to contracts of marine insurance, sections 18 and 19 Marine Insurance Act, 1906.

(*d*) 12 A. C. 271.

(*e*) 13 East, 135 (n.).

(*f*) 16 M. & W. 355.

(*g*) 2 A. C. 616.

(*h*) See *Raphael* v. *Bank of England*, 17 C. B. 161, 175.

(*i*) [1892] A. C. 201, at p. 221.

(*k*) See *A. L. Underwood, Ltd.* v. *Bank of Liverpool*, [1924] 1 K. B. 774; and see the cases discussed in the notes to *Miller* v. *Race*, 1 Smith's L. C.

customer's money is trust money, see *Coleman* v. *Bucks, etc. Bank* (*l*); *Thomson* v. *Clydesdale Bank* (*m*).

6. Third Condition of Notice under section 199, sub-section 1 (ii) of the Law of Property Act, 1925.

Notice imputed through Solicitor or Agent.—The third condition in the enactment is, if "in *the same transaction*, with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."

This section restores the law as laid down by Lord Hardwicke in *Warrick* v. *W.* (*n*), restricting the effect of notice through counsel, agent, or solicitor, to notice in the same transaction.

In *Re Cousins* (*o*), Chitty, J., said that section 3 of the Conveyancing Act, 1882 (of which section 199, sub-section 1 (ii), of the Law of Property Act, 1925, is a reproduction), was intended to remedy the consequences of the doctrine illustrated by *Hargreaves* v. *Rothwell* (*p*), imputing notice "if there was such a distance only between the transactions as left the Court under the impression (it could not be much more than an impression) that the solicitor had actually remembered the former transaction, and in that way knowledge was imputed to the solicitor, and then through the solicitor notice was imputed to the client." The result of the enactment, as regards notice through a solicitor, is that (1) it must be in the same transaction, (2) the matter must come to his knowledge, and (3) must come to the knowledge of the solicitor as such (*q*).

(*l*) [1897] 2 Ch. 243; and see *Re Wigzell*, [1921] 2 K. B. 835.

(*m*) [1893] A. C. 282; and see *Rainford* v. *James Keith & Blackman Co., Ltd.*, [1905] 2 Ch. 147.

(*n*) 3 Atk. 291. And see *Fitzgerald* v. *Fauconberge*, Fitzgibb. 207; *Worsley* v. *Earl of Scarborough*, 3 Atk. 392; *Steed* v. *Whitaker*, Barn. Ch. 220; *Hine* v. *Dodd*, 2 Atk. 275; *Ashley* v. *Baillie*, 2 Ves. Sen. 368; *Lowther* v. *Carlton*, 2 Atk. 242; *Fuller* v. *Benett*, 2 Ha. 394; *Tylee* v. *Webb*, 6 B. 552; *S. C.*, 14 B. 14; *Finch* v. *Shaw*, 19 B. 500; 5 H. L. Cas. 905; *Re Smallman's Estate*, 2 Ir. Eq. 34.

(*o*) 31 Ch. D. 671, 676.

(*p*) 1 Keen, 154.

(*q*) *Re Cousins*, 31 Ch. D. 671; *Blackburn, Low & Co.* v. *Vigors*, 12 A. C. 531. Cf. *Wm. Pickersgill & Sons, Ltd.* v. *L. and P. Marine, etc. Co., Ltd*, [1912] 3 K. B. 614, a case decided on section 50, sub-section 2 of the Marine Insurance Act, 1906.

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The view has been expressed that if the solicitor for a purchaser or mortgagee is himself the vendor or mortgagor in the transaction, and has knowledge of some defect in the title, gained in some previous transaction, then notice of the defect will be imputed despite the section (*r*).

The cases in note (*s*) may be referred to as illustrating the doctrine of notice imputed through a solicitor; and for cases where the solicitor has been concerned for both vendor and purchaser see note (*t*); or has himself been the vendor (*u*), or has acted both for mortgagor and mortgagee (*x*).

The circumstance of only one solicitor acting in a transaction does not necessarily constitute him the solicitor of both parties, so as to affect one with notice of facts known to the other (*y*). The employment of a solicitor to do *a merely ministerial* act, such as the procuring the execution of a deed, does not constitute him solicitor to the party executing the deed so as to affect him with constructive knowledge of matters within the knowledge of the solicitor (*z*).

The relationship of solicitor and client must exist before notice can be imputed. Accordingly, if a mortgagee employs no solicitor and the mortgagor, himself a solicitor, prepares the mortgage deed, the mortgagee will not be affected with notice of facts known only to the solicitor or mortgagor (*a*). The mortgagee will, however, have notice of all facts which would have come to the knowledge of an independent solicitor acting for the mortgagee with due diligence (*b*).

(*r*) See Dart, Vendors and Purchasers (7th ed.), p. 899, and see *Re Weir*, 58 L. T. 792; but cf. *Bateman* v. *Hunt*, [1904] 2 K. B. 530, 540.

(*s*) *Sheldon* v. *Cox*, 2 Eden, 224; *Newstead* v. *Searles*, 1 Atk. 265; *Tunstall* v. *Trappes*, 3 Si. 301; *Dryden* v. *Frost*, 3 My. & C. 670; *Lenehan* v. *M'Cabe*, 2 Ir. Eq. R. 342; *Rickards* v. *Gledstanes*, 3 Gif. 298; *Atterbury* v. *Wallis*, 8 De G. M. & G. 454; *Vane* v. *V.*, L. R. 8 Ch. 383; *Bradley* v. *Riches*, 9 Ch. D. 189.

(*t*) *Sheldon* v. *Cox*, 2 Eden, 224; *Fuller* v. *Benett*, 2 Ha. 402; *M'Mahon* v. *M'Elroy*, 5 Ir. R. Eq. 1; *Walker* v. *Linom*, [1907] 2 Ch. 104.

(*u*) *Marjoribanks* v. *Hovenden*, 6 Ir. Eq. R. 238; Dru. 11; *Atkins* v. *Delmege*, 12 Ir. Eq. R. 1; *Twycross* v. *Moore*, 13 Ir. Eq. R. 250; *Robinson* v. *Briggs*, 1 Sm. & G. 188; *Tucker* v. *Henzill*, 4 Ir. Ch. R. 513; *Spencer* v. *Topham*, 2 Jur. (N.S.) 865; *Re Rorke*, 13 Ir. Ch. R. 273; 14 Ir. Ch. R. 442.

(*x*) *Tweedale* v. *T.*, 23 B. 341; *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632; *Walker* v. *Linom*, [1907] 2 Ch. 104.

(*y*) *Perry* v. *Hall*, 2 De G. F. & J. 38, 53.

(*z*) *Wyllie* v. *Pollen*, 3 De G. J. & S. 596; 32 L. J. Ch. 782.

(*a*) *Espin* v. *Pemberton*, 4 Drew. 333; 3 De G. & J. 547; see *Thorne* v. *Cann*, [1895] A. C. 11.

(*b*) See, *e.g.*, *Atterbury* v. *Wallis*, 8 De G. M. & G. 454; cf. *Taylor* v. *London & County Bank*, [1901] 2 Ch. 231; *Bateman* v. *Hunt*, [1904] 2 K. B. 530, 540.

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Notice to a solicitor in the country is notice to a person acting in a cause by his town agent (*c*). In the case of *Toulmin* v. *Steere* (*d*) (which on the question of merger has been often questioned) Grant, M.R., said no difference would be made if the sale were made to infants, and referring to the principal case of *Le Neve* v. *Le N.*, said that in it the interest of unborn children was not attempted to be distinguished from that of the mother. Notice will be imputed where the relationship of principal and agent arises through ratification of a transaction. Thus in *Coote* v. *Mammon* (*e*), it was held that where A having notice of an incumbrance purchases in the name of B and then agrees that B shall be the purchaser, and B accordingly pays the purchase-money without notice of the incumbrance, though B did not employ A, nor know anything of the purchase till after it was made, yet B, approving of it afterwards, made A his agent *ab initio*, and therefore B was affected with the notice of A.

And where moneys which formed part of a larger sum placed by a client in the hands of his solicitor for the purposes of investment, were lent by him on the security of a mortgage in which he had affected to act as principal, the client was held to be bound by the notice of all the circumstances which came within the solicitor's knowledge (*f*). The knowledge must be *material* to the transaction, and such as it was the duty of the agent to communicate. In *Wyllie* v. *Pollen* (*g*), it was held by Westbury, C., that the transferee of a mortgage would not be affected by the knowledge of the solicitor acting for him in the transfer of an incumbrance subsequent to the original mortgage, so as to prevent him from making further advances, such knowledge not being material to the business of the transfer.

Notice to a director is not necessarily notice to the company of which he is director (*h*). The mere fact of two companies having the same solicitor, or same directors, does not affect each company with notice of everything that is done by the other (*i*).

(*c*) *Norris* v. *Le Neve*, 3 Atk. 26.

(*d*) 3 Mer. 210.

(*e*) 5 Bro. P. C. 355.

(*f*) *Spaight* v. *Cowne*, 1 Hem. & M. 359; cf. *Bateman* v. *Hunt*, [1904] 2 K. B. 530.

(*g*) 3 De G. J. & S. 596; 32 L. J. Ch. 782.

(*h*) *Peruvian Railways Co.* v. *Thames, etc. Insurance Co.*, L. R. 2 Ch. 617.

(*i*) *Re Marseilles Extension Ry. Co.*, L. R. 7 Ch. 161; and see as to cases where actual disclosure would have involved disclosure of fraud of a sole director, *Re European Bank*, L. R. 5 Ch. 358; or of a common body of directors, *Lagunas*

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In *Re Hampshire Land Co., Limited* (*k*), the question was whether constructive notice arose in consequence of the same person being common officer of a lending and a borrowing company in the case of a mortgage, and the test was said to be : " (1) was it within the scope of the duty of one company's officer to give notice to the other; (2) was it within the scope of his duty as the officer of the other company to receive such notice." It was decided that it was not within the scope of such duty, and that the lending company had no notice that the borrowing company had no authority to accept the loan, the resolution authorising it not having been duly passed. In this case the lending society had no notice of the irregularity, unless it could be imputed to the society from the fact that a person who was its managing director was secretary to the borrowing company (*l*).

Persons dealing with companies are entitled to assume that all acts of internal management have been properly done. Lord Halsbury, in *County of Gloucester Bank* v. *Rudry, etc.* (*m*), after referring to *The Royal British Bank* v. *Turquand* (*n*), and *Mahony* v. *East Holyford Mining Co.* (*o*), said : " Persons dealing with joint stock companies are bound to look at, what one may call, the outside position of the company (that is to say), they must see that the acts which the company is purporting to do are within the general authority of the company; and if those public documents, which every one has a right to refer to, disclose an infirmity in their action, they take the consequences of dealing with a joint stock company which has apparently exceeded its authority. . . . An outside person, not knowing the internal regulations, when he found a document sealed with the common seal of the company, and attested and signed by two of the directors and secretary, was entitled to assume that that was the mode in which the company was authorised to execute an instrument of that description. It turns out that their own internal regulation was that the

Nitrate Co. v. *Lagunas Syndicate*, [1899] 2 Ch. 431; cf. *Gluckstein* v. *Barnes*, [1900] A. C. 240.

(*k*) [1893] 2 Ch. 743; 75 L. T. 181; *Re Fenwick, Stobart & Co.*, [1902] 1 Ch. 507; *Re Payne & Co., Ltd.*, [1904] 2 Ch. 608.

(*l*) And see *Peruvian Rys. Co.* v. *Thames, etc., Insurance Co.*, L. R. 2 Ch. 617; *Re Carew's Estate Act*, 31 B. 39; *Re Ebbw Vale Co.'s Claim*, 8 Eq. 14; *Hardy* v. *Metropolitan Land Co.*, 12 Eq. 386; L. R. 7 Ch. 427; *Montreal, etc., Co.* v. *Robert*, [1906] A. C. 196.

(*m*) [1895] 1 Ch. 629, 633; and see *Re Romford Canal Co.*, 24 Ch. D. 85; *Dey* v. *Pullinger Engineering Co.*, [1921] 1 K. B. 77.

(*n*) 6 E. & B. 327.

(*o*) L. R. 7 H. L. 869.

number of directors should exceed two. But that is a matter which was known to them and to them alone."

It has been held that the *imputed* knowledge of the client through the solicitor, cannot be rebutted by evidence that the solicitor did not communicate his knowledge. In *Bradley* v. *Riches* (*p*), Fry, J., said : "The knowledge of the agent is the *imputed* knowledge of the client. It appears to me clear that that presumption or imputation is a thing which the client cannot be allowed to rebut. If it could be rebutted, it was amply rebutted in *Le Neve* v. *Le N.* If it could be rebutted, the language of Lord Hatherley, in *Rolland* v. *Hart* (*q*), could not be upheld." In *Espin* v. *Pemberton* (*r*), Lord Chelmsford said : "Notice which affects a principal through a solicitor does not depend upon whether it is communicated to him or not. If a person employs a solicitor, who either knows or has imparted to him in the course of his employment some fact which affects the transaction, the principal is bound by the fact, whether it is communicated to or concealed from him."

The rule above referred to, that it is not open to the client to rebut the imputation of knowledge which his solicitor possesses applies in certain cases even where the solicitor is guilty of a fraud.

In *Vane* v. *V.* (*s*) it was held that the doctrine that what the agent knows the principal knows, was so well established that a purchaser for value, though he had not personal knowledge of a fraud, was affected by the knowledge of his agent, as his *alter ego*, in such a sense that he could not protect himself under the words of the saving in section 26 of the Real Property Limitation Act, 1833 (*t*), as "a *bona fide* purchaser for value who at the time of the purchase did not know, and had no reason to believe, that any such fraud had been committed."

Qualification in case of Fraud of Solicitor or Agent.—Where fraud is effected by the transaction in which it is attempted to impute notice through the solicitor to the client there is more difficulty. A leading case is *Kennedy* v. *Green* (*u*), where

(*p*) 9 Ch. D. 196, 197; and see *Kettlewell* v. *Watson*, 21 Ch. D. 704, 707; *Boursot* v. *Savage*, 2 Eq. 141, 142.

(*q*) L. R. 6 Ch. 678.

(*r*) 3 De G. & J. 547.

(*s*) L. R. 8 Ch. 383.

(*t*) 3 & 4 Will. 4, c. 27.

(*u*) 3 My. & K. 699. See *Taylor* v. *London & County Banking Co.*, [1901] 2 Ch. 231; and cf. *Dixon* v. *Winch*, [1900] 1 Ch. 736.

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Brougham, L.C., held that since the solicitor in the transaction in question was practising a fraud on the client, the client was not affected with constructive notice, either of the fraud practised upon him, or of a previous fraud by the solicitor on another client, in obtaining a deed of assignment of a mortgage without consideration. But as regards this previous fraud, the Lord Chancellor held that, though prior to, it was in effect part of, and for the purpose of committing the fraud in, the second transaction. The Lord Chancellor, however, held the client affected with notice that the consideration had not been paid, on the ground that the deed and the indorsed receipt thereon were drawn in a peculiar form. An examination of the deed by an independent solicitor would at once have shown the suspicious character of the transaction.

In the case of *Rolland* v. *Hart* (*x*), the fraud consisted in the non-communication by the solicitor of a previous deed, and Hatherley, C., held that notice must be imputed to the client, for that in order to apply the rule of *Kennedy* v. *Green*, excluding notice, "it must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him."

In *Boursot* v. *Savage* (*y*), A, a solicitor, acting for himself and a purchaser, executed an assignment of leaseholds held by him on trust with two co-trustees, and forged their signatures and the assent of the *cestui que trust*. Kindersley, V.-C., held that the purchaser through the solicitor had notice of the trust: "It is the existence of the trust, and not of the fraud, of which he is held to have constructive notice." In *Dixon* v. *Winch* (*z*), the defendant mortgaged in fee to his solicitor D, who transferred his mortgage to E, who did not give notice of the transfer to the defendant. Subsequently D and the defendant sold the fee to the plaintiff, D acting for all parties, and the deed of conveyance falsely reciting that D was entitled in fee free from incumbrances, and had recently agreed to sell the property to the defendant. D paid himself the amount of the mortgage and interest out of the

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(*x*) L. R. 6 Ch. 678; see p. 682. See also *Willis* v. *Greenhill*, 29 B. 387; and *per* Fry, J., in *Kettlewell* v. *Watson*, 21 Ch. D. 685; 26 Ch. D. 502.

(*y*) 2 Eq. 134. This case is apparently not of authority since the L. P. Act, 1925, s. 199, sub-s. 1 (ii), re-enacting the C. A., 1882, s. 3, in so far as it decided that the purchaser had notice of the trust; see *Taylor* v. *London & County Bank*, [1901] 2 Ch., p. 259.

(*z*) [1900] 1 Ch. 736, affirming the decision of Cozens-Hardy, J., but on different grounds.

purchase-money; the defendant did not ask for the mortgage deed, but trusted D blindly. The Court of Appeal held that the defendant having placed himself entirely in the hands of D, had constructive notice of the transfer, and that in consequence the mortgage remained unpaid. The transferee was therefore entitled to priority over the plaintiff, whom the defendant was bound to indemnify. The decision appears to rest upon the fact that the defendant had placed himself entirely in the hands of D (*a*).

In the case of *Sharpe* v. *Foy* (*b*), a solicitor acted both for a husband and wife seeking to mortgage the wife's fee simple (which was in fact caught by a covenant to settle) and also for the intending mortgagee. The solicitor had notice from the mortgagors of the covenant, and told the mortgagors that he would not disclose it to the mortgagee. It was held that the mortgagee was not affected with constructive notice of the covenant. Lord Hatherley says (p. 40): "When he gave the answer it was the duty of Foy and his wife to go further, and communicate with the client himself; and the Court can only treat their not doing so as a conspiracy with Clark (the solicitor) against his client. It would be an encouragement of fraud to apply the rules of notice, which were established for the safety of mankind, to a transaction like this; it would be sanctioning a scheme to rob a man by colluding with his solicitor."

In *Ogilvie* v. *Jeaffreson* (*c*), Stuart, V.-C., observed that "since the case of *Kennedy* v. *Green* it has become usual to treat such cases as depending on the question of negligence, rather than on the doctrine of implied notice to the purchaser by reason of his employing the same solicitor who had practised the original fraud."

In *Espin* v. *Pemberton* (*d*), Chelmsford, C., referring to *Kennedy* v. *Green*, *supra*, says: "The presumption of non-communication does not seem to be the proper principle to apply. I would rather say that the commission of the fraud broke off the

(*a*) Cf. *Taylor* v. *London & County Bank*, [1901] 2 Ch. 231; *Berwick* v. *Price*, [1905] 1 Ch. 632.

(*b*) L. R. 4 Ch. 35.

(*c*) 2 Gif. 353, see p. 376; and see *Jones* v. *Smith*, 1 Ph. 256, *Hunt* v. *Elmes*, 2 De G. F. & J. 578; 27 B. 62; *Neesom* v. *Clarkson*, 2 Ha. 163; *Hiorns* v. *Holtom*, 16 B. 259; *Greenslade* v. *Dare*, 20 B. 284, 291; *Spencer* v. *Topham*, 2 Jur. (N.S.) 865; *Thompson* v. *Cartwright*, 33 B. 178; 2 De G. J. & S. 10; *Re European Bank*, L. R. 5 Ch. 358; *Sankey* v. *Alexander*, 9 Ir. R. Eq. 259; *Waldy* v. *Gray*, 20 Eq. 238; *Cave* v. *C.*, 15 Ch. D. 639; *Re Lord Southampton's Estate*, 16 Ch. D. 178; *Agra Bank* v. *Barry*, L. R. 7 H. L. 149.

(*d*) 3 De G. & J. 555.

relation of principal and agent, or was beyond the scope of the authority, and therefore it prevented the possibility of imputing the knowledge of the agent to the principal." Fry, J., in *Cave* v. *C.* (*e*), points out that the exception in the case of fraud has been put in two ways: in *Thompson* v. *Cartwright* (*f*) on the ground that circumstances raised the inevitable conclusion that the notice had not been communicated; and by Lord Chelmsford in *Espin* v. *Pemberton* (*g*), and Lord Hatherley in *Rolland* v. *Hart* (*h*), because "the act done by the agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent."

The result would seem to be that the test whether the imputation of notice through a solicitor is to be excluded by reason of the fraud of the solicitor would seem to depend upon whether the fraud was such as to exclude the doctrine of agency; and even if the fraud were of this nature, notice would nevertheless be imputed of anything which an independent solicitor would have discovered from the documents which he would have seen.

7. Some Miscellaneous Cases.

Statutes.—A public Act of Parliament is of itself full notice, but not a private Act (*i*), nor, it seems, a private Act made a public one (*k*).

Bankruptcy.—As to notice of act of bankruptcy see (*l*), or commission of bankruptcy under the old law (*m*).

With regard to the protection given by the Bankruptcy Act in certain cases to persons dealing with bankrupts, without notice of any available act of bankruptcy, see the Bankruptcy Act, 1914, s. 45, replacing section 49 of the Act of 1883 (*n*).

(*e*) 15 Ch. D. 639. (*f*) 33 B. 178.

(*g*) 3 De G. & J. 555.

(*h*) L. R. 6 Ch. 678. See *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632.

(*i*) *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. Sen. 480.

(*k*) *Hesse* v. *Stevenson*, 3 Bos. & P. 565, 578; *Att.-Gen.* v. *Marrett*, 10 Ir. R. Eq. 167.

(*l*) *Wilkes* v. *Bodington*, 2 Vern. 599; *Collet* v. *De Gols*, Cas. t. Talb. 65; *Ex p. Knott*, 11 V. 609; but see *Latouche* v. *Dunsany*, 1 Sch. & L. 152; *Ex p. Herbert*, 13 V. 183.

(*m*) *Hitchcock* v. *Sedgwick*, 2 Vern. 156; reversed Dom. Proc., House of Lords Journal, vol. 14, p. 601; 3 My. & K. 591; *Sowerby* v. *Brooks*, 4 B. & Ald. 523; *Re Barr's Trusts*, 4 K. & J. 219.

(*n*) See *Re Seaman*, [1896] 1 Q. B. 412; *Re Badham*, 10 Morr. 252; *Re Jukes*,

8. Notice in case of Land in a Register County.

As regards land in a register county it was long since settled that the registered deed alone would be treated as valid in law, and that the legal estate would pass by it although in equity it might be postponed. Lord Hardwicke says in the principal case : " The enacting clause says that every such deed shall be void against any subsequent purchaser or mortgagee unless a memorial thereof be registered, etc., that is, it gives him the legal estate; but it does not say that such subsequent purchaser is not left open to any equity which a prior purchaser or incumbrancer may have." In *Doe* v. *Allsop* (*o*), where two assignments of a leasehold in Middlesex were executed and that executed last was registered first, it was held that the legal estate passed by the deed last executed and that the deed first executed and last registered must be treated as void in law, although the party claiming thereunder might be on the ground of notice entitled to relief in equity. It had, however, been decided before the decision in the principal case and within a short time after the passing of the Middlesex Registry Act that equity would give relief on the ground of notice (*p*).

It was held in *Greaves* v. *Tofield* (*pp*), that an annuity deed not registered under 18 & 19 Vict. c. 15, s. 12, had priority in equity over a purchaser or mortgagee from the grantor having notice of the annuity, on the ground that the words of that Act were similar to those in the Middlesex Registry Act and that the principle of *Le Neve* v. *Le N.* was applicable (*q*).

Limitations on Constructive Notice in a Register County.— In some of the cases on the Middlesex Registry Acts a purchaser or mortgagee taking a registered conveyance has been postponed to a prior unregistered charge or judgment by reason of what is called " constructive " notice, not meaning thereby constructive in the sense in which that word is applied to notice through a solicitor or agent, but meaning notice implied from neglect to make inquiries as to title, or as to suspicious facts, or to require explanation of the

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ex p. Official Receiver, [1902] 2 K. B. 58; *Re Slobodinsky, ex p. Moore*, [1903] 2 K. B. 517; *Re Dunkley, ex p. Waller*, [1905] 2 K. B. 683; *Re Sharp*, 83 L. T. 416 *The Ruby, ibid.*, 438; and *Ward* v. *Fry*, 85 L. T. 438.

(*o*) 5 B. & Ald. 142.

(*p*) *Forbes* v. *Denniston*, 4 Bro. P. C. 189; *Blades* v. *B.*, 1 Eq. Ca. Abr. 358, pl. 12; *Chivall* v. *Nicholls*, 1 Strange, 664; *Sheldon* v. *Cox*, Amb. 624.

(*pp*) 14 Ch. D. 563.

(*q*) See *Bradley* v. *Riches*, 9 Ch. D. 189; *Re Weir*, 58 L. T. 792.

non-production of deeds, which would be sufficient in ordinary cases to put a purchaser on inquiry (*r*).

The Middlesex Act only makes unregistered deeds void as against purchasers for value, and section 14 of the Yorkshire Registry Act of 1884 in effect enacts that the Act is not to confer priority on a person claiming without valuable consideration.

By the Law of Property Act, 1925, s. 11, sub-s. 1, it is provided that it shall not be necessary to register a memorial of any instrument made after the commencement of the Act in any local deeds registry, unless the instrument operates to transfer or create a legal estate, or to create a charge thereon by way of legal mortgage, nor will the registration of any instrument not required to be registered affect any priority. Section 197, sub-section 1 provides that the registration in a local deeds registry of an instrument transferring or creating a legal estate or charge by way of legal mortgage, is to be deemed to constitute actual notice of the transfer or creation of the legal estate or charge to all persons and for all purposes, so long as the registration continues in force. And section 197, sub-section 2 provides that the registration of a memorial of an instrument not required to be registered does not operate to give notice of such instrument or of its contents.

By section 10, sub-section 6 of the Land Charges Act, 1925, as amended by the Act of 1926, in the case of a general equitable charge, restrictive covenant, equitable easement or estate contract affecting land within any of the three ridings, registration is to be effected in the local deeds registry in place of the registry under the Land Charges Act, 1925, and is to have effect as if the land charge created by the document had been registered under the Land Charges Act, 1925. Section 18 of the Land Charges Act, 1925, provides that it is not necessary to register in the Middlesex registry any land charge (except a puisne mortgage) of Class B, Class C or Class D created or made after the commencement of the Act, which is or was capable of registration under the Land Charges Act, 1925, or any enactment replaced by that Act. Section 13, sub-section 2 of the Land Charges Act, 1925, provides that a land charge of Class B, Class C or Class D, created after the commencement of the Act, is to be void as against a purchaser of the land charged, unless the land charge is registered in the

(*r*) See *Martinez* v. *Cooper*, 2 Russ. 198; *Rochard* v. *Fulton*, 1 Jo. & Lat. 413; *Wormald* v. *Maitland*, 35 L. J. Ch. 69; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

appropriate register before completion of the purchase. But, as respects a charge of Class D and an estate contract created after the Act, this provision only applies in favour of a purchaser. By section 198, sub-section 1 of the Law of Property Act, 1925, the registration of any instrument under the Land Charges Act, 1925, or any enactment which it replaces, is to be deemed to constitute actual notice to all persons and for all purposes, so long as the registration continues in force. By section 199, sub-section 1 of the Law of Property Act, 1925, a purchaser is not to be prejudicially affected by notice of any instrument capable of registration under the Land Charges Act, 1925, or any enactment it replaces, which is void or not enforceable against him under that Act or enactment, by reason of the non-registration thereof.

9. Notice under Land Registration Act, 1925.

The question how far a transferee taking from a registered proprietor was affected by notice of equitable rights not disclosed by the register was (prior to 1926) one of considerable doubt and difficulty.

Section 5 of the Land Registration Act, 1925, provides that where registered land is a freehold estate, the registration of a person as first proprietor with an absolute title will vest in such person an estate in fee simple in possession, subject (1) to the incumbrances appearing on the register, and (2), unless the contrary is expressed on the register, subject to such overriding interests as affect the land, and (3) where the first proprietor is not entitled for his own benefit, subject (as between himself and the persons entitled to minor interests (*s*)) to any minor interests of such persons of which he has notice, but free from all other estates and interests whatsoever. By section 6, where the registered land is freehold, the registration of a person as first proprietor with a possessory title is not to affect any estate or interest adverse to the title of the first proprietor, subsisting or capable of arising at the time of the registration of that proprietor, but save as aforesaid it is to have the same effect as the registration of a person with an absolute title. And by section 7, where on the application for registration with an absolute title, it appears to the Registrar that the title can only be established subject to certain reservations, he may, by entry in the register, except from the effect of registration any estate or interest arising before a specified date, or

(*s*) Defined by section 3 (xv) of the L. R. Act, 1925.

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arising under a specified instrument, or otherwise described in the register.

Section 74 of the Land Registration Act, 1925 (taking the place of the amendment made by the Land Transfer Act, 1897, to section 83, sub-section 1 of the Land Transfer Act, 1875), provides that : " Subject to the provisions of this Act as to settled land (*t*), neither the Registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust, express, implied, or constructive, and references to trusts shall, so far as possible, be excluded from the register."

Section 59, sub-section 1 provides that writs, orders, etc., which in the case of unregistered land may be protected by registration under the Land Charges Act, 1925, are to be protected, where the land is registered, by lodging a creditor's notice, a bankruptcy inhibition or a caution; and registration of a land charge (other than a local land charge), where the land is registered, is to be effected by registering a notice, caution, or other prescribed entry (sub-section 2). This provision (by sub-section 5) is not to apply to a puisne mortgage (*u*). Sub-section 6 contains the important enactment that subject to the provisions of the Act relating to fraud (*x*), or to the title of a trustee in bankruptcy (*y*), a person acquiring title under a registered disposition is not to be concerned with any pending action, order, matter or claim (not being an overriding interest) which is not protected by a caution or other entry on the register, whether he has or has not notice thereof.

Section 114 of the Land Registration Act, 1925 (reproducing section 98 of the Land Transfer Act, 1875), provides for cases of fraud, but is so qualified that a transfer for value by a proprietor who has obtained registration by fraud, would confer, apparently, a good title whether or not the transferee had notice of the fraud (*z*). It is in the following terms :—

> " 114. Subject to the provisions in this Act contained with respect to indemnity *and to registered dispositions for valuable consideration,* any disposition of land or of a charge, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

(*t*) See Part VIII of the Act.
(*u*) See L. C. Act, 1925, s. 10, sub-s. 1, class C (i).
(*x*) See *infra*.
(*y*) See sections 42—45 of L. R. Act, 1925.
(*z*) See Brickdale and Stewart-Wallace (3rd ed.), p. 328.

PENALTIES AND FORFEITURES.

SIR HARRY PEACHY *v.* THE DUKE OF SOMERSET.

1724. 1 Stra. 447 (*a*).

Penalties and Forfeitures.

No relief against a voluntary forfeiture of copyhold estate, as by making a lease without licence from the lord. But it is otherwise where the forfeiture was only intended by way of security for sums due, as of a fine or rent; for there, upon payment of what is due with interest, equity will relieve.

Quære, whether working a quarry in a copyhold which had been first opened on the freehold, or lopping trees, or grubbing up hedges are legal forfeitures of a copyholder's estate.

The plaintiff brought his bill to be relieved against a forfeiture of his copyhold, by making leases contrary to the custom of the manor, without licence of the lord, felling timber, digging stones, and grubbing up hedges; offering to make a recompense. And on the pleadings, the case was this:—Sir Harry, being seised of a copyhold estate of inheritance of £90 per annum, held of the manor of Petworth, of which the Duke of Somerset is lord, made a lease of part of it for seven years, without licence, at £13 per annum. The Duke, upon this, brings an ejectment against all the plaintiff's copyhold, which occasioned the plaintiff to bring a bill in his own and his infant son's name, for relief. The Duke, in his answer, insisting on other causes of forfeiture besides the making the lease without licence, Sir Harry brought a supplemental bill of discovery and relief against those other forfeitures. Upon the plaintiff's giving judgment in

(*a*) *S. C.*, Pr. Ch. 568; 2 Eq. Ca. Abr. 227, 228, pl. 9 and 10.

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ejectment, subject to the order of the Court, an injunction was granted; and now, upon the hearing, the case came out to be this:—

Upon Sir Harry's marriage, in 1693, all the copyhold lands were surrendered to the use of Sir Harry for life, with remainder to the first and every other son in tail male, in pursuance of an agreement before marriage for that purpose; but no admittance was ever taken upon that surrender. Before Sir Harry came into possession, there had been a quarry of stone in the freehold adjoining to the copyhold, and during Sir Harry's time it was worked in the copyhold; but whether it was first opened in the copyhold in the plaintiff's time did not appear. The avenue to the plaintiff's house, which consisted both of freehold and copyhold, was planted with timber trees by the plaintiff's father. The plaintiff had topped the trees that were on the copyhold part of the avenue, by which, from timber, they were become pollards. There were several hedges and boundaries of lands upon the copyhold, which the plaintiff had grubbed up and destroyed: but whether they are boundaries between copyhold and freehold, or only between one part and another of the copyhold, did not appear. And in the year 1714, the plaintiff, as before mentioned, let part of the copyhold for seven years, without licence, or any custom of the manor to warrant it.

Upon this it came in question, whether any and which of these several acts are forfeitures at law: and if so, whether any and which of them are relievable in equity; and if not, whether the son's case is to be distinguished from the father's.

1. Whether these are forfeitures at law. Which were of four sorts: the digging the quarry, the topping the timber trees, the destroying the boundaries, and making the lease without licence.

As to the quarry, the plaintiff's counsel insisted, it was opened even upon the copyhold in his father's time, and so purged by the admittance; and his digging it since was but like the case of a lessee, who may dig quarries and mines that were open at the time of his lease, though he cannot open any new ones.

As to the topping of timber trees, which the plaintiff insisted was done only for the uniformity of his walk, and without design

to injure the lord, it was answered, that it was voluntary waste, and the motives for doing it are not material to the lord.

As to the destroying of the fences, a case was cited out of Litt. Rep. 264, etc., where grubbing up the fences and removing the boundaries upon copyholds were held to be forfeitures, without distinguishing between the outward boundaries and those within the copyhold, as it tends to the destroying of the evidence relating to the lord's interest in the estate; and it was said, it is on this foundation laid down, 1 Inst. 53, that though a tenant might cut down wood to repair fences as he found them, yet not to make new fences.

As to the making of the lease without licence, it was acknowledged on all sides to be a forfeiture at law.

2. The next question was, whether, supposing all these to be forfeitures, relief was proper in this Court, either upon the general case of this sort of forfeitures, or any particular equitable circumstances that may be in the present case.

For the particular equitable circumstances of this case, one was, that the steward's deputy engrossed and was a witness to the lease. This was compared to the lord's being privy to or witness to such lease, which would be held in equity as a permission, a kind of licence; and it has been held, that licence granted by a deputy steward was good. But answered, that this rather aggravated the injury, by making the lord's servant a party in the confederacy to injure him.

Another circumstance was the plaintiff's not having notice of this custom. But this is not material, for the tenant comes in under the customs of the manor, and is bound to take notice of them; and besides, this is common law.

But if those circumstances were not sufficient to ground a relief upon, whether the general nature of those forfeitures will not admit of relief.

In favour of the plaintiff it was argued, that it was a sort of maxim that all forfeitures were odious. That copyholds are now become a more fixed and established estate than they were formerly, and the law itself has been altering these hundred years very much in their favour, and therefore a Court of equity

ought to go as much in their favour, to keep them out of that vassalage and subjection which the original nature of their estates laid them under, which their present fixed condition seems inconsistent with. That forfeitures were intended to secure the lord's rents and services, and therefore very proper for a Court of equity to interpose and prevent his having more than that security. And this is agreeable to the common cases of relief against the penalty of a bond, and upon mortgage, and conditions of re-entry on non-payment of rent, and *nomine pœnæ*, in which cases this Court will not allow the parties to take any other advantage of the forfeitures, than what is necessary to satisfy the original intent of the agreement. The law has annexed these conditions in the cases of copyholds (? to the estate) instead of the parties; but as it had something else in view by them than the gaining the land to the lord, this Court may make amends to the lord, and fulfil the design of the law, and save the estate to the party. In the case of making a lease without licence, the intent of the law in making that forfeiture is to prevent the lord's being disinherited of his interest in the copyhold, and to secure the fine due on a licence; both of which may easily be secured, by obliging the tenant either to accept a licence or make surrender and admittance and pay the fine; which will be a compleat recompence for any injury the lord may have suffered; and then it comes within the common rule, that this Court will relieve against forfeitures, whenever a compleat satisfaction can be made for the injury which is the cause of forfeiture. Several cases were cited: *Shelley* v. *Mason* (*b*), in Lord Coventry's time; *Cox* v. *Hickford* (*c*), *Rowland* v. *Dean of Exon; Nash* v. *Lord Derby* (*d*), *Cudmore* v. *Raven* (*e*), *Cox* v. *Brown* (*f*), *Thomas* v. *Porter* (*g*).

If it is a difficult matter to ascertain damages in any of these cases, it is because there is really no damage; and surely it is no reason against relief, that the person who seeks it has done no injury.

(*b*) (5 Car. 1), 6 Vin. Abr. 114.
(*c*) 2 Vern. 664.
(*d*) 2 Vern. 537.
(*e*) Cited 2 Vern. 664; 6 Vin. Abr. 114.
(*f*) 1 Ch. R. 170.
(*g*) 1 Ch. Ca. 95; 1 Eq. Ca. Abr. 121, pl. 18.

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For the defendant, these distinctions, as to relief against forfeiture, were insisted on:—Whether the forfeiture was for nonfeasance or malfeasance. Whether the condition was annexed by law or the party. Whether there were any particular circumstances of equity or not.

As to the difference between nonfeasance and malfeasance, as where a tenant refuses to pay a fine upon admittance, this Court will relieve on doing that which he ought to have done. The difference is only as to the circumstance of time, which this Court easily supplies. So where there is only permissive waste, the Court has relieved; but if by obstinate refusal this forfeiture is aggravated, the Court will look upon it as voluntary waste, and not grant relief, as in the case before cited of *Cox* v. *Hickford*.

All the instances of forfeiture in the present case are of voluntary acts. One is of making a lease without licence, which is a disseisin of the lord (*h*) and an attempt to disinherit him. The others are all voluntary wastes.

The next distinction is between conditions in law and by the party. The intention of the parties is easy to be discovered, and you answer the end of the contract, if you give them everything they expected, which may in many cases be easily done. This is the case of all mortgages, conditions of re-entry on nonpayment of rent, etc. But even in conditions of the parties, where the ascertaining the damage is not plain and clear, the Court will not relieve against such conditions or penalties. It was never known that this Court relieved against a *nomine pœnæ* for ploughing up ancient meadow. It was denied in the Duchy of Lancaster: *Eyre* v. *Hatton*.

But in cases of forfeiture on conditions in law this Court seldom relieves. If tenant for life makes a feoffment, or levies a fine *sur conusance de droit come ceo*, etc., it was never pretended this forfeiture could be relieved in equity. Or if the reversioner brings waste on the statute for recovery of the place wasted, equity would not interpose. Those conditions in law are a sort of limitation of the estate of the party, and though the intent of the party is never so plain, equity will not alter the legal con-

(*h*) 4 Co. 21 b

struction of the words: as where by will one gives an estate to A for life, remainder to the heirs male of A, equity will not give the son of A a remainder, and confine A's to a life estate, though the intent was plainly so.

But though this is generally the state of forfeitures, yet there may be some circumstances of equity to ground relief upon; and wherever the Court has granted relief, it is upon some such circumstances, as where the party who is to take advantage of the condition is himself the means of its being broke. It was said by Lord Somers in the case of *Bertie* v. *Falkland* (*i*) that conditions precedent are not relievable, unless some indirect means be used by the party to prevent the performance. So in the case of *Hamond* v. *Ainge*, before the present Chancellor, where a lord of a manor tells one that had a freehold held of his manor that it was copyhold and he must be admitted by copy of Court roll, and pay a fine: the lord was in this Court obliged to erase the admittance and pay the fine.

The third question related to the infant plaintiff, whether he was in any better condition than the father.

(The arguments on this question are omitted.)

Lord Chancellor Macclesfield.—This is a point of so great consequence, that if relief could be given in this Court, it is strange it should not have been found out long ago. The forfeitures in those cases arise purely from the imbecility of the copyholder's estate. He was originally merely tenant at will, and is so still on all accounts but as to the continuance of his estate. There have been, indeed, very favourable constructions for the copyholder in that particular, because he is called tenant at will, *secundum consuetudinem manerii*; it has been held, the lord cannot determine his will but according to that custom. The true meaning of those words *secundum consuetudinem manerii*, was not to bound the lord's pleasure in the determination of his will, but that the tenant, as long as he continued tenant, was to hold his land under those terms and conditions which the custom had established.

These matters, which are mentioned as forfeitures, are

(*i*) 3 Ch. Ca. 129, 134; Salk. 231.

indeed limitations of the estate; such as determined it when they happen. Tenant for life making a greater estate than his own, gives up or surrenders the right he had before, and yet he does no damage to the remainderman. So, tenant by copy, taking upon him to make a greater estate than by law he may, and contrary to the nature of his estate, does by that determine his estate; the law has made it so; and what is there in this case to ground relief upon, and require me to set aside the law?

It is a hard law, and therefore the party must not be subject to it; but is not this directly repealing the law?

In an action of waste for recovery of the place wasted, it is certain and admitted this Court cannot relieve; and yet this may be called a very unconscionable thing. But is it so to take advantage of a law which is known and equal to all? Nor can I see any difference, whether the statutes make this condition or the common law makes it.

It is not sufficient to say, here is no damage in this case, and therefore it is there can be no recompense given by this Court; for it is the recompense that gives this Court a handle to grant relief.

The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired; but it is quite otherwise in the present case. These penalties or forfeitures were never intended by way of compensation, for there can be none.

But even in the case of copyholds there are some cases of forfeitures intended for a different purpose; as for non-payment of rent or fines; which are only by way of security of the rent or fine; and, therefore, when these are paid afterwards, with interest, the money itself is paid according to the intent, only as to the circumstance of time; which is the true foundation of the relief which this Court gives in those cases.

Cases of agreements and conditions of the party and of the law are certainly to be distinguished. You can never say the law has determined hardly, but you may that the party has made a hard bargain.

Thus it stands on the general state of these kind of forfeitures.

But what equitable circumstances are there peculiar to this case? It is certain there may be circumstances which may make it fit and equitable for this Court to relieve, either in these cases or in actions on the Statute of Waste. If the lord should give the tenant encouragement, by *parol* only, to pull down a messuage, and he did it accordingly, this might induce the Court to prevent the lord's taking advantage of a fraudulent act of his own. In the present case, if the lord had been present at the making of the lease, and advised it, relief might be reasonable; but the steward's standing by, or even engrossing the lease, is rather a circumstance against relief, as it looks like a confederacy to cheat the lord, and break the customs of the manor.

As to the other cases of forfeiture relating to the quarry, the topping of the trees, and the destroying of the boundaries, there does not enough appear to determine whether they are legal forfeitures or not (*k*); but if they are, I think they are all, as the making of the lease under the same consideration in this Court, and not proper for relief.

As to the infant, his case does not seem as yet ripe for this Court; but it may be a question how far his equitable interest will entitle him to be secured against these forfeitures (*l*).

I am apprehensive the lord must always have such a tenant upon his lands as may be sufficient to answer all demands, and capable of committing forfeitures.

Suppose one lets a trustee be admitted for him, who commits a forfeiture; no doubt the estate would be forfeited, and the *cestui que trust* would have no equity against the lord.

The person who is the legal tenant is subject, with regard to that estate, to all the imbecilities of that estate; if not, by the means of a trust, a copyhold would be entirely discharged from all those imperfections it labours under, and the lord's interest be taken away; for the lord can take advantage of nobody's acts but those of his tenant. He is not at all concerned with the private agreements or trusts of the parties.

(*k*) See *Dearden* v. *Evans*, 5 M. & W. 11.

(*l*) In the report in Precs. Ch. 573, the Chancellor is said to have been clear that as there had been no admittance upon the surrender to the uses of the settlement of 1693, the father was to be considered as absolute tenant to the Duke.

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In the present case suppose Sir Harry admitted according to the surrender, the infant is then tenant in remainder, and the father's act cannot prejudice the son, who is now admitted as a distinct tenant. But till admittance the son is no tenant; and suppose, when he comes of age, he should release to his father, there would be no occasion for any admittance at all, but Sir Harry would continue tenant upon his old admittance. The lord is not bound to take notice of anything but what appears on the Court rolls.

I am, therefore, apprehensive it will be a hard case to relieve the son. But I agree that if the lord's fine for admission be paid, though there was no actual admittance, since the lord received all the advantage that could be had from the admittance, it might be a good reason for relieving the son; and then it might be proper, perhaps even now, for the son to bring a bill against his father and the lord, in order to have his father admitted pursuant to the surrender. But it does not appear whether the fine was paid.

I should, therefore, for these reasons, dismiss the bill absolutely. But since the points of law are disputed as to all the forfeitures, excepting the making of the lease, which concern other parts of the copyhold, and since judgment in ejectment is given, which would take in other lands as well as those comprised in the lease, I think the bill should be retained till the points of law are tried at law upon the ejectment, which the plaintiff shall immediately receive declarations in, and plead to trial.

As to costs, they shall wait the event of the trial; and, as to them, I think the equity of them will depend upon the issue of that; if the plaintiff recovers there, he should pay costs here, because he had no occasion to come into this Court, excepting as to the discovery. If the Duke gets the better, I think, as this is a point of equity that has not been fully settled before, and in such case it is natural for a man to struggle the most to retain his estate, it would be too hard to make him lose his estates and pay costs likewise.

As to the infant, I will not dismiss the bill absolutely, but without prejudice, because, being an infant, he may not have made the best of his case.

SLOMAN *v.* WALTER.

1784. 1 Bro. Ch. 418.

Penalty when Relieved Against.

Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery of it, and an issue *quantum damnificatus*, to try the real damage.

Upon showing cause why an injunction should not be dissolved, the case appeared to be thus: That the plaintiff and defendant were partners in the Chapter Coffee-house, and, upon entering into the partnership, it had been agreed that the business should be conducted entirely by the plaintiff, but that the defendant should have the use of a particular room in the house whenever he thought proper. And, in order to enforce this agreement, a bond was entered into by the plaintiff to the defendant in the penalty of £500. After some time, the defendant demanded the use of the room, and being refused brought an action for the penalty of the bond (*a*). Plaintiff filed this bill, praying an issue to try *quantum damnificatus*, and an injunction in the meanwhile. He obtained an injunction till answer or further order; and the answer being now come in, the only question, in respect to continuing the injunction till the hearing, was whether the penalty of the bond was merely intended as a security for the enjoyment of the room, or in the nature of assessed damages between the parties.

Mr. Scott and Mr. Harvey, for the defendant, contended the injunction ought to be dissolved, and the defendant permitted to have his remedy upon the bond. It was impossible a jury, upon an issue of *quantum damnificatus*, could assess any other damages than those already assessed by the parties themselves.

(*a*) A verdict had been obtained in that action in the full penalty of the bond. The bill was filed on the ground of these damages being excessive.

They referred to the case in the H. L., where £5 per acre penalty for ploughing up meadow land was reserved in a lease, and the Court of Chancery having relieved against the penalty, and directed an issue to try the actual damage, the decree was reversed (*b*).

Lord Chancellor Thurlow said the only question was, whether this was to be considered as a penalty or as assessed damages. The rule that, where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred, is too strongly established in equity to be shaken. This case is to be considered in that light. The injunction must be continued till the hearing.

NOTES.

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8. Relief against forfeiture under the L. P. Act, 1925, p. 243.
9. Forfeiture as affected by the Settled Land Act, 1925, p. 247.

1. Generally.

Lord Macclesfield, in *Peachy* v. *Duke of Somerset*, puts the jurisdiction of equity to give relief in cases where forfeitures or penalties might be insisted upon at law, on the only foundation upon which it could properly be maintained, *viz.*, *the original intent of the case, where the penalty was designed only to secure money, and the Court could give a party, by way of recompense, all that he expected or desired.* The principal case of *Sloman*

(*b*) *Rolfe* v. *Peterson*, 2 Bro. P. C. 470, and also cited, *Roy* v. *The Duke of Beaufort*, 2 Atk. 190, and *Tall* v. *Ryland*, 1 Ch. Ca. 183.

v. *Walter* shows, however, that the jurisdiction of equity was not of so limited a nature, but was extended to cases where the penalty was inserted, not merely to secure the payment of money, but *the performance of some collateral act.* The origin of the doctrine is probably to be attributed to those cases in which relief was given originally with reference to non-payment of money at the specified time; the Court holding that, by the payment of interest, the party was put in just the same state as if the principal had been paid at the time stipulated; though, as was said by Eldon, C., in condemnation of the doctrine, "The failure of the payment at the time may be attended with mischievous consequences, that never can be cured in a rational sense by subsequent payment with the addition of interest" (*c*).

The authorities show that Courts of equity only granted relief in cases of penalties and forfeitures when they were able to give compensation in lieu thereof, and in such cases only they treated stipulations in contracts for penalties or forfeitures as unessential (*d*). But relief was not given generally in all cases of forfeiture even where compensation was possible (*e*). By the Jud. Act, 1925, ss. 36, 37, 38 and 40 (taking the place of section 24, sub-sections 1—4, and section 25, sub-section 11, of the Jud. Act, 1873 (*f*)), law and equity are to be concurrently administered in all the Divisions of the High Court, and the rules of equity, where there is any conflict or variance with the rules of the common law, are to prevail.

Another principle illustrated by the authorities on this subject, is, that where a man covenants to do or to abstain from doing an act, and that if he breaks his covenant he will pay a sum by way of penalty he cannot avoid performance of his contract by paying the money. The Court will, if necessary, restrain the covenantor from breaking his covenant by injunction (*g*). Equity considers the intention of the parties, and regards the thing agreed to be done or not to be done as the true object of the covenant. The covenantee must, however, choose between an injunction and liquidated damages; he cannot have both (*h*).

(*c*) *Reynolds* v. *Pitt*, 19 V. 140.

(*d*) See, *e.g.*, *per* Lord Alvanley in *Eaton* v. *Lyon*, 3 V. 693.

(*e*) See *infra*.

(*f*) 36 & 37 Vict. c. 66, s. 24, sub-s. 4; s. 25, sub-s. 11.

(*g*) See judgment of Lord St. Leonards in *French* v. *Macale*, 2 Dr. & War. 274; and of Lord Hardwicke in *Howard* v. *Hopkyns*, 2 Atk. 371.

(*h*) *General Accident Assurance Co.* v. *Noel*, [1902] 1 K. B. 377.

2. On what Breaches the Court will generally grant Relief.

Bonds.—The most familiar, and perhaps earliest case, in which equity gave relief against penalties, was a common bond, in which the penalty is evidently inserted to secure the payment of the principal and interest : but the interference of equity in relieving from the penalty in such case was rendered unnecessary by 4 & 5 Anne, c. 16, ss. 12 and 13, by which the contract was in effect rendered incapable of being enforced, even at law, to the extent of the penalty; and the debtor was discharged on paying principal, interest, and costs (*i*).

The Act of Anne only applied to common money bonds. All other bonds and covenants with a penalty are governed by 8 & 9 Will. 3, c. 11, s. 8, which enables the damages to be assessed for such breaches as may be proved, execution being stayed on payment of the amount assessed and costs. The judgment, however, remained to answer any future breach (*k*).

The same principle has been applied where a penalty was inserted in a contract to secure the payment of purchase-money (*l*). An agreement for the sale of land provided that the purchase-money should be paid, with interest, by specified instalments at certain dates, and *declared that time should be of the essence of the contract*, and that on default in the punctual payment of any instalment the agreement was to be void and all payments made were, in such case, to be forfeited to the vendor. Default having been made in the payment of the second instalment, the vendor brought an action to enforce the forfeiture and the purchaser paid into Court the instalment and interest due and counterclaimed for specific performance. It was held that the condition for forfeiture was in the nature of a penalty from which the purchaser was entitled to be relieved on payment of the money due, and an order for specific performance was made on the counterclaim (*m*).

Courts of equity, in allowing redemption of mortgages at any time, as expressed in the maxim "once a mortgage always a mortgage," applied the same principle. This is expressed by Lord

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(*i*) As to payment into Court with respect to breaches, Ann. Pract., O. xxii., and notes

(*k*) For the practice, see Ann. Pract., O. xiii, r. 14, and notes thereto.

(*l*) See *Re Dagenham (Thames) Dock Co.*, L. R. 8 Ch. 1022; *Hatton* v. *Harris*, [1892] A. C. 547. Cf. *Sprague* v. *Booth*, [1909] A. C. 576.

(*m*) *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, [1913] A. C. 319.

Hatherley thus :—" Where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage, or be it by way of stipulation that in case of its not being paid at the time appointed *a larger sum shall become payable, and be paid*, in either of these cases equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision, against which equity will relieve when the object in view, *viz.*, the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which equity will relieve " (*n*).

Where, as in *Sloman* v. *Walter*, the penalty in an instrument was merely to secure the performance of some collateral act or undertaking, the bill has been retained, and an issue *quantum damnificatus* directed, and relief granted upon payment of the damages as assessed by a jury (*o*).

Covenants in Leases.—The modern law is contained in the L. P. Act, 1925, ss. 146 and 147 (for which see *infra*, pp. 243 and 244). Before the Judicature Act, 1873, applications were frequently made to Courts of equity for relief to restrain actions of ejectment.

From an early period relief was granted in case of forfeiture for non-payment of rent (*p*), which relief came to be regulated by statute, first by 4 Geo. 2, c. 28, and then by the Common Law Procedure Acts, 1852—1860. " At first there seems to have been some hesitation whether this relief might not be extended to other cases of forfeiture for breach of covenants, such as to repair, to insure and the like, where compensation could be made; but it was soon recognised that there would be great difficulty in estimating the proper amount of compensation; and, since the decision of Lord Eldon in *Hill* v. *Barclay* (*q*), it has always been held that equity would not relieve merely on the ground that it could give compensation, upon breach of any covenant in a lease, except the

(*n*) *Thompson* v. *Hudson*, L. R. 4 H. L., at p. 15. See also *Lady Holles* v. *Wyse*, 2 Vern. 239; *Strode* v. *Parker*, *ibid.* 316; *Nicholls* v. *Maynard*, 3 Atk. 519.

(*o*) *Hardy* v. *Martin*, 1 Bro. Ch. 419 (n.); and see *S. C.*, 1 Cox, 26; *Benson* v. *Gibson*, 3 Atk. 395; *Errington* v. *Aynesley*, 2 Bro. Ch. 341.

(*p*) Woodfall (21st ed.), p. 406.

(*q*) 18 V. 56. See also *Bracebridge* v. *Buckley*, 2 Price, 200.

covenant for payment of rent" (*r*). But this "left unaffected the undoubted jurisdiction to relief in case of breach occasioned by fraud, accident, surprise or mistake. . . . The use of the word 'forfeiture' in cases of this kind is somewhat misleading. This is not like the condition of a will. . . . It is a contract between landlord and tenant that if the latter does, or omits to do, certain specific acts then the landlord may re-enter" (*s*), and equity can only interfere in very exceptional circumstances. Thus where a notice to repair according to the covenant had been given, and negotiations followed, but no agreement was arrived at, equity would relieve if the repairs were done within the specified time, after the rupture of the negotiations; for the effect of the negotiations was to suspend the notice (*t*).

Relief on breach of a covenant to insure against fire was provided for by the Acts 22 & 23 Vict. c. 35, ss. 4—9, and 23 & 24 Vict. c. 126, s. 3, which were repealed and replaced by the C. A., 1881, s. 14; and this provision has now been replaced by the L. P. Act, 1925, s. 146.

Excepting the cases of non-payment of rent and of failure to insure, it appears that (prior to the C. A., 1881) accident and surprise were the only instances in which relief was given, and that the fact that a landlord gained ever so large an improved value by insisting on the forfeiture was not taken into account (*u*).

From a very early period equity would, at any *indefinite* time after a tenant had incurred forfeiture, and been ejected for non-payment of rent at a particular time, under a stipulation in his lease, relieve him upon his paying to the lessor the rent accrued due, interest, and costs, upon this principle, that as the right of entry was intended merely as a security for the rent, the lessor thereby received full compensation, and was put in the same situation as if the rent had been paid to him when it was due. Relief in such cases came to be regulated by the Common Law Procedure Acts. Section 1 of the C. L. P. Act, 1860, has been repealed by

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(*r*) *Per* Kay, L.J., in *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417, at p. 425; and see *Matthews* v. *Smallwood*, [1910] 1 Ch., at p. 792.

(*s*) *Barrow* v. *Isaacs*, [1891] 1 Q. B., at p. 425; cf. *Eastern Telegraph Co.* v. *Dent*, 78 L. T. 713. As to the measure of damages, see *Conquest* v. *Ebbetts*, [1896] A. C. 490; *Clare* v. *Dobson*, [1911] 1 K. B. 35, 42; *Anstruther-Gough-Calthorpe* v. *McOscar*, [1924] 1 K. B. 716.

(*t*) *Hughes* v. *Met. Ry. Co.*, 2 A. C. 439; cf. *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, [1913] A. C. 319, 322, 324.

(*u*) Woodfall (21st ed.), p. 406.

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the Judicature Act, 1925, and replaced by section 46 of that Act, which is in the following terms :—

> "46. In the case of any action for a forfeiture brought for non-payment of rent, the High Court or a Judge thereof shall have power to give relief in a summary manner, and subject to the same terms and conditions in all respects as to payment of rent, costs and otherwise as could formerly have been imposed in the Court of Chancery, and if the lessee, his executors, administrators or assigns are so relieved they shall hold the demised premises according to the terms of the lease and without the necessity of any new lease."

The jurisdiction possessed by the Court under the Common Law Procedure Acts to grant relief in the case of forfeiture for non-payment of rent was held to extend to a case where the lessor, without legal proceedings, had obtained peaceable possession (*x*).

3. Distinction between Penalties and Liquidated Damages.

As a Court of equity would give a person relief against a penalty, intended only to secure the performance of the contract, so, on the other hand, it would not permit him to resist specific performance, or escape an injunction, by electing to pay the penalty (*y*). Where, however, the real intent of the contract was, that a person might do certain acts, upon payment of an additional sum, then the agreement for payment, not being intended to secure the performance of any other contract, but being a contract which the parties were at liberty to make, a Court of equity would, although it might bear the appearance of a penalty, neither relieve him from payment on doing such acts, nor compel him to abstain from them. In a case in which premises were demised by the plaintiffs at a rent named, and at a further rent if certain trades thereinafter covenanted against were carried on thereon, and the lease contained a covenant preventing the lessee from carrying on certain offensive trades and also a proviso for re-entry on breach of that covenant; it was held that the lease could not be construed as meaning that the lessees were entitled to carry on the trades in question on payment

(*x*) *Howard* v. *Fanshawe*, [1895] 2 Q. B. 581.

(*y*) *French* v. *Macale*, 2 Dr. & W. 269; *Cole* v. *Sims*, 5 De G. M. & G. 1; and see *Howard* v. *Woodward*, 34 L. J. Ch. 47; *National Provincial Bank, etc.* v. *Marshall*, 40 Ch. D. 112.

of the additional rent, and therefore the plaintiffs could re-enter under the condition for re-entry (*z*).

Where the sum named in case of breach is held to be a penalty, it would seem that the plaintiff may recover the actual amount recoverable on the ordinary measure of damages, even if it largely exceeds the penal sum (*a*).

The question whether the sum mentioned in an agreement to be paid for a breach is to be treated as a penalty, or as liquidated and ascertained damages, is a question of construction to be decided upon the terms and inherent incidents of each particular contract, judged of as at the time of the making thereof, not at the time of the breach (*b*). Sometimes the instrument itself shows the nature of the payment, as in the case of bonds, *supra*, p. 224. The mere use of the terms "penalty," or "liquidated damages," is not conclusive (*c*). Recognised rules of construction have been established.

(1) Where a larger sum is agreed to be paid on the non-payment of a debt or liquidated money demand it is presumptively a penalty, since no damages other than nominal are recoverable for the retention of a debt (*d*).

In *Re Dagenham Dock* (*e*) a company agreed to purchase a piece of land for £4,000, £2,000 to be paid at once and the remaining £2,000 on a day named, with a proviso that if the whole of the £2,000 with interest was not paid off by that day (time to be of the essence of the contract), the vendors might repossess the land as of their former estate without any obligation to repay any part of the purchase-money. *Held*, that this stipulation was in the nature of a penalty from which the company was entitled to be relieved on payment of the balance of the purchase-money with interest.

An instance of an application of the principle is shown by the ordinary rule in mortgages, that a proviso for increasing the rate of

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(*z*) *Weston* v. *Manager of Metropolitan Asylum District*, 9 Q. B. D. 404; 8 Q. B. D. 387; and see *Cole* v. *Sims*, *supra*; *Woodward* v. *Gyles*, 2 Vern. 119.

(*a*) *Diestal* v. *Stevenson*, [1906] 2 K. B. 345.

(*b*) *Dunlop, etc., Ltd.* v. *New Garage, etc., Ltd.*, [1915] A. C. 79, 86. See also *Pub. Works Commissioners* v. *Hills*, [1906] A. C. 368; *Webster* v. *Bosanquet*, [1912] A. C. 394.

(*c*) *Betts* v. *Burch*, 4 H. & N., at p. 511; *Elphinstone* v. *Monkland, etc. Co.*, 11 A. C. 332; *Parfitt* v. *Chambre*, 15 Eq. 36; *Lea* v. *Whitaker*, L. R. 8 C. P. 70; *Yzquierdo* v. *Clydebank, etc. Co.*, [1905] A. C. 6; *Commr. of Public Works* v. *Hills*, [1906] A. C. 368; *Dunlop, etc., Ltd.* v. *New Garage, etc., Ltd.*, [1915] A. C., at p. 86.

(*d*) *Kemble* v. *Farren*, 6 Bing. 141. See *per* Jessel, M.R., in *Wallis* v. *Smith*, 21 Ch. D. 257. (*e*) L. R. 8 Ch. 1022. See *Dickson* v. *Lough*, 18 L. R. Ir. 518.

interest on non-punctual payments is not allowed as being a penalty, but a proviso for reduction from the rate first stipulated on punctual payment, and in default at the original rate is a good agreement (*f*).

Thus, in a mortgage bond given to secure the due payment by instalments of a sum due, a provision making the total sum due enforceable on any default is not to be considered a penalty (*g*).

(2) Where in cases dealing with a single condition, a fixed sum is agreed to be paid on a breach of contract of uncertain value, it is presumptively liquidated damages and not a penalty (*h*).

In *Kemble* v. *Farren* (*i*), Tindal, C.J., said : "There is nothing illegal or unreasonable in the parties by their mutual agreement settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases it saves the expense and difficulty of bringing witnesses to that point."

In building contracts a stipulated payment of a fixed sum for each week or day's delay in completion is recoverable as liquidated damages (*k*), and where by a contract to deliver rails between January 15 and May 15 it was agreed in the event of the contractors exceeding the time of delivery that they should pay 7s. 6d. per ton per week, on their failing to complete until September, they were held liable to pay the stipulated fine from May 15 (*l*).

And if the lessee covenants not to do an act, *e.g.*, not to plough pasture land, or to cease to reside on the premises, but if he does so, to pay an additional rent, the Court will look upon the additional rent as liquidated damages and not as a penalty (*m*), and consequently will not restrain the lessee from doing the act.

(*f*) *Powis* v. *Maynard*, 3 Atk. 519; *Ford* v. *Chesterfield*, 19 B. 428; *Thompson* v. *Hudson*, L. R. 4 H. L. 1, 15; *Union Bank of London* v. *Ingram*, 16 Ch. D. 53.

(*g*) *Wallingford* v. *Mutual Society*, 5 A. C. 685, 696.

(*h*) *Galsworthy* v. *Strutt*, 1 Exch., at p. 665; *Sainter* v. *Ferguson*, 7 C. B. 716; *Cass* v. *Thompson*, 5 W. R. 289; *Carnes* v. *Nesbitt*, 7 H. & N. 778.

(*i*) 6 Bing. 148; and see *Dunlop, etc., Ltd.* v. *New Garage, etc., Ltd.*, [1915] A. C. 79.

(*k*) *Jones* v. *St. John's Coll., Oxford*, L. R. 6 Q. B. 115; *Law* v. *Redditch*, [1892] 1 Q. B. 127; *Re White and Arthur*, 84 L. T. 594; but see *Re Newman*, 4 Ch. D. 724; *Dodd* v. *Churton*, [1897] 1 Q. B. 562.

(*l*) *Bergheim* v. *Blaenavon Iron Co.*, L. R. 10 Q. B. 319; 44 L. J. Q. B. 92; and see *Elphinstone* v. *Monkland Iron, etc. Co.*, 11 A. C. 332.

(*m*) *Jones* v. *Green*, 3 Y. & J. 298; *Rolfe* v. *Peterson*, 2 Bro. P. C. 436; *Ponsonby* v. *Adams*, *ibid.*, 431; and see *Forbes* v. *Carney*, Wallis Rep. 38; *Gerrard* v. *O'Reilly*, 3 Dr. & War. 414; *Hurst* v. *H.*, 4 Exch. 571. See now 13 & 14 Geo. 5, c. 9, s. 29.

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It seems, however, that where there is not only a stipulation that an increased rent is to be paid upon certain acts being done by the tenant, but also that his interest shall be forfeited, the sum so stipulated to be paid will be considered as a penalty and not liquidated damages (*n*), and he will be restrained from committing the acts.

In agreements for the sale of a business containing covenants against carrying on a similar business within certain limits, on breach of which a certain sum is to be paid, the sum is recoverable in full as liquidated damages (*o*). And where a public-house keeper agreed to pay his lessor £50 if convicted of contravening the Licensing Act, the £50 was held to be liquidated damages (*p*).

In *Astley* v. *Weldon* (*q*), Eldon, C.J., said, that the excessive amount of the sum fixed to be paid for a breach of uncertain value is not alone a sufficient ground for treating it as a penalty and not liquidated damages, as it is competent for the parties to form their own estimate of the value. But, on the other hand, there are cases which seem to show that where the breach, though of uncertain value, must necessarily cause very little loss to the aggrieved person, the sum stipulated will be treated as a penalty. Thus, where a charter-party contained a clause, "the captain shall sign charterers' bill of lading as presented without qualification . . . or pay £10 for every day's delay as and for liquidated damages until the ship is totally lost or the cargo delivered," and the captain wrongfully refused to sign the bill of lading as presented, but the charterers sustained no damage thereby, the sum named was held to be a penalty, and the charterers could only recover nominal damages (*r*).

Thus far the rules deal with the breach of a single condition only. Jessel, M.R., in *Wallis* v. *Smith* (*s*), went exhaustively into the whole question and divided the authorities into four classes :

(1) "That where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the

(*n*) *Barret* v. *Blagrave*, 5 V. 555; *French* v. *Macale*, 2 Dr. & War. 269; but see *Willson* v. *Love*, [1896] 1 Q. B. 626.

(*o*) *Galsworthy* v. *Strutt*, 1 Exch. 663; *Price* v. *Green*, 16 M. & W. 346; *Reynolds* v. *Bridge*, 6 E. & B. 528; *Mercer* v. *Irving*, E. B. & E. 563.

(*p*) *Ward* v. *Monaghan*, [1895] W. N. 123.

(*q*) 2 B. & P., at p. 351; *Wallis* v. *Smith*, 21 Ch. D. 243, 259.

(*r*) *Rayner* v. *Rederiaktiebolaget Condor*, [1895] 2 Q. B. 289; and see *Jones* v. *Hough*, 5 Ex. D. 115; *The Princess*, 70 L. T. 388.

(*s*) 21 Ch. D. 243.

payment of a sum of money of less amount, that is really as penalty, and you can only recover the actual damage and the Court will not sever the stipulations" (*t*).

In *Kemble* v. *Farren* (*u*), Tindal, C.J., said, "that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which Courts of equity have always relieved, and against which Courts of law have in modern times endeavoured to relieve by directing juries to assess the real damages sustained by the breach of the agreement."

The principle seems to be that if you find a covenant the breach of which will occasion a damage, not uncertain, but such as is capable of being ascertained, or where there is a particular sum to be paid which is much less than the sum named as payable on the breach, there the last named sum is specified by way of penalty (*x*).

(2) "Cases in which the amount of damages is not ascertainable *per se*, but in which the amount of damages for a breach of one or more of the stipulations either must be small, or will in all human probability be small—that is where it is not absolutely necessary that they should be small; but it is so near a necessity having regard to the probabilities of the case, that the Court will presume it to be so. Then the question is, whether in that class of cases the same rule applies? Now upon this there is no decision. There are a great many dicta upon the question, and a great many dicta on each side. * * The Court is not bound by the dicta. * * It is within the principle, if principle it be, of a larger sum being a penalty for non-payment of a smaller sum, but at the same time it is also within another class of cases."

(3) "Cases in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are dicta there which seem to say that if they vary much in importance, the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance the sum has always been

(*t*) See *Astley* v. *Weldon*, *supra*; *Re Newman*, 4 Ch. D. 724.
(*u*) 6 Bing., at p. 148.
(*x*) *Reynolds* v. *Bridge*, 6 E. & B. 540.

treated as liquidated damages." This statement of Jessel, M.R., has been criticised (*y*). But it seems to have been, in substance, re-established by the decision of the House of Lords in *Dunlop, etc., Co., Ltd.* v. *New Garage, etc., Co., Ltd.* (*z*), in which case it was held that where a single sum is agreed to be paid expressly as liquidated damages on the breach of a number of stipulations of varying importance, and the damage is the same *in kind* for every possible breach and is incapable of being precisely ascertained, the agreed sum (provided it be a fair pre-estimate of the probable damage and not unconscionable) will be regarded by the Court as liquidated damages and not as a penalty.

(4) The "last class of cases," mentioned by Jessel, M.R., in *Wallis* v. *Smith* (*a*), is: "Where a deposit is to be forfeited for the breach of a number of stipulations some of which may be trifling; some of which may be for the payment of money on a given day, in all those cases the Judges have held that this rule does not apply and that the bargain of the parties is to be carried out."

This statement was criticised by Bigham, J., in *Pye* v. *British Automobile Commercial Syndicate, Ltd.* (*b*), who observed, however, that "where the sum of money has been deposited, that is a circumstance to be taken into account in ascertaining the intention of the parties."

The law as to forfeiture of a deposit on a sale of real estate was considered in *Howe* v. *Smith* (*c*), where the purchaser paid £500 "as a deposit and in part payment of the purchase-money." The contract provided that the purchase should be completed on a day named, and if the purchaser should fail to comply with the agreement the vendor should be at liberty to resell and to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase-money, and after repeated delays the vendor resold the property for the same price. The original purchaser having brought an action, it was held that the deposit was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reason-

(*y*) *Elphinstone* v. *Monkland*, 11 A. C. 332; *Willson* v. *Love*, [1896] 1 Q. B., at pp. 630, 633; and see *Magee* v. *Lavell*, L. R. 9 C. P. 111; *Bradley* v. *Walsh*, 88 L. T. 737; *Watson* v. *Bosanquet*, [1912] A. C. 396.

(*z*) [1915] A. C. 79.

(*a*) 21 Ch. D. 243.

(*b*) [1906] 1 K. B. 425, 430; and see *Cooper* v. *London and Brighton Ry. Co.*, 4 Ex. D. 88.

(*c*) 27 Ch. D. 89; *Hill* v. *Barnell*, [1911] 2 Ch. 551; *Mayson* v. *Clouet*, [1924] A. C. 980.

able time, had no right to a return of the deposit. In order to enable the vendor to retain the deposit there must be acts on the part of the purchaser which amount, in effect, to a repudiation on his part of the contract (*d*).

In *Howe* v. *Smith* the usual clause giving a power to the vendor to resell was stated by Fry, L.J. (*e*), to give the vendor an alternative remedy so that he can either affirm the contract and sell under this clause, or rescind the contract and sell under his absolute title. If he act under the clause he must bring the deposit into account in his claim for the deficiency; if he sells as owner he may retain the deposit but loses his claim for the deficiency under the clause in question. But such a clause does not give the purchaser a right to elect to forfeit the deposit and avoid the agreement (*f*).

Where, after accepting the title, the purchaser makes default, and receives notice of rescission and forfeiture, he cannot afterwards recover the deposit on proving that the vendor had no title, so that he could not in any case have completed (*g*).

4. Specific Performance where Forfeiture has been Incurred by Plaintiff.

Where a person seeking a purely equitable remedy has committed acts of forfeiture, the Court will generally refuse relief. Thus if a person entitled by contract to the grant of a lease is seeking specific performance, and he is shown to have done acts (*e.g.*, cultivating in an unhusbandlike manner) which if the lease were granted would give the lessor an immediate right of re-entry, specific performance may be refused, for it is useless to require the execution of a lease which might be immediately determined (*h*). The same rule applies where the contract is to grant an underlease and the intended underlessee has after notice committed acts which are a breach of the covenants in the head lease (*i*).

(*d*) *Howe* v. *Smith*, *supra*; and see *Soper* v. *Arnold*, 35 Ch. D. 384; *Re Scott and Alvarez' Contract*, [1895] 2 Ch. 603; *Levy* v. *Stogdon*, [1898] 1 Ch. 478.

(*e*) 27 Ch. D. 105; cf. *Hart* v. *Porthgain, etc.*, [1903] 1 Ch. 690; see *Kingdon* v. *Kirk*, 37 Ch. D. 141.

(*f*) See *Crutchley* v. *Jerningham*, 2 Mer., at p. 506; *Long* v. *Bowring*, 33 B. 585.

(*g*) *Soper* v. *Arnold*, *supra*; and see *Re Scott and Alvarez' Contract*, *supra*.

(*h*) *Thompson* v. *Guyon*, 5 Si. 65; *Gregory* v. *Wilson*, 9 Ha. 683, 687; Woodfall (21st ed.), pp. 145, 471.

(*i*) *Lewis* v. *Bond*, 18 B. 85.

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Where the performance of covenants in a lease is a condition precedent to the lessee's privilege of having a new lease, the lessor will not be ordered to grant a new lease if, at the time, there is a breach of the covenants of the old lease (*k*). Nor will specific performance be decreed where acts of gross *waste* have been committed by the intended lessee which would, although giving the landlord no power of re-entry under a proviso, have amounted to a forfeiture at law (*l*).

Where the renewal was not conditioned on the due performance of the covenants and there was no proviso for re-entry on breach, the Court granted specific performance of the covenant to renew, although there had been a breach of the covenant to repair, leaving the lessor to sue at law on the breach (*m*). Specific performance, moreover, of a covenant to grant a new lease may be decreed where breaches of covenant have been of a trivial character, for which merely nominal damages would be obtained, or where breaches have been waived (*n*), or were of such a nature as the Court would relieve against either under its general jurisdiction (*o*), or (*semble*) under its statutory powers (*p*).

The erection by an intended lessee on the premises which he had agreed to take on a building lease, of buildings which although alleged to be injurious were not proved to be necessarily a nuisance to the neighbouring lands of the lessor, was held to be no objection to specific performance of the agreement for a lease (*q*).

Where two contracts relating to the same subject are contained in one instrument, a forfeiture in respect of one of them will not debar a party obtaining specific performance of the other if they are independent of one another. In *Green* v. *Low* (*r*), the defendant agreed to grant a lease of ground to the plaintiff upon his building a villa thereon, which he was to keep insured in the joint names of himself and the defendant in a particular office. And it was also agreed, that if the plaintiff should not perform the agreement on his part, the agreement for a lease was to be void, and

(*k*) *Bastin* v. *Bidwell*, 18 Ch. D. 238; Woodfall, 472. Cf. *Starkey* v. *Barton*, [1909] 1 Ch. 284.

(*l*) *Duke of Somerset* v. *Gourlay*, 1 V. & B. 68, 73.

(*m*) *Hare* v. *Burges*, 5 W. R. 585.

(*n*) *Walker* v. *Jeffreys*, 1 Ha. 341, 352; and see *Mundy* v. *Joliffe*, 5 My. & C 167, 176; *Besant* v. *Wood*, 12 Ch. D. 605.

(*o*) *Gregory* v. *Wilson*, 9 Ha. 683; and see *Parker* v. *Taswell*, 2 De G. & J. 559.

(*p*) See *infra*, pp. 243, 244.

(*q*) *Gorton* v. *Smart*, 1 S. & S. 66; Woodfall (21st ed.), 145.

(*r*) 22 B. 625; and see *Wilkinson* v. *Clements*, L. R. 8 Ch. 96.

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that the defendant might re-enter. There was a further stipulation, that the plaintiff was to have the option of purchasing the fee within two years. The plaintiff erected the villa, but insured in the wrong office, and in his own name only. It was held that the right to purchase being independent of the right to a lease, the plaintiff was entitled to specific performance of the contract to sell to him the fee.

5. On what Breaches the Court will generally not Grant Relief.

There is no general power in the Court to relieve against forfeiture arising from the breach of covenants. Cases in which relief has been refused under contracts for the grant of a lease include—a breach of a covenant to make a roadway in front of a particular house, though, if made before the roadway in front of adjacent houses were made, it would be continually cut up and useless (*s*); and a breach of a covenant to erect houses within a specified period (*t*).

Equity would not relieve a lessee, who, contrary to his covenant, did not cultivate land in a husbandlike manner (*u*), or who carried on a trade without a licence (*x*), or a lessee who assigned without licence, "for . . . the Court cannot estimate the damage. The consideration whether the lessor is to gain or lose by having a tenant put upon him must run through the whole continuance of the lease : it is sufficient that the lessor insists upon his covenant" (*y*). The Conveyancing Act, 1881, did not alter the law as to covenants not to assign, underlet, etc.; but by the Law of Property Act, 1925, s. 146, a lessee's right to relief, where a forfeiture has been incurred, is extended to breaches of a covenant not to assign, underlet, etc., provided that the breach occurs after the commencement of the Act.

The usual covenant not to assign, etc., provides that consent is not to be refused in the case of a respectable and responsible person or that consent is not to be unreasonably withheld. Where the covenant is in either of these forms it would seem that if the proposed assignee fulfils the required description, so that the proposed assignment or underletting is reasonable, and leave is

(*s*) *Nokes* v. *Gibbon*, 3 Drew. 681.
(*t*) *Croft* v. *Goldsmid*, 24 B. 312; see *Jones* v. *St. John's College*, L. R. 6 Q. B. 115.
(*u*) *Hills* v. *Rowland*, 4 De G. M. & G. 430.
(*x*) *Macher* v. *The Foundling Hospital*, 1 V. & B. 187.
(*y*) *Per* Lord Eldon in *Hill* v. *Barclay*, 18 V. 56, 63.

asked, the lessee is free from the covenant (*z*); but it is otherwise if leave is not asked. In *Barrow* v. *Isaacs* (*a*), the tenant underlet without applying for consent, to a person for whom consent could not have been refused. The omission to ask for consent was solely due to the solicitor not having examined the head lease. It was held that the landlord was entitled to re-enter. Upon the same principle, Jekyll, M.R., in *Descarlett* v. *Dennett* (*b*), refused to relieve a lessee, who, contrary to a covenant not to suffer persons to make use of a way over part of the lands demised, had put up a gate at the entrance of the close, and permitted any person to pass over the way, requiring them to pay, because "this tends to the prejudice of the inheritance, inasmuch as it may hereafter amount to an evidence for a prescription over the close. The case of an entry for non-payment of rent is very different; for there the loss is certain, and may be recompensed by damages. This has been a settled rule in equity" (*c*).

If there were breaches of several covenants in a lease, and there were any one of them with respect to which there existed no equitable ground for relief, although there might be as to all the others the most unquestionable right to relief in equity, the Court would not interfere to prevent the lessor from recovering in an action of ejectment founded on those breaches (*d*).

Although a Court of equity would not give relief to a copyholder against a forfeiture properly incurred, it had concurrent jurisdiction with Courts of law to relieve a copyholder against an illegal seizure of the property by the lord (*e*).

Equity will not relieve against the operation of a proviso for forfeiture or cesser of a term on the bankruptcy or attempted alienation of a tenant for life, or on his doing some act forbidden by the instrument under which he takes (*f*).

Companies, etc.—Equity refuses to grant relief against

(*z*) *Willmott* v. *L. R. C. Co.*, [1910] 2 Ch. 525; *Evans* v. *Levy*, [1910] 1 Ch. 452; *Ideal Film Renting Co., Ltd.* v. *Nielsen*, [1921] 1 Ch. 575. As to when a refusal to consent to an assignment will be considered unreasonable, see *Houlder Bros.* v. *Gibbs*, [1925] 1 Ch. 198, 575.

(*a*) [1891] 1 Q. B. 417; and see *Fuller's Theatre, etc., Co.* v. *Rofe*, [1923] A. C. 435; *Abrahams* v. *Mac Fisheries, Ltd.*, [1925] 2 K. B. 18. The Landlord and Tenant Bill Act, 1927, provides that in all leases a covenant against assigning or underletting without licence is to be deemed to be subject to a proviso that such consent is not to be unreasonably withheld.

(*b*) 9 Mod. 22. (*c*) Approved in *Bracebridge* v. *Buckley*, 2 Price, 221.

(*d*) *Nokes* v. *Gibbon*, 3 Drew, 693. (*e*) *Andrews* v. *Hulse*, 4 K. & J. 392.

(*f*) *Kearsley* v. *Woodcock*, 3 Ha. 185; *Rochford* v. *Hackman*, 9 Ha. 475; *Ex p. Gould*, 13 Q. B. D. 454. And see L. P. Act, 1925, s. 146, sub-ss. 9 and 10.

forfeiture of shares, etc., in public undertakings for non-payment of calls or other causes. Thus, in *Sparks* v. *The Liverpool Waterworks* (*g*), relief was refused against a forfeiture under a bye-law of an incorporated company for waterworks, which provided that the members receiving notice of default in paying a call should incur forfeiture by non-payment ten days after, although the non-payment arose from ignorance of the call, absence from town when the notice was sent, and other accidental circumstances. Grant, M.R., said (*h*): "The parties might contract upon any terms they thought fit, and might impose terms as arbitrary as they pleased. It is essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in these undertakings, they could not be carried on. It is essential that the money should be paid, and that they should know what is their situation. Interest is not an adequate compensation, even among individuals, much less in these undertakings. In particular cases interest might be a compensation, but in the majority of cases it is no compensation, from the uncertainty in which they may be left. The effect is the same, whether money has been paid or not. They know the consequence; the party making default is no longer a member; but if a party can in equity enter into a discussion of the circumstances, each may bring his suit. They must remain a considerable time, to see whether a suit will be begun, and before the suit can be decided. They do not know when any member will sue. If a bill is to be permitted, there cannot be any certainty that every member who has made default may not file a bill. . . . Accident here is only the want of precaution. The plaintiff did not inform himself of the orders and rules of the company. . . . The Court cannot relieve against such accidents."

There is no implied power to forfeit shares in a company; to do so express power must be taken (*i*). Nor is such a power necessarily incident to a mining adventure conducted on the cost-book principle (*k*). Where such power exists, it is to be treated

(*g*) 13 V. 428; but an interlocutory injunction against forfeiture until the hearing of the action may be obtained on terms, see *Lamb* v. *Sambas, etc. Co.*, [1908] 1 Ch. 845; *Jones* v. *Pacaya Co.*, [1911] 1 K. B. 455.

(*h*) 13 V., at p. 434.

(*i*) *Re National Patent Steam Fuel Co.*, 7 W. R. 369; *Re Saloon S. P. Co.*, 37 L. J. Ch. 49.

(*k*) *Clarke* v. *Hart*, 6 H. L. Cas. 633. As to payment of calls made pending an action for rescission, see *Lamb* v. *Sambas, etc. Co.*, [1908] 1 Ch. 845.

as *strictissimi juris*, like a power of forfeiture with respect to an estate, and the forms to be observed in declaring the forfeiture must be strictly followed (*l*), otherwise the forfeiture will be invalid. Thus, where no shares could be forfeited except by a resolution passed by *all* the directors, a resolution passed by four out of five is illegal (*m*). So, too, is a resolution of directors declaring shares of a shareholder forfeited for non-payment of calls, if the notice to the shareholder claim interest from the day of the call instead of from the day fixed for its payment (*n*).

Forfeiture, moreover, to be valid must be for the benefit of the company and *bona fide*. If, therefore, the forfeiture is fraudulent, *e.g.*, in order to relieve the shareholder from liability (*o*), or *ultra vires* (*p*), then it is invalid. But a forfeiture *ultra vires* will be validated by lapse of time where every shareholder knows the facts and acquiesces in the forfeiture (*q*).

Mere laches does not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture (*r*).

A valid forfeiture prevents the shareholder being placed on the list of contributories as a present member (*s*), but neither forfeiture nor transfer will save him from being a contributory as a past member if the company is wound up within a year after forfeiture or transfer (*t*).

Statutes and Conditions in Law.—Although, in cases of contract between parties, equity will often relieve against penalties and forfeitures, where compensation can be granted, relief can never be given against the provisions of a statute (*u*). Thus penalties imposed by a Benefit Building Society, in accordance with their rules under the Friendly Societies Act (*x*), cannot be relieved

(*l*) 6 H. L. Cas., at pp. 650, 651; but see *Jones* v. *N. Vancouver Land, etc. Co.*, [1910] A. C. 317.

(*m*) *Goulton* v. *London Architectural Brick and Tile Co.*, [1877] W. N. 141.

(*n*) *Johnson* v. *Lyttle's Iron Agency*, 5 Ch. D. 687.

(*o*) *Richmond's Case*, *Painter's Case*, 4 K. & J. 305; see Buckley (10th ed.), pp. 597 *et seq.*

(*p*) *Spackman* v. *Evans*, L. R. 3 H. L. 171; see also *Lord Belhaven's Case*, 3 De G., J. & S. 41; *Stanhope's Case*, L. R. 1 Ch. 161; *Dixon's Case*, L. R. 5 Ch. 79. Cf. *Hopkinson* v. *Mortimer, Harley & Co.*, [1917] 1 Ch. 645.

(*q*) *Brotherhood's Case*, 31 B. 365.

(*r*) *The Garden, etc. Co.* v. *M'Lister*, 1 A. C. 39. Cf. *Jones* v. *North Vancouver Land Co.*, [1910] A. C. 317.

(*s*) *Woollaston's Case*, 4 De G. & J. 437; *Marshall* v. *Glamorgan Iron Co.*, 7 Eq. 129; *Re Cobre Copper Co.*, 9 Eq. 107.

(*t*) *Creyke's Case*, L. R. 5 Ch. 63; *Dridger's Case* and *Neill's Case*, L. R. 4 Ch. 266.

(*u*) *Keating* v. *Sparrow*, 1 Ball & B., at pp. 373, 374; *Re Brain*, 18 Eq. 389, 410.

(*x*) 6 & 7 Will. 4, c. 32 (now 1896 Act).

against in equity, nor can a borrowing member redeem a mortgage to the society without paying the fines which he has incurred (*y*), but the fines must be specified in the rules and be reasonable, otherwise they cannot be enforced (*z*).

6. How far Accident, Fraud, Surprise, or Acquiescence are Sufficient to Prevent a Party from taking Advantage of a Forfeiture.

If, either by unavoidable accident, by fraud, by surprise, or ignorance not wilful, parties might have been prevented from executing a covenant literally, a Court of equity would interfere, and, upon compensation being made, the party having done everything in his power, and being prevented by the means alluded to, would give relief (*a*), because, although at law a covenant must be strictly and literally performed, in equity it would suffice if it were really and substantially performed according to the true intent and meaning of the parties, so far as circumstances would admit. In *Hill* v. *Barclay* (*b*), Lord Eldon expressly guards his observations, which are strongly against relief being granted in ordinary cases, from being taken to apply to cases of accident and surprise; the effect of the weather, for instance, in that case, or permissive want of repair, the landlord standing by and looking on (*c*).

Equity would relieve a lessee against forfeiture for a breach of a covenant to repair, when the landlord has by his conduct misled the lessee into supposing that the covenant would not be insisted on (*d*). And circumstances other than the conduct of the lessor may have this effect, as in *Bargent* v. *Thomson* (*e*), where a lessor brought ejectment for breach of covenant to repair within three months after notice, and it appeared that out of twenty-two items twenty had been proceeded with and fourteen completed, that the works had been partially *delayed by the weather*, and that no further remonstrance had been made by the lessors. A breach

(*y*) *Parker* v. *Butcher*, 3 Eq. 762.

(*z*) See *Lovejoy* v. *Mulkern*, [1877] W. N. 127; *Pilkington* v. *Baker*, [1877] W. N. 210.

(*a*) *Per* Lord Alvanley, M.R., in *Eaton* v. *Lyon*, 3 V. 693.

(*b*) 18 V. 56, 62.

(*c*) See *Hannam* v. *South London Waterworks Co.*, 2 Mer. 61, 65 note (*a*); *Bamford* v. *Creasy*, 3 Gif. 675; *Meek* v. *Carter*, 6 W. R. 852; *Burke* v. *Prior*, 15 Ir. Ch. R. 106.

(*d*) *Hughes* v. *Met. Ry. Co.*, 2 A. C. 439; and see *Bruner* v. *Moore*, [1904] 1 Ch. 305; *Kilmer* v. *British Columbia, etc., Ltd.*, [1913] A. C. 319.

(*e*) 4 Gif. 473.

of a covenant to repair, however, was not excused because the covenantor had *bona fide* employed persons to repair, who neglected to do so (*f*).

A party entitled to take advantage of a forfeiture would not be allowed to do so when the act of forfeiture was committed in reliance upon the assurances of an agent of such party. Thus, where a life policy was subject to a condition, making it void if the assured went beyond the limits of Europe without licence, and the assignee of the policy, on paying the premium to a local agent of the Assurance Society, informed him that the assured was resident in Canada, and the agent stated that this would not avoid the policy, and received the premiums till the assured died, it was held that the society was precluded from insisting on the forfeiture (*g*).

But although relief might be obtained in equity against a forfeiture where a person incurring it had been misled by the person legally entitled to insist upon it, a subsequent distinct forfeiture might be taken advantage of. Thus, although relief might be had in equity against a forfeiture of a lease during the period when the landlord dealt with the tenant so as to lead him to suppose the forfeiture would not be insisted on, if a subsequent forfeiture was incurred after such dealings had ceased, the prior transaction would raise no equity for relief (*h*).

In dealing with a lunatic's estate, relief will be given to a tenant who has incurred a forfeiture, if it is beneficial to the lunatic not to insist upon it. In *Ex p. Vaughan* (*i*), where the tenant of a lunatic's estate was relieved against an ejectment brought by the committee, founded on a forfeiture, by breach of covenant to repair, Lord Eldon said that there were forfeitures arising from breaches of covenant against which Courts of equity could not relieve, but which a judicious landlord would not take advantage of. The question was whether the landlord, acting for himself, would have taken advantage of the forfeiture; and that care must be taken not to get rid of a good tenant by being too strict.

Even at law, long acquiescence in a breach of covenant, as for instance not to apply a house to purposes of trade, will raise a

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(*f*) *Nokes* v. *Gibbon*, 3 Drew. 681; cf. *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417.

(*g*) *Wing* v. *Harvey*, 5 De G. M. & G. 265; see also *Duke of Beaufort* v. *Neeld*, 12 Cl. & Fin. 248.

(*h*) *Flattery* v. *Anderdon*, 12 Ir. Eq. R. 218.

(*i*) T. & R. 434.

presumption of a licence so to use it, that the lessor cannot insist upon his right to a forfeiture (*k*).

7. Waiver of Forfeiture.

The expression "waiving a forfeiture" is not strictly accurate. It is a matter of election which may be by deed or word, and, in cases where the lessor has a right of re-entry on breach, the question is, has the lessor having notice of the breach elected not to avoid the lease, or to avoid it, or has he made no election? (*l*).

The right to insist upon a forfeiture might be waived at law (*m*), as well as in equity (*n*), by the acceptance of (even under protest) (*o*), or distraining for (*p*), rent becoming due after the forfeiture was incurred, and although the landlord when the rent was tendered took it not as rent but as compensation for use and occupation subsequent to the forfeiture. And acceptance of rent with knowledge of the forfeiture will operate as a waiver notwithstanding that the lease may contain a provision that no waiver shall have effect unless it is in writing (*q*). In *Croft* v. *Lumley* (*r*), after all the forfeitures had been incurred, the time having come when the rent would become due, the lessee tendered the rent to the lessor. He refused to take it except on the terms that it should be taken not as rent, but as compensation for use and occupation subsequent to the forfeiture. The lessee refused to agree to any such condition; the lessor then took the money, declaring he would not take it as rent, or as waiving the forfeitures. It was held by the Court of Queen's Bench, that in legal effect money must be taken according to the intent of the party paying it—in this case as rent—and that the receipt of rent, as a matter of law, operated as a waiver of all forfeitures then

(*k*) *Gibson* v. *Doeg*, 2 H. & N. 615; *Whitehead* v. *Bennett*, 9 W. R. 626; *Page* v. *Bennett*, 6 Jur. (N.S.) 419; *Hepworth* v. *Pickles*, [1900] 1 Ch. 108.

(*l*) See judgment of Bramwell, B., in *Croft* v. *Lumley*, 6 H. L. Cas. 705; and see *James* v. *Young*, 27 Ch. D. 652, 663; *Matthews* v. *Smallwood*, [1910] 1 Ch. 777. Cf. *Millard* v. *Humphrys*, 62 Sol. Jo. 505.

(*m*) *Croft* v. *Lumley*, 6 H. L. Cas. 672; *Davenport* v. *The Queen*, 3 A. C. 115; *Att.-Gen. of Victoria* v. *Ettershank*, L. R. 6 P. C. 354, 368.

(*n*) *Bridges* v. *Longman*, 24 B. 27.

(*o*) *Price* v. *Worwood*, 4 H. & N. 516; *Guillemard* v. *Silverthorne*, 99 L. T. 584; *R.* v. *Paulson*, [1921] A. C. 271. But see *Re Martin*, 106 L. T. 381.

(*p*) *Walrond* v. *Hawkins*, L. R. 10 C. P. 342.

(*q*) *R.* v. *Paulson*, [1921] 1 A. C. 271.

(*r*) 5 El. & Bl. 648. In the House of Lords the point was not decided, but its correctness was doubted: 6 H. L. Cas. 672.

known to the lessor, and that no protest on his part could prevent this legal effect; and, moreover, that the lessor must be taken to waive all forfeiture by that breach of which he had notice, although it was more extensive than he was aware of.

Where, however, a landlord brings an action of ejectment for a forfeiture, he unequivocally elects to treat his tenant as a trespasser; and a subsequent distress for rent will not only not affirm the tenancy or waive the breaches in respect of which the forfeiture had taken place, but is unlawful (*s*). In an ejectment action on a lease containing a general covenant to repair, and a covenant to repair within a certain period after notice, a notice to repair within the certain period was held to be a waiver of the forfeiture incurred by a breach of the general covenant (*t*); *secus*, when the notice was to repair forthwith (*u*), or in accordance with the covenants of the lease (*x*).

In a recent case, the lease contained a covenant not to erect any structure (other than a conservatory) or make any alteration in the premises without the lessors' written consent, which was not to be unreasonably withheld, and there was the usual proviso for re-entry. The lessee erected two sheds without obtaining, or applying for any consent; and shortly afterwards the lessors, who had complained to the lessee of the breach of covenant, conveyed the property to the plaintiff, subject to and with the benefit of the lease. At the date when he took his conveyance the plaintiff was fully aware of the lessee's breach of covenant. It was held by Astbury, J., that by recognising in his conveyance the subsistence of the lease, the plaintiff must be taken to have waived the forfeiture (*y*).

As the actual ground of forfeiture need not be stated, the mere claim of forfeiture by reason of the non-payment of rent will not preclude the plaintiff from relying on a previous forfeiture (*z*).

(*s*) *Grimwood* v. *Moss*, L. R. 7 C. P. 360; *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 304; *Civil Service Co-operative Society* v. *McGrigor's Trustee*, [1923] 2 Ch. 347; and see *Evans* v. *Enever*, [1920] 2 K. B. 315; *Commissioners of Works* v. *Hull*, [1922] 1 K. B. 205.

(*t*) *Doe* d. *Morecraft* v. *Meux*, 4 B. & C. 606.

(*u*) *Roe* d. *Goatly* v. *Paine*, 2 Camp. 520.

(*x*) *Few* v. *Perkins*, L. R. 2 Ex. 92.

(*y*) *Davenport* v. *Smith* (1921), 1 Ch. 270. Cf. *Atkin* v. *Rose* (1923), 1 Ch. 522, 539.

(*z*) *Toleman* v. *Portbury*, L. R. 5 Q. B. 288, L. R. 7 Q. B. 344; cf. *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 304.

Sloman v. Walter.

8. The Law as to Relief against Forfeiture under the Law of Property Act, 1925, ss. 146 and 147.

Section 146 of the Law of Property Act, 1925, which takes the place of section 14 of the Conveyancing Act, 1881, and section 2 of the Conveyancing Act, 1892, provides in substance, by sub-section 1, that a right of re-entry or forfeiture under a proviso for breach of covenant or condition in a lease is not to be enforceable unless and until the lessor serves on the lessee a notice (a) specifying the breach complained of, and (b) if the breach is capable of remedy, requiring the lessee to remedy the breach, and (c) in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor.

By sub-section 2, where a lessor is proceeding to enforce a right of re-entry or forfeiture, the lessee may apply to the Court for relief, which may be granted on such terms as the Court thinks fit; and by sub-section 4, where a lessor is proceeding to enforce such a right, the Court may, on application by an under-lessee, make an order vesting, for the term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any interest in the property, upon such conditions as the Court thinks fit.

By sub-section 8, the section does not extend (i) to a covenant or condition against assigning, under-letting, or parting with possession, *where the breach occurred before the commencement of the Act*; or (ii) in a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books or accounts, or to enter and inspect the mine or its workings. And the section does not apply (sub-section 9) to a condition for forfeiture on bankruptcy or on taking in execution of the lessee's interest, if contained in a lease of (a) agricultural land; (b) mines; (c) a public-house or beer-shop; (d) a dwelling-house, let with the use of furniture or other chattels; (e) any property with respect to which the personal qualifications of the tenant are of importance. Where a condition of forfeiture on bankruptcy or on taking in execution of the lessee's interest is contained in any lease, other than a lease of any of the classes mentioned in sub-section 9, then (by sub-section 10) if the lessee's interest is sold

within one year from the bankruptcy or taking in execution, the section applies; but if the lessee's interest is not sold before the expiration of such year, the section only applies during the first year from the date of the bankruptcy or taking in execution. The section does not (sub-section 11), save as otherwise mentioned, affect the law relating to re-entry or forfeiture, or relief in case of non-payment of rent.

Section 147 contains new provisions giving relief in certain cases where there has been an omission to execute decorative repairs. By sub-section 1, after service on a lessee of a notice relating to internal decorative repairs to a house or other building, he may apply to the Court for relief, and if, having regard to all the circumstances, the Court is satisfied that the notice is unreasonable, it may by order wholly or partially relieve the lessee from liability for such repairs. By sub-section 2, the section does not apply (i) where the liability arises under an express covenant or agreement to put the property in decorative repair; (ii) to any matter necessary for putting the property in a sanitary condition, or for the maintenance of the structure; (iii) to any statutory liability to keep a house fit for habitation; (iv) to a covenant to yield up in a specified state of repair at the end of the term.

The notice required by section 146, sub-section 1, must not be a general one, but must be expressed with reasonable detail (*a*); and where the notice is not sufficiently specific as to certain breaches, the fact that it is sufficient as to other breaches mentioned in it, will not prevent the whole notice being bad (*b*). But it is not necessary to specify in the notice every defect in the state of repair (*c*), or to point out in what manner the breach of covenant should be remedied (*d*). And where the notice is good in form, the fact that some of the breaches alleged cannot be relied upon will not invalidate the notice as to those breaches which are proved (*e*).

In spite of the terms of the section, compensation need only be asked for where appropriate (*f*).

(*a*) *Fletcher* v. *Nokes*, [1897] 1 Ch. 271.
(*b*) *Re Serle*, [1898] 1 Ch. 652.
(*c*) *Fox* v. *Jolly*, [1916] 1 A. C. 1.
(*d*) *Piggott* v. *Middlesex C. C.*, [1909] 1 Ch. 134.
(*e*) *Pownall* v. *City of London Ry. Co.*, [1900] 1 Ch. 496.
(*f*) *Skinners' Co.* v. *Knight*, [1891] 2 Q. B. 542; *Lock* v. *Pearce*, [1893] 2 Ch. 271.

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In *Rose* v. *Spicer*, *Rose* v. *Hyman* (*g*), the defendant lessees, who were seeking relief against forfeiture in the lessors' action, had made certain alterations in buildings comprised in the premises demised. Those alterations were alleged to amount to a breach of the covenant to repair and maintain contained in the lease. The defendants offered to secure the reinstatement of the buildings in their former condition at the expiration of the lease, but insisted that they were entitled to make and continue certain of the alterations. The Court of Appeal, Cozens-Hardy, M.R., and Fletcher-Moulton, L.J. (Buckley, L.J., dissenting), held that the lessees were not entitled to relief, but this decision was overruled by the House of Lords. Cozens-Hardy, M.R., in that case laid down certain principles which should in his opinion be followed by the Court in granting or refusing relief: (1) the breaches of covenant alleged in the notice must be remedied, so far as possible, and reasonable compensation paid for those which cannot be remedied; (2) if a negative covenant has been broken the applicant must undertake to observe the covenant in future; (3) in cases not falling under (2) if the act complained of is one which would be restrained by the Court during the currency of the lease as an act of waste, the applicant for relief must undertake to make good the waste if possible; (4) if the act done falls neither under (2) nor (3) but is one for which damages could be recovered on the covenant, the applicant must undertake not to repeat the wrongful act or be guilty of a continuing breach. Commenting on the rules thus laid down by the Master of the Rolls, Lord Loreburn, in the House of Lords, said (*h*): "The discretion given by the section (*i*) is very wide. . . . I do not doubt that the rules enunciated by the Master of the Rolls are useful maxims in general, and that in general they reflect the point of view from which Judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted."

If the proper statutory notice has been given, the tenant can only obtain relief under this section before the landlord has re-entered or has recovered possession (*j*), but it is sufficient if

(*g*) [1911] 2 K. B. 234; [1912] A. C. 623. (*h*) [1912] A. C., p. 631.
(*i*) Section 14 of C. A., 1881, now replaced by section 146 of L. P. Act, 1925.
(*j*) *Rogers* v. *Rice*, [1892] 2 Ch. 170; *Re Riggs*, [1901] 1 K. B. 16.

he has applied for relief before re-entry (*k*). Where the right of renewing a lease for lives had been lost by non-payment of renewal fines, though demanded by the reversioners, the Court refused to relieve (*l*). But where a forfeiture had been incurred through breach of a covenant to repair, relief was granted on the terms of the defendant executing proper repairs and paying arrears of rent and costs (*m*).

Where a forfeiture had been incurred by the default of the lessee to complete houses under a covenant in a lease, the equitable mortgagees of the lessee were, under the special circumstances of the case, where no proper notice had been given, relieved from forfeiture upon their undertaking to perform the covenants (*n*), and a judgment by default in an action against the lessee for recovery of the land on the forfeiture was set aside on the application of the equitable mortgagees, although not parties to the action (*o*).

When the Court has made an order for relief the tenant may elect to take the order or suffer the forfeiture, for the Court has no jurisdiction to compel the tenant to take relief on the terms of the order (*p*). If relief is actually obtained, the effect is that the forfeiture is deemed never to have been incurred (*q*).

The sale within one year under section 146, sub-section 10, must be absolute; a conditional contract of sale is not sufficient (*r*). The ordinary proviso in a lease for forfeiture on bankruptcy applies where the person who is the holder for the time being of the term becomes bankrupt. Where, after assignment, the original lessee becomes bankrupt, there is no forfeiture (*s*).

It is important to observe that section 146 of the Law of Property Act, 1925 (unlike section 14 of the Conveyancing Act, 1881) applies to a covenant or condition against assigning, underletting, or parting with possession, provided that the breach occurs after the commencement of the Act. But under sub-section 4 (which re-enacts section 4 of the Conveyancing Act, 1882), the

(*k*) *Lock* v. *Pearce*, [1892] 2 Ch. 328.
(*l*) *Ruttledge* v. *Whelan*, 10 L. R. Ir. 263.
(*m*) *Bond* v. *Freke*, [1884] W. N. 47.
(*n*) *North London Land Co.* v. *Jacques*, [1883] W. N. 187.
(*o*) *Jacques* v. *Harrison*, 12 Q. B. D. 136.
(*p*) *Talbot* v. *Blindell*, [1908] 2 K. B. 114.
(*q*) *Dendy* v. *Evans*, [1910] 1 K. B. 268.
(*r*) *Re Castle*, 94 L. T. 396; *Ferguson & Co.* v. *F.*, [1924] I Ir. R. 22.
(*s*) *Smith* v. *Gronow*, [1891] 2 Q. B. 394.

Court may relieve an under-lessee, in a proper case, even though the breach of such a covenant or condition occurred before the commencement of the Act (*t*).

9. Forfeiture as affected by the Settled Land Act, 1925.

Under the Settled Land Act, 1925, the powers of the Act may be exercised by a limited owner, without his estate being determined or any cesser taking place thereupon. Section 106 (which takes the place of sections 51 and 52 of the Settled Land Act, 1882) provides (sub-section 1) in substance that if in a settlement or other instrument, a provision is inserted purporting to forbid a tenant for life or statutory owner to exercise any power under the Act, or his right to require the settled land to be vested in him, or attempting or tending, by a disposition over, or in any other manner, to prevent him from exercising or to induce him to abstain from exercising any power under the Act, or his right to require the settled land to be vested in him, such provision, as far as it purports or tends, or might have, the said operation, is to be deemed void. By sub-section 2, an estate or interest limited to continue so long only as a person abstains from exercising any such power or right is to take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power or right discharged from liability to determination on his exercising the same. Sub-section 3 provides that notwithstanding anything in a settlement the exercise by the tenant for life or statutory owner of any power under the Act is not to occasion a forfeiture.

It will be observed that the section applies whether the provision made inoperative is contained in the settlement itself or in a separate instrument (*u*), and whether the property affected by such a provision or limitation is the settled property itself or other property (*x*).

Dispositions designed to make the continuance of the tenant-for-life's rights under the settlement or in other property dependent upon his continued residence in (*y*) or continued receipt of the rents

(*t*) See *Imray* v. *Oakshotte*, [1897] 2 Q. B. 218; *Gray* v. *Bonsall*, [1904] 1 K. B. 601.

(*u*) *Re Smith*, [1899] 1 Ch. 331.

(*x*) *Re Ames*, [1893] 2 Ch. 479; *Re Eastman's S. E.*, 68 L. J. Ch. 122.

(*y*) *Re Paget's S. E.*, 30 Ch. D. 161; *Re Dalrymple*, 49 W. R. 627; *Re Fitzgerald*, [1902] 1 Ir. R. 162; *Re Adair*, [1909] 1 Ir. R. 311. Cf. *Re Gibbons*, [1920] 1 Ch. 372; *Re Anderson*, [1920] 1 Ch. 175.

and profits (*z*) of the settled property are void. A provision requiring residence *until* lease or sale is, however, valid (*z*); such a provision can only be invalid in so far as it is designed to restrain the exercise of the statutory powers (*a*). A limitation of the *income* of property to a tenant-for-life until he alienates or charges it, etc., is not affected by this section. Such a limitation in no way impedes the sale under the statutes of the subject-matter of the settlement, and if that is sold then the limitation in question is transferred to the income of the proceeds (*b*).

(*z*) *Re Haynes*, 37 Ch. D. 306; *Re Edwards' Settlement*, [1897] 2 Ch. 412.
(*a*) *Re Trenchard*, [1902] 1 Ch. 378.
(*b*) See *Re Levy's Trusts*, 30 Ch. D. 119.

POWERS.

TOLLET *v.* TOLLET.

1728. 2 P. W. 489.

Defective Execution of a Power aided.

Husband has a power to make a jointure to his wife by deed: he does it by will, and she has no other provision; equity will make this good. Equity will supply the want of a surrender of a copyhold, in case it be devised for payment of debts, or for a wife, or for younger children; so also will it help a defective execution of a power; but not a non-execution.

The husband, by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first and other sons in tail male, with a power to the husband to make a jointure on his wife by *deed* under his hand and seal.

The husband having a wife, for whom he had made no provision, and being in the Isle of Man, by his last *will*, under his hand and seal, devised part of his lands within his power to his wife for her life.

Objection.—This conveyance, being by a will, is not warranted by the power, which directs that it should be by *deed;* and a will is a voluntary conveyance, and, therefore, not to be aided in a Court of equity.

Sir Joseph Jekyll, M.R.—This is a provision for a wife who had none before, and within the same reason as a provision for a child not before provided for (*a*); and as a Court of equity would, had this been the case of a copyhold *devised*, have supplied the want of a surrender; so where there is a defective execution of the power, be it either for payment of debts, or provision for a wife or children unprovided for, I shall equally supply any defect of this nature.

(*a*) See *Hervey* v. *H. etc.*, 1 Atk. 561, cited *infra*.

The difference is betwixt a *non-execution* and a *defective execution of a power;* the latter will always be aided in equity, under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But this Court will not help the *non-execution* of a power (*b*), since it is against the nature of a power, which is left to the free will and election of the party whether to execute or not; for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself.

And in this case, the legal estate being in trustees, they were decreed to convey an estate to the widow for life in the lands devised to her by her husband's will.

NOTES.

1. Generally.
2. Of the classes in whose favour equity will aid a defective execution of a power or supply a surrender, p. 251.
3. Defective execution, p. 255.
4. Cases in which defects will not be aided, p. 258.
5. What powers will be aided, p. 259.
6. Non-execution of a power, p. 261.

1. Generally.

Wherever the formalities required by a power are not strictly complied with, the appointment will, at law (unless made valid by statute (*c*)), be void, and the property which is the subject of the power will consequently go as in default of appointment. Equity, however, although not holding the power to be well executed, will, where there is the *ability* to exercise a power over property, and a distinct *intention* to exercise it in favour of certain classes of persons, aid a *defective* execution of it by compelling, as in the principal case, the person having the legal interest to transfer it in the manner pointed out by the defective appointment. The principle upon which equity acts in these cases is thus stated by Alvanley, M.R. (*d*) : " Whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural

(*b*) But see cases dealt with in notes to *Harding* v. *Glyn*, *infra*.
(*c*) See *infra*, p. 260.
(*d*) *Chapman* v. *Gibson*, 3 Bro. Ch. 229.

obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir to make him perfect this intention " (*e*).

The execution of a power and a surrender of a copyhold *devised*, go hand in hand (*f*), but equity would not supply a surrender in the case of a covenant in a *deed* at the instance of persons having merely a *meritorious* consideration, any more than it would carry into execution a voluntary contract at the instance of such persons (*g*). For forms of judgments supplying defects in the execution of powers, see Seton (7th ed.), p. 1671.

2. Of the Classes in whose Favour Equity will aid a Defective Execution of a Power or supply a Surrender.

Purchasers for value.—" There is a distinction between persons claiming for meritorious and for valuable consideration; and good consideration is (*semble*) included in ' valuable ' " (*h*). A mere agreement or covenant to execute a power in favour of persons claiming only upon a *meritorious* consideration will not be enforced in equity; but where the consideration is *valuable*, an agreement or covenant to exercise a general power of appointment by deed (*i*) in a certain way will be enforced. So where D contracted to sell, at a price to be fixed by arbitration, certain lands over which he had a power of appointment, to a railway company, and then died without executing the power, the Court supplied the defect (*k*).

Creditors.—Secondly, equity will aid *creditors*. Where a testator shows an intention to provide for debts the Court will supply a defective execution (*l*). In *Wilkes* v. *Holmes* (*m*),

(*e*) See *Holmes* v. *Coghill*, 7 Ves. 498, in which the principle is criticised by Grant, M.R.

(*f*) *Chapman* v. *Gibson*, *supra*; *Sayer* v. *S.*, 7 Ha. 387; *Cotter* v. *Layer*, 2 P. W. 623; *Rodgers* v. *Marshall*, 17 V. 297; and Jekyll, M.R., in the principal case.

(*g*) See *Jefferson* v. *J.*, Cr. & Ph. 138; and see notes to *Ellison* v. *E.*, *post*. Surrenders of copyholds to the use of wills were rendered unnecessary by 55 Geo. 3, c. 192, repealed and replaced by sections 3—5 of 1 Vict. c. 26.

(*h*) Farwell on Powers, 3rd ed., p. 385.

(*i*) As to the effect of a covenant to exercise a general power of appointment by will, see *Beyfus* v. *Lawley*, [1903] A. C. 411; notes to *Aleyn* v. *Belchier*, *infra*.

(*k*) *Re Dykes' Estate*, 7 Eq. 337. *Secus* where there is no binding contract, *Morgan* v. *Milman*, 3 De G. M. & G. 24. See also *Fothergill* v. *F.*, 2 Freem. 257; *Taylor* v. *Wheeler*, 2 Vern. 564; *Jennings* v. *Moore*, 2 Vern. 609; *The London Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572.

(*l*) *Chapman* v. *Gibson*, 3 Bro. Ch. 229; *Bixby* v. *Eley*, 2 Bro. 325; *Ithell* v. *Beane*, 1 Ves. Sen. 215; *Tudor* v. *Anson*, 2 Ves. Sen. 582; *Fothergill* v. *F.*, 2 Freem. 257. (*m*) 9 Mod. 485.

power was given, in a marriage settlement, to the husband and wife to raise £2,000 out of certain lands of the wife's; and if no part should be raised in the life of the husband and wife, then it should be lawful for the survivor of them, *by will duly executed*, to raise that sum for the purpose of paying the debts of the husband and wife, or either of them, or making a provision for younger children. The wife, upon the death of the husband, defectively executed the power; it was objected that the debts which were to be paid by means of the power were the debts of the husband, whereas the estate was originally the wife's. However, Lord Hardwicke supplied the defect, observing that the debts were expressly provided for by the deed of settlement.

Where, moreover, a person has a *general* power of appointment over property which in default of appointment is given over, if he exercises such appointment in favour of volunteers by deed, or by will, such property will be liable in aid of the assets of the appointor for the benefit of his creditors (*n*), but if he does not exercise his power equity cannot interfere, and the persons entitled in default of appointment will take the property (*o*). The appointee is a trustee for the testator's creditors at the date of his death, not for those at the date of his will. Therefore, where a testator executes a general power of appointment and becomes bankrupt, the appointed fund is not available for creditors who have proved in the bankruptcy, but is available only for creditors whose claims have accrued subsequently (*p*).

A purchaser from a volunteer under a deed of appointment has a better equity than a general creditor of the appointor (*q*), but this does not apply in the case of appointments by will. In the latter case purchasers from an appointee are in the same position as purchasers of a legacy and subject to the same equities in respect thereof as their vendor (*r*). Creditors cannot claim to have a defective execution of a power in favour of a volunteer (who could not himself be aided) supplied in their favour (*s*). A

(*n*) See *Thompson* v. *Towne*, 2 Vern. 319; *Fleming* v. *Buchanan*, 3 De G. M. & G. 976; *Beyfus* v. *Lawley*, [1903] A. C. 411; *Re Hadley*, [1909] 1 Ch. 20, 35; and see A. E. Act, 1925, s. 3, sub-s. 2, and Sched. I, Part II.

(*o*) *Holmes* v. *Coghill*, 7 V. 499.

(*p*) *Jenney* v. *Andrews*, 6 Madd. 264; *Re Guedalla*, [1905] 2 Ch. 331; and see *Re Mathieson*, [1927] 1 Ch. 283.

(*q*) *George* v. *Milbanke*, 9 V. 190. Cf. *Halifax Joint Stock Banking Co.* v. *Gledhill*, [1891] 1 Ch. 31; *Re Hart*, [1912] 3 K. B. 6.

(*r*) *Jennings* v. *Bond*, 2 Jo. & Lat. 720; A. E. Act, 1925, Sched. I, Part II.

(*s*) Farwell, Powers (3rd ed.), p. 389.

lender to a testator who has taken by way of security for his loan a covenant by the testator to execute a general power of appointment by will in his favour is, as between himself and the other creditors of the testator, only a volunteer, and entitled to no preference (*t*).

By section 4 of the Married Women's Property Act, 1882, the execution of a general power by will by a married woman has the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable by the Act (*u*).

Charities.—Thirdly, *charities* will be aided. The rule of this Court, both before and since the passing of the Statute of Charitable Uses (*x*), seems to have been, that where the uses are charitable, and the person has full power to convey, the Court will aid a defective conveyance to such uses (*y*). This Statute is repealed by the Mortmain and Charitable Uses Act, 1888, but the preamble of it is preserved by section 13, sub-section 2 of the latter Act.

" The principle," said Wigram, V.-C., " upon which the Court appears to go is this, that if a person has power, by his own act, to give property, and has, by some paper or instrument, *clearly shown that he intended to give it*, although that paper, by reason of some informality, is ineffectual for the purpose . . . the Court will, in the case of a charity, by its decree make the instrument effectual to do that which was intended to be done " (*z*).

Meritorious Consideration.—Fourthly, equity will aid a *wife and a legitimate child* of the donee of the power, although they claim merely as volunteers, upon a meritorious consideration; as, for instance, upon a provision made for them after marriage (*a*), and a wife or child, although provided for, will be entitled to the aid of

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(*t*) *Re Lawley, Zaiser* v. *Lawley*, [1902] 2 Ch. 799, *sub nom. Beyfus* v. *Lawley*, [1903] A. C. 411.

(*u*) See *Hodges* v. *H.*, 20 Ch. D. 749; *Re Roper*, 39 Ch. D. 482; *Re De Burgh Lawson*, 41 Ch. D. 568; *Re Hughes*, [1898] 1 Ch. 529; *Re Fieldwick*, [1909] 1 Ch. 1; and notes to *Hulme* v. *Tennant*, Vol. I.

(*x*) 43 Eliz. c. 4.

(*y*) *Att.-Gen.* v. *Tancred*, 1 Eden. 14. As to the report of this case see 2 R. & M. 111 (*n.*).

(*z*) *Innes* v. *Sayer*, 7 Ha. 377, 388; 3 Mac. & G. 606; *Att.-Gen.* v. *Burdet*, 2 Vern. 754.

(*a*) *Tollet* v. *T.*, *supra*; *Fothergill* v. *F.*, 2 Freem. 257; *Sarth* v. *Blanfrey*, Gilb. Eq. R. 166; *Affleck* v. *A.*, 3 Sm. & G. 394; *Hervey* v. *H.*, 1 Atk. 567; *Lucena* v. *L.*, 5 B. 249; *Barron* v. *Constabile*, 7 Ir. Ch. 467; *Carlton* v. *C.*, [1906] 2 Ch. 523.

equity, the Court considering that the husband or the father are the proper judges what is a reasonable provision (*b*).

To no other persons, except a wife or legitimate child (*c*), will the aid of the Court be granted, upon the ground of the provision being for a *meritorious consideration*; neither to a husband (*d*); nor to a natural child (*e*); nor to a grandchild (*f*); nor to a father (*g*); nor to a mother, brother, or sister (*h*); nor to a nephew or niece (*i*); nor to a cousin (*k*); nor to a settlor defectively executing a power in his own favour (*l*). *A fortiori* equity will not afford its aid to *mere volunteers* (*m*).

If the obligation upon the donee of the power to provide for the persons taking in default of appointment be equal to the obligation owed to the objects of the power, equity will not interfere. "The principle must be this, that the testator being under an obligation to do an act, we will compel the heir to perfect it; but we will not compel him to fulfil an obligation at the expense of another; and, if the testator has totally forgot to make any provision for his eldest son, this shall be an answer to the claim of the wife, or other children" (*n*). If a daughter is unprovided for, but a son is provided for, a defective execution of a power in favour of the daughter will be aided in equity (*o*).

In *Braddick* v. *Mattock* (*p*), Leach, V.-C., said, "This Court will not supply a surrender against the heir-at-law *unprovided* for;

(*b*) *Hervey* v. *H.*, 1 Atk. 568; *Sneed* v. *S.*, Amb. 64; *Chapman* v. *Gibson*, 3 Bro. Ch. 230; *Smith* v. *Baker*, 1 Atk. 385 (surrender of copyholds); *Hume* v. *Rundell*, 6 Madd. 331; *Morse* v. *Martin*, 34 B. 500; *Re Walker*, [1908] 1 Ch. 560.

(*c*) A child made legitimate by the parents' subsequent marriage, under 16 & 17 Geo. 5, c. 60, would doubtless be regarded, for the purpose referred to in the text, as if born in wedlock; so also, it is thought, would a child adopted under 16 & 17 Geo. 5, c. 29.

(*d*) *Moodie* v. *Reid*, 1 Madd. 516; *Hughes* v. *Wells*, 9 Ha. 749, 769.

(*e*) *Fursaker* v. *Robinson*, Pr. Ch. 475; *Tudor* v. *Anson*, 2 Ves. Sen. 582; *Blake* v. *B.*, Beat. 575. Cf. *Re Deakin*, [1894] 3 Ch. 565.

(*f*) *Tudor* v. *Anson*, 2 Ves. Sen. 582; *Perry* v. *Whitehead*, 6 V. 544.

(*g*) *Sloane* v. *Cadogan*, App. to Sug. on Powers, 8th ed., p. 914.

(*h*) *Goodwyn* v. *G.*, 1 Ves. Sen. 226; *Goring* v. *Nash*, 3 Atk. 189, overruling *Watts* v. *Bullas*, 1 P. W. 60.

(*i*) *Strode* v. *Russel*, 2 Vern. 621, 625; *Marston* v. *Gowan*, 3 Bro. Ch. 170.

(*k*) *Tudor* v. *Anson*, 2 Ves. Sen. 582.

(*l*) *Ward* v. *Booth*, cited 3 Ch. Ca. 69, 92; *Ellison* v. *E.*, *post*, 6 V. 656; *Sergeson* v. *Sealey*, 9 Mod. 390.

(*m*) *Smith* v. *Ashton*, 2 Freem. 309; *Godwin* v. *Kilsha*, Amb. 684; *Re Anstis*, 31 Ch. D. 596. And see *per* Cotton, L.J., *Tucker* v. *Bennett*, 38 Ch. D. 1, 10.

(*n*) *Chapman* v. *Gibson*, 3 Bro. Ch. 230.

(*o*) *Hume* v. *Rundell*, 6 Madd. 331; *Lucena* v. *L.*, 5 B. 249; *Morse* v. *Martin*, 34 B. 500; *Re Walker*, [1908] 1 Ch. 560.

(*p*) 6 Madd. 363.

but it considers the parent as the best judge of the provision of that heir, and will not examine the sufficiency of the provision, unless perhaps in a case in which it may be challenged as illusory." It is clear that a surrender will be supplied as against a *collateral* heir, whether provided for or not; as a person is not supposed to be under any obligation to provide for a collateral heir (*q*).

3. Defective Execution.

As a general rule, where the *intention to execute* a power is sufficiently declared, though not in the form prescribed by the donor of the power, the persons to be benefited, and the amount they are to take, are sufficiently indicated, and there is *good consideration* for the attempted execution of the power, the defect in form will be supplied in equity, unless such defect is of the *essence* of the power (*r*).

Intention to Execute.—If the intention to execute the power appear clearly in writing, as where a donee of a power covenants to execute it (*s*), even before the power actually comes into existence (*t*); or, by his will, he desires the remaindermen to create the estate authorised by the power (*u*); or if he enters into an agreement to execute it (*x*); even though he keep the agreement in his own possession (*y*); or if by a mere writing, not sealed and delivered, he expresses an intention to give property which he had power to appoint by instrument sealed and delivered (*z*); or if he promises by letters to grant an estate (*a*); or to give a security (*b*), which he could only do by the exercise of his power, aid will be given. And an agreement for valuable consideration to exercise a power by deed will be aided in equity as an informal

(*q*) *Fielding* v. *Winwood*, 16 V. 90; see also *Chapman* v. *Gibson*, 3 Bro. Ch. 229; and also against *hæres factus*, *Smith* v. *Baker*, 1 Atk. 385.

(*r*) *Shannon* v. *Bradstreet*, 1 Sch. & L. 63; *Garth* v. *Townsend*, 7 Eq. 220; *Cooper* v. *Martin*, L. R. 3 Ch. 47, 57; *Kennard* v. *K.*, L. R. 8 Ch. 227; *Hallett* to *Martin*, 24 Ch. D., p. 632. See *Beddington* v. *Baumann*, [1903] A. C. 13.

(*s*) *Fothergill* v. *F.*, 2 Freem. 256; *Coventry* v. *C.*, 2 P. W. 222; *Sarth* v. *Bianfrey*, Gilb. Eq. R. 166.

(*t*) *Charlton* v. *C.*, [1906] 2 Ch. 523.

(*u*) *Vernon* v. *V.*, Amb. 1.

(*x*) *Shannon* v. *Bradstreet*, 1 Sch. & L. 52; *Mortlock* v. *Buller*, 10 V. 315; *Lowry* v. *Dufferin*, 1 Ir. Eq. R. 281; *Dowell* v. *Dew*, 1 Y. & C. Ch. 345.

(*y*) *King* v. *Roney*, 5 Ir. Ch. R. 64, 77.

(*z*) *Kennard* v. *K.*, L. R. 8 Ch. 227.

(*a*) *Campbell* v. *Leach*, Amb. 740; Sugd. on Powers, App. 8th ed., p. 950; and see *Blake* v. *French*, 5 Ir. Ch. R. 246.

(*b*) *The London Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572.

execution of a general power of appointment (*c*). A recital by the donee of a power, in the marriage settlement of one of his daughters, who was one of the objects of the power, that she was entitled to a share of a sum to which she could only be entitled by his appointment, has been held sufficient evidence of his intention to execute the power, and was therefore aided as a defective execution of a power (*d*). And a statement in a lease that certain persons were "the present trustees" of a will was held to operate as an appointment of new trustees (*e*). So also where a donee of a power, in an answer to a bill in Chancery, states that he "appoints, and intends, by writing in due form, to appoint" (*f*); but of course there can be no intention to execute a power unless there is a knowledge of its existence (*g*). So where a donee of a power concurred in a deed of settlement, for purposes unconnected with the fund subject to the power, and in ignorance of the existence of the power, such concurrence was held not to operate as a defective exercise of the power which would be aided in equity (*h*). And where a married woman had two powers of appointment, both exercisable by will, but from the terms of her will it was quite uncertain which power she intended to exercise, it was held that her will did not operate as an exercise of either power (*i*).

In order that the Court should be able to rectify any informality in the execution of a power, it is essential, not only that the persons to be benefited, and the amount of the benefit, should be sufficiently indicated, *but that the intention to pass the property, though not necessarily under the power* (*j*), should be clearly shown.

In *Garth* v. *Townsend* (*k*), Mrs. G., having power to appoint funds amongst her children by deed, or by her last will in writing, or any writing purporting to be or being in the nature of her last will, or any codicil thereto, to be attested by two credible

(*c*) *Re Dykes' Estate*, 7 Eq. 337. Cf. *Beyfus* v. *Lawley*, [1903] A. C. 411 (as to execution of power by will).

(*d*) *Wilson* v. *Piggott*, 2 V. 351; *Poulson* v. *Wellington*, 2 P. W. 533.

(*e*) *Re Farnell*, 33 Ch. D. 599.

(*f*) *Carter* v. *C.*, Mos. 365; and see *Fortescue* v. *Gregor*, 5 V. 553.

(*g*) As to knowledge of the future existence of a power, see *Charlton* v. *C.*, [1906] 2 Ch. 523. Cf. *Re Hayes*, [1901] 2 Ch. 259.

(*h*) *Griffith-Boscawen* v. *Scott*, 26 Ch. D. 358.

(*i*) *Re Herdman's Trusts*, 31 L. R. Ir. 87.

(*j*) *Carver* v. *Richards*, 27 B. 488.

(*k*) 7 Eq. 220.

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witnesses, died intestate; but left in an envelope, addressed to her son, an unattested memorandum (signed by herself, and dated eight years before her death), "For my sons and daughters. Not having made a will, I leave this memorandum, and hope my children will be guided by it, though it is not a legal document. The funds I wish divided as follows" (and after apportioning the funds among her children, and making a bequest to them out of another fund, and a gift of the residue, she thus ends the memorandum): "This paper contains my last wishes and blessings upon my dear children, and thanks for their love to me." James, V.-C., held that the Court could not aid any defects in the execution of the memorandum, so as to give it validity as an appointment. "The true test," said his Honour, "is, is there a *distinct intention to execute the power?* Now, here the persons to take and the amount to be taken are sufficiently pointed out, but where the instrument fails is in *intention to execute the power.* Mrs. Garth purposely abstained from executing it. . . . The jurisdiction of the Court is to *supply defects occasioned by mistake or inadvertence; not to supply omissions intentionally made*" (*l*).

But a donee may have sufficiently indicated a present intention to execute a power, although he may in a certain event express an intention to give the property by a more formal document. In *Kennard* v. *K.* (*m*), a lady, having a power of appointment by deed or will over certain leasehold property, which in default of appointment was vested absolutely in her, wrote and signed an unattested paper, by which, after referring to the property in terms sufficient to identify it, she proceeded: "If I die suddenly, I wish my eldest son to have it. My intention is to make it over to him legally if my life is spared." She died within three months after signing this paper. It was held that the memorandum was a defective execution of the power by the donee, and that equity would relieve against the defect in favour of the eldest son. "She expresses," said James, L.J., "her intention that her son shall have the property which is the subject of the power. * * * In *Garth* v. *Townsend* I considered that, upon the true construction of the instrument, there was no intention to give the property, but only to request the persons taking it in default of appointment to make a certain application of it, without legally binding them to do so." And

(*l*) And see *Pennefather* v. *P.*, 7 Ir. Eq. 300; Farwell, Powers (3rd ed.), p. 379.

(*m*) L. R. 8 Ch. 227.

Mellish, L.J., observed, "She means in any event to give the property, but to do so by a more formal instrument if her life is spared" (*n*).

Defects relieved against.—Equity will supply a defect in the execution of a power which consists in the want of some circumstance required in the manner of execution, as the want of a seal or of a sufficient number of witnesses, or where it has been executed by a deed instead of a will (*p*). Since the Wills Act (*q*), powers to be executed by will must comply with the formalities of the Act, but need not be executed with additional formalities, even though so expressly required by the instrument creating the power. An informal document which appears to be, *prima facie*, testamentary, but which can be fairly construed as intended to operate *inter vivos*, may be so construed and aided in equity accordingly (*r*). But if the document be clearly testamentary, and be not executed with two witnesses in accordance with the provisions of the Wills Act, it will not be so aided. In the case, however, of a will made abroad, in accordance with the forms of the *lex loci*, it may operate as the exercise of a power of appointment over funds in this country, although not executed in the form required by English law (*s*).

A power will, as in the principal case, be aided, if it has been executed by a *will*, when it ought strictly to have been executed by deed (*t*).

In *Barron* v. *Constabile* (*u*) the power was to *charge* a jointure not exceeding £600 a year by deed or will; the donee of the power *devised* instead of charging a jointure, and the devise was held an execution of the power.

4. Cases in which Defects will not be Aided.

Equity will not aid a defect if the intention of the donor would be thereby defeated. Thus, although there is no doubt that a Court

(*n*) See *Re Kirwan's Trusts*, 25 Ch. D. 373, 380.

(*p*) *Cockerell* v. *Cholmeley*, 1 R. & M. 418, 424. As to the want of sufficient witnesses to a deed, see L. P. Act, 1925, s. 159, *infra*.

(*q*) 1 Vict. c. 26, ss. 9 and 10. As to powers insufficiently executed by will before the Act, see *Lucena* v. *L.*, 5 B. 249; *Morse* v. *Martin*, 34 B. 500.

(*r*) *Kennard* v. *K.*, *supra*.

(*s*) *Re Walker*, [1908] 1 Ch. 560; *Re Simpson*, [1916] 1 Ch. 502; *Re Wilkinson's Settlement*, [1917] 1 Ch. 620. The *dictum* upon this point of Kay, J., in *Re Kirwan*, 25 Ch. D. 373, 381, and the decision in *Hummel* v. *H.*, [1898] 1 Ch. 642, cannot be considered any longer law.

(*t*) *Sneed* v. *S.*, Amb. 64; *Mills* v. *M.*, 8 Ir. Eq. R. 192; *Bruce* v. *B.*, 11 Eq. 371.

(*u*) 7 Ir. Ch. R. 467.

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of equity will aid the defective execution of a power in favour of a creditor or purchaser (although the donee be a married woman (*x*)), the Court, in such cases, must be satisfied that the formalities which have not been observed, are no more than matters of form; and that the donee of the power has not by their non-observance been deprived of any of the protection which the due exercise of the power would have afforded. Thus a power to be executed by will cannot be executed by deed, and equity will not give its aid, as this would destroy an essential qualification of the power (*y*). Neither (*semble*) would equity treat an instrument, if clearly testamentary in character, but which neither satisfied the Wills Act nor the terms of the power, as a deed (*z*). The Court looks with especial jealousy on any such transaction in which a wife may have acted under the influence of her husband (*a*). Equity will not relieve where the execution sought to be aided would involve a breach of trust (*b*). Nor where it would be a fraud upon the power (*c*). Nor where there is a defect in the execution of a power under an Act of Parliament, save so far as excepted by statute (*d*). Nor as to powers under the Civil List Act, or under particular family entails (*e*). Nor wherever the defect is of *the essence* of the power (*f*). Where a woman having a power "during coverture by deed or will to appoint," appoints by a will made during coverture, but survives her husband and dies whilst discovert, the power is well exercised (*g*).

5. What Powers will be Aided.

There is no doubt that powers of jointuring (*h*), of raising portions, of sale, of revoking uses and generally appointing an estate, will, if defectively executed, be aided.

(*x*) *Pollard* v. *Grenville*, 1 Ch. Ca. 10; *Dowell* v. *Dew*, 12 L. J. Ch. 158; *Doe* v. *Weller*, 7 T. R. 480; *Dillon* v. *Grace*, 2 Sch. & L. 456; *Stead* v. *Nelson*, 2 B. 245.

(*y*) *Reid* v. *Shergold*, 10 V. 370, 380; *Re Walsh*, 1 L. R. Ir. 320; *Coffin* v. *Cooper*, 13 W. R. 571.

(*z*) See *per* Mellish, L.J., in *Kennard* v. *K.*, L. R. 8 Ch. 227.

(*a*) *Hopkins* v. *Myall*, 2 Russ. & M. 86; *Thackwell* v. *Gardiner*, 5 De G. & Sm. 58; and *Marjoribanks* v. *Hovenden*, 6 Ir. Eq. R. 238.

(*b*) *Mortlock* v. *Buller*, 10 V. 292; *Ord* v. *Noel*, 5 Madd. 438; *Bellringer* v. *Blagrave*, 1 De G. & Sm. 63.

(*c*) *Harnett* v. *Yielding*, 2 Sch. & L. 549; *Re Kirwan*, 25 Ch. D. 373; see *Dyas* v. *Cruise*, 2 Jo. & Lat. 460.

(*d*) Farwell, Powers, 3rd ed., p. 394. (*e*) Farwell, Powers, p. 395.

(*f*) *Cooper* v. *Martin*, L. R. 3 Ch. 47.

(*g*) *Re Illingworth*, [1909] 2 Ch. 297.

(*h*) *Charlton* v. *C.*, [1906] 2 Ch. 523; Farwell, 582.

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Powers of Leasing.—It was pointed out in the last edition of this work that equity (at that date) would aid, as against the remainderman, a defective appointment under a power of leasing, a lessee being *pro tanto* a purchaser; and that the statutes 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17, also conferred powers of granting relief. But these Acts have been repealed by the Law of Property Act, 1925, and substantially replaced by section 152 of that Act; and under the legislation of 1925, leases granted by tenants for life or by trustees take effect practically in all cases, in exercise of statutory powers. Equity could not, it seems, aid a defective exercise of a statutory power which does not comply with the conditions imposed by the statute.

Other Statutory Enactments relating to Powers.—It may here be mentioned that if a will is in other respects properly executed, probate cannot be refused upon the ground that the power under which it has been made has not been properly followed (*i*). It is a question of construction for the Court to determine whether the formalities required by the power have been duly complied with (*k*).

If a power of appointment is exercised by a will executed in English form, though the appointor is domiciled abroad and the will is not validly executed according to the law of domicil, the document may be admitted to probate as a will for the purposes of the appointment, though not admissible for other purposes (*l*).

By the Wills Act (*m*) no appointment made by will, in exercise of any power, will be valid, unless the same be executed with the solemnities required by the Act (*n*); but if those are complied with, the appointment will be valid, although some additional or other form of execution or solemnity may have been required by the power (*o*). The Wills Act governs all testamentary dispositions of land in England (*p*) including leaseholds (*q*) and all wills of personal

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(*i*) *Barnes* v. *Vincent*, 5 Moo. P. C. 201.

(*k*) See *De Chatelain* v. *De Pontigny*, 1 Sw. & Tr. 411; *Paglar* v. *Tongue*, L. R. 1 P. & D. 158; *Re Fenwick*, *ibid.* p. 319. On the question of the functions of the Court of Probate and the Court of Construction, see Jarman, Wills (6th ed.), i, 799 *et seq.*

(*l*) *Murphy* v. *Deichler*, [1909] A. C. 446; Farwell (3rd ed.), pp. 154-5.

(*m*) 1 Vict. c. 26, s. 10.

(*n*) See *Re Barnett*, [1908] 1 Ch. 402. Cf. *Re Broad*, [1901] 2 Ch. 86.

(*o*) *Re Tharp*, 3 P. D. 80.

(*p*) See Westlake Int. Law (7th ed.), p. 221.

(*q*) *Pepin* v. *Bruyère*, [1902] 1 Ch. 24; but cf. *Re Grassi*, [1905] 1 Ch. 584.

estate of persons dying domiciled in England (*r*). The will of personalty of a person dying domiciled abroad is (subject to the provisions of Lord Kingsdown's Act (*s*)), governed by the law of his domicil at the time of his death.

By section 159 of the Law of Property Act, 1925 (taking the place of section 12 of the 22 & 23 Vict. c. 35), it is provided that a deed executed in the presence of, and attested by, two or more witnesses (in the manner in which deeds are ordinarily executed and attested) is, so far as respects the execution and attestation thereof, a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it is expressly required that a deed or instrument in writing made in exercise of the power, is to be executed or attested with some additional or other form of execution, or attestation, or solemnity. By sub-section 2 this provision does not operate to defeat any direction in the instrument creating the power that—(a) the consent of any particular person is to be necessary; (b) any act is to be performed having no relation to the mode of executing the instrument. The section does not prevent the donee of a power from executing it in accordance with the power by writing, or otherwise than by an instrument executed and attested as a deed (sub-section 3).

6. Non-execution of a Power.

Defective execution must be distinguished from non-execution. Defective execution is where a person does some act with the intention of passing the property subject to the power (*t*).

The non-execution of a power will not be aided (*u*) : a person, for instance, is not entitled to the aid of the Court on the ground of the execution of the power having been prevented by accident or by the sudden death of the donee (*x*). The non-execution of a power through *mistake* will not be aided; as where a donee under a mistaken apprehension that certain persons whom he desired to benefit would take on his leaving the power unexecuted, and *expressed his intention not to make any further appointment* (*y*).

(*r*) Westlake, pp. 153 *et seq.*

(*s*) 24 & 25 Vict. c. 114.

(*t*) See *Shannon* v. *Bradstreet*, 1 Sch. & L. 52, 63.

(*u*) See *Holmes* v. *Coghill*, 12 V. 206; Farwell (3rd ed.), p. 384.

(*x*) *Piggott* v. *Penrice*, Com. 250; Gilb. Eq. R. 138; *Blockvill* v. *Ascott*, 2 Eq. Ca. Abr. 659 (n.); and see *Buckell* v. *Blenkhorn*, 5 Ha. 131.

(*y*) *Langslow* v. *L.*, 21 B. 553; *Re Jack*, [1899] 1 Ch. 374. Cf. *Garth* v. *Townsend*, 7 Eq. 220.

Tollet v. Tollet.

Where, however, the execution of a power has been prevented by fraud, as where the deed creating the power has been fraudulently retained by the person interested in its non-execution, then, *semble*, equity will afford its aid (*z*).

(*z*) *Bath and Montague's Case*, 3 Ch. Ca. 84, 122; *Ward* v. *Booth*, cited 3 Ch. Ca. 69. See also *Piggott* v. *Penrice*, Pr. Ch. 471; *Vane* v. *Fletcher*, 1 P. W. 354; *Luttrell* v. *Olmius*, cited 11 V. 683; *Seagrave* v. *Kirwan*, 1 Beat. 157; *Bulkley* v. *Wilford*, 2 Cl. & Fin. 102; Farwell, 383—5; and cf. *Middleton* v. *M.*, 1 J. & W. 94.

ALEYN *v.* BELCHIER.

1758. 1 Eden, 132 (*a*).

Fraud upon a Power.

Power of jointuring executed in favour of a wife, but with an agreement that the wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts: held a fraud upon the power, and the execution set aside, except so far as related to the annuity; the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment.

The Rev. Thomas Aleyn being seised of a real estate in Essex, of the yearly value of £540, subject to a mortgage for a term of 500 years to Sir Charles Palmer for £500, and having a nephew, Edmund Aleyn, and two brothers, the plaintiff, Giles Aleyn, and William, who was a defendant, by his will, bearing date May 28, 1746, devised the same to Eyre and Bragg in trust by sale or mortgage to raise money, and pay his debts and legacies, and to permit his wife to receive the rents and profits of the residue for her life, and after her death in trust to convey to his nephew Edmund for life, with remainder to his first and other sons in tail male, with proper limitations to support contingent remainders, with *a power to his nephew to make a jointure on any woman he should then after marry, for her life, in bar of dower,* with powers to provide for younger children, and to make leases, with remainder to the testator's brother Giles for life; remainder to his first and other sons in tail male; remainder to his brother William for life; remainder to his first and other sons in tail male; remainder to his own right heirs: he gave his brother, the plaintiff, an annuity of £30 a year for his life, to be paid out of his estate, to be increased to £50 a year in case his nephew should survive his, the testator's, wife.

(*a*) S. C. Sugd. on Pow. App.; Amb. MSS.; Reg. Lib. A. 1757, fol. 432.

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A bill was filed soon after the testator's death by the widow, and, on February 14, 1749, a decree made to establish the will, and for payment of debts and legacies by mortgage or sale in the usual way. The Master reported there was due for debts and legacies £1,516 1s. 10d. which he approved to be raised by mortgage. The widow died in April, 1750, and Edmund became entitled to the possession of the estate. The defendant, William Belchier, having advanced money to pay off the incumbrances, a mortgage, bearing date June 26 and 27, 1750, was made of the estate to him in fee, and the term for years was assigned to John Belchier in trust for W. Belchier.

Edmund was very extravagant, and became indebted to William Belchier in the sum of £1,760.

On June 4, 1750, Edmund married the defendant Jane, who was a low woman without fortune, and no provision for her was either made or agreed to be made; but, soon after the marriage, by articles of agreement, bearing date August 1, 1750, and made between Edmund Aleyn and his wife of the one part, and William Belchier of the other, reciting the will of Thomas Aleyn, giving Edmund a power of jointuring, and that he and Jane were lately married, and that he was indebted to William Belchier in the sum of £1,760, besides the mortgage, Edmund Aleyn, in satisfaction and discharge of the said sum of £1,760, and in consideration of the several annuities and money thereinafter agreed to be paid, covenanted within six months to procure an effectual conveyance and settlement to be made by the trustees in Thomas Aleyn's will, and immediately after such settlement should be made, to appoint the whole estate to his wife for her life, in case she should survive him, for her jointure; and that he and his wife, as soon as they should become respectively seised of the legal estate of freehold, would, by fine and conveyances, convey and assure all the said premises by the said will devised and intended to be settled, unto and to the use of William Belchier, his heirs and assigns, during the lives of Edmund Aleyn and Jane his wife, and the longer liver of them; and in consideration thereof, William Belchier covenanted that, in case the said settlement should be perfected, whereby the estates should become well vested in him and his heirs, for the lives of Edmund and Jane

his wife, and the longer liver of them, to pay the several annuities after mentioned, namely: to Jane Aleyn, during the joint lives of her and Edmund her husband, £60 a year, clear of all deductions, for her separate use; to Edmund Aleyn, for his life, in case he should survive Jane his wife, £60 a year, clear of all deductions; and to Jane, in case she should survive Edmund her husband, for her life, £100 a year, clear of all deductions; and to pay to John Miles, son of Jane by a former husband, £105 at the age of twenty-one years; and also to pay Jane £5 yearly towards his maintenance and education, till the £105 should become payable.

The estate was conveyed by lease and release of August 6 and 7, 1750, to the uses of Thomas Aleyn's will pursuant to the decree; and by deed, dated August 8, 1750, reciting the conveyance and power to jointure, Edmund Aleyn, in consideration of the marriage, and in order to make a provision for Jane, his wife, appointed the whole estate to Jane his wife, for a jointure, subject to the payment of the annuities given by the will of Thomas Aleyn, and of the mortgage of £1,516 1s. 10d. and interest.

On August 10, 1750, Edmund Aleyn and Jane, his wife, executed a deed, by which Edmund covenanted with George Townsend, that he and his wife would levy a fine of the premises to Townsend and his heirs, for and during the lives of Edmund and his wife, and the longer liver of them, in trust for William Belchier and his heirs, which was levied accordingly.

William Belchier took possession of the estate, and received the rents and profits, and paid the plaintiff, during Edmund's life, two sums of £25 and £21 5s., in part of the annuity he was entitled to under Thomas Aleyn's will.

Edmund died in June, 1755.

On November 26, 1756, the plaintiff filed the present bill to redeem the estate, on payment of £1,516 1s. 10d., the mortgage money borrowed under the decree, and to be let into the possession of the estate; for an account of the rents and profits from the death of Edmund, submitting to pay Jane £100 a year for her life, and to have the deeds and writings of the estate delivered up.

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Jane Aleyn and William Belchier admitted, in their several answers, the facts as before stated. Jane Aleyn said that the settlement was intended to make a reasonable provision for her, and to save Edmund from ruin; and that if Edmund had not been in debt at the time of their marriage, he would have settled the whole estate on her for her jointure. William Belchier said that the consideration of the settlement and conveyance was truly and *bona fide* advanced, part before the execution of the settlement, and the remainder at or about the time of the execution of the settlement and conveyance to Townsend; and they both admitted that Edmund was, at the time of the settlement, in distressed circumstances, and in want of money.

Mr. Perrot and Mr. Ambler for the plaintiff (*b*).

The Attorney-General, Sir Charles Pratt, and the Solicitor-General, the Hon. Charles Yorke, for the defendant Belchier; Clark, for the jointress.

The Lord Keeper Henley (*c*).—The question is whether Edmund Aleyn has properly executed the power as a jointure, and has properly conveyed to the defendant, Belchier, or whether the transaction is void *in toto*, or in part. I am inclined to think the power was not well executed in point of law (*d*). It ought to have been before marriage. The power is given under restrictions. It must be a jointure in bar of dower, which can only be before marriage. Dower is not barrable by a jointure after marriage. But, I build my opinion upon the next question.

The whole transaction is an agreement between the husband and wife. No point is better established than that *a person having a power must execute it* bona fide *for the end designed, otherwise it is corrupt and void.* The power here was intended for a jointure, not to pay the husband's debts. The motive that induced Edmund to execute it was not a provision for his wife. This case is not distinguishable from the cases alluded to, nor from *Lane* v. *Page*. If a father has a power to appoint amongst

(*b*) They cited *Lane* v. *Page*, Amb. 233; *Lord Tyrconnel* v. *Duke of Ancaster*, Amb. 237.

(*c*) Afterwards Lord Chancellor and Earl of Northington.

(*d*) *Sed vide* Sugd. Pow. (8th ed.), p. 708.

children, and agrees with one of them, for a sum of money, to appoint to him, such appointment would be void. It was admitted the execution would be void, but it was said to be only so amongst the children. In that case the money is to go to the children: no other person has any interest in it; here the remainder-man has an immediate right to the estate after the death of Edmund, if there is no appointment. It was said to differ from the case of parent and children; and that, if the husband had fairly executed the power, the wife might have immediately afterwards joined in a fine to pay his debts. The reason is plain: she would then have had a first interest, and the husband would have had no control over it; but it does not from thence follow that they might make an agreement to divide the money between them. It cannot be supposed he would have settled the whole on her without some such view. She was of no family and had no fortune. It would have kept the children, if they had any, entirely out of the estate till her death. It is like the case put of parents and children; and I think *Lane* v. *Page* is in point, and ought to govern my decision in the present case.

Declare the appointment good as to the £100 only, for the benefit of Jane. The plaintiff to redeem, on payment of principal and interest of the mortgage and costs, so far as relates to the mortgage. Account of rents and profits from the death of Edmund; and Belchier to pay the rest of the costs.

NOTES.

1. Generally.
2. Excess, where severable, p. 274.
3. Purchasers for value, p. 275.
4. Family arrangements, p. 276.
5. Appointments to infants and sick and dying persons, p. 277.
6. Release of power, p. 279.
7. Consent of trustees and others to exercise of power, p. 281.
8. Bond or covenant to appoint, p. 281.
9. Illusory appointments, p. 283.
10. Burden of proof, p. 283.

1. Generally.

"Fraud" is here used in a technical sense; for it frequently happens that the persons implicated in what is called a fraud upon

a power are acting from honest motives (*e*). "The term 'fraud' in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term, or any conduct which could properly be called dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power" (*f*).

A person having a limited or special power, must execute it *bona fide* for the end designed, otherwise the appointment will be held corrupt and void (*g*).

"The donee, the appointor under the power," said Westbury, C., in *Portland* v. *Topham* (*h*), "must at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power), which he may desire to effect in the exercise of the power."

But the donee of a power to jointure may exercise it in favour of his wife in accordance with a bargain by which he himself is benefited, provided this is done, not by diverting from her any part of the jointure itself, but by applying it to its proper use in consideration of his getting something which he is at liberty to take for his own benefit (*i*).

The donee of a power of appointment is not a trustee of it, except in the sense that he must not attempt to gain any indirect object by its execution in a way which in form may be good, but which is a mere mask for something that is bad, or unauthorised (*k*). So where a man has a power to make a jointure under restrictions, as £100 a year for every £1,000 of the wife's portion, and he has himself advanced a sum of money, in order colourably to enable

(*e*) See, *e.g.*, *Duggan* v. *D.*, 7 L. R. Ir. 152; *Re Crawshay*, 43 Ch. D. 615; *Re Perkins*, [1893] 1 Ch. p. 288.

(*f*) *Per* Lord Parker in *Vatcher* v. *Paull*, [1915] A. C., p. 378.

(*g*) *Topham* v. *Portland*, 1 De G. J. & S. 517; L. R. 5 Ch. 40; *S. C.*, nom. *Portland* v. *Topham*, 11 H. L. Cas. 32; *Re Cohen*, [1911] 1 Ch. 37; *Cochrane* v. *C.*, [1922] 2 Ch. 230.

(*h*) 11 H. L. Cas. 54; *Cochrane* v. *C.*, *supra*.

(*i*) *Saunders* v. *Shafto*, [1905] 1 Ch. 126, overruling *Whelan* v. *Palmer*, 39 Ch. D. 648.

(*k*) *Palmer* v. *Locke*, 15 Ch. D., p. 303.

him to make the jointure larger, the Court will reject such part as is more than proportionate to the real fortune (*l*). So an appointment to a child by a father in consideration of his wife postponing her jointure to some mortgages which he proposed to effect, has been held void (*m*) : and if a parent, having a power of appointment amongst his children, appoints to one or more of them, to the exclusion of the others, upon a bargain either for the benefit of a stranger or for his own advantage, equity will relieve against the appointment as a fraud upon the power, as where there is a secret understanding that the child shall assign a part of the fund to a stranger (*n*), or where the appointment is expressed to be made in payment of a debt (*o*), or where it is shown to have been made in order that a decree *nisi* for divorce might without delay be made absolute (*p*). And an antecedent bargain between a father and his children, that if the appointment is made in their favour they will lend the fund to their father (though on good security), will vitiate the appointment (*q*).

It seems that a condition attached to an appointment, making it determine if the appointee changes his religion, is not invalid as a fraud on the power (*r*).

In *Duggan* v. *D.* (*s*), a tenant for life of a farm, with power of appointment among her children, made an agreement with such of them as had attained a full age to appoint the fund to them on condition that they would purchase her life interest at a valuation, and pay her the purchase money out of the fund so appointed. It was held that the appointment was bad, as its *primary object and only certain effect* was to confer an immediate personal benefit upon herself alone, even though, pursuant to the agreement, she applied a greater part of the money so obtained in payment of the debts which the appointees had joined her in securing, and which had

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(*l*) *Lane* v. *Page*, Amb. 234; *Tyrconnel* v. *Ancaster*, Amb. 237; 2 Ves. Sen. 500. And see *Weir* v. *Chamley*, 1 Ir. Ch. R. 295, 317.

(*m*) *Rowley* v. *R.*, Kay, 242.

(*n*) *Daubeny* v. *Cockburn*, 1 Mer. 626; *Re Marsden's Trusts*, 4 Drew. 594; *Farmer* v. *Martin*, 2 Si. 502; and see *Thompson* v. *Simpson*, 1 Dr. & W. 459; *Askham* v. *Barker*, 12 B. 499; *Conolly* v. *M'Dermott*, Beat. 601; *Jackson* v. *J.*, 7 Cl. & Fin. 977; *Carver* v. *Richards*, 1 De G. F. & J. 548.

(*o*) *Reid* v. *R.*, 25 B. 469: and see *Beddoes* v. *Pugh*, 26 B. 407, 411.

(*p*) *Cochrane* v. *C.*, [1922] 2 Ch. 230.

(*q*) *Arnold* v. *Hardwick*, 7 Si. 343.

(*r*) *Hodgson* v. *Halford*, 11 Ch. D. 959; *Wainwright* v. *Miller*, [1897] 2 Ch. 255; cf. *D'Abbadie* v. *Bizoin*, 5 Ir. Eq. R. 205.

(*s*) 7 L. R. Ir. 152.

been contracted by her for the benefit of her family and in keeping up a farm where they all resided (*t*).

An appointment to a child, *although not for the advantage of the appointor*, will be invalid, if it be not made *bona fide*; thus in *Salmon* v. *Gibbs* (*u*), the donee of a power of appointment over a fund among his children, to whom it was given in default of appointment, had only two daughters, and appointed nearly the whole of the fund to one of them, who was unmarried, on an understanding, but without any positive agreement, that the appointee would re-settle one moiety of it on trust for the separate use of the other daughter, who was married, exclusively of her husband, and after her death on trust for her children. A re-settlement was accordingly made without the privity of the married daughter, who did not hear of the transaction until several years after. It was held on the suit of her husband, that the appointment was invalid, and a settlement of his wife's share was directed.

And an appointment by will to an object of the power, *unobjectionable when it was executed*, may be rendered invalid as a fraud on the power by the appointee entering into an arrangement with the appointor under which a person, not an object of the power is to take an interest in the sum appointed (*x*).

Moreover, where an appointment is exercised with the view of defeating the object of the power, it will be invalid, *although the objectionable arrangement has not been made known to the appointee*, if the appointment was made by the appointor relying upon the moral influence which his wishes, when made known to the appointee, would exercise over him, in carrying out such arrangement. In *Re Marsden's Trusts* (*y*), a mother, who had under a settlement a power of appointment among children, desired to make a provision for the father out of the settled fund. This intention was openly discussed, and a solicitor consulted, who advised that no appointment could be made to the father. An arrangement was then made *between the father and the mother*, that the whole fund should be appointed to the eldest daughter, an infant, with the object that when the mother was dead, the father might tell the daughter that the whole fund had been appointed to her under an

(*t*) And see *Re Crawshay*, 43 Ch. D. 615.

(*u*) 3 De G. & Sm. 343; and see *Knowles* v. *Morgan*, 54 Sol. Jo. 117.

(*x*) *Re Kirwan's Trusts*, 25 Ch. D. 373; and see *Tharp* v. *T.*, [1916] 1 Ch. 142; *Re Cooke*, [1922] 1 Ch. 292.

(*y*) 4 Drew. 594; *Re Crawshay*, 43 Ch. D. 615; see *Re Perkins*, [1893] 1 Ch. 283; Farwell, (3rd ed.), pp. 382—4.

arrangement between himself and her mother, made for the purpose of enabling the daughter to make a provision for him, and that thus she, the daughter, might be induced to carry out the intention. The appointment was held bad, as a fraud on the power. "In my opinion," said Kindersley, V.-C., "it is not necessary that the appointee should be privy to the transaction, because the design to defeat the purpose for which the power was created will stand just the same, whether the appointee was aware of it or not (*z*); . . . Neither is it necessary that the object should be the personal benefit of the donee of the power. If the design of the donee in exercising the power is to confer a benefit, not upon himself actually, but upon some other person not being an object of the power, that motive just as much interferes with and defeats the purpose for which the trust was created, as if it had been for the personal benefit of the donee himself." The learned Judge further observed that "There may be a *suspicion* that the trust has been exercised in a particular manner and from a certain motive, which if it could be proved would be held not to be a proper motive—but if it be *mere suspicion*—and not matter amounting to a judicial inference or conviction from the facts, the Court will not act upon it" (*a*).

Condition annexed to Appointment.—Where there is no bargain between appointor and appointee, and no suspicion of improper motive, but the appointor has annexed a condition to the appointment which would, if observed, be a fraud upon the power, although in itself *bona fide* and honest, the question which arises is, is there a complete execution of the power with something, "*ex abundanti*," added, in which case the excess will be void and the execution good; or is the execution and excess not distinguishable, in which case the execution will be bad (*b*)? In *Re Cohen* (*c*) the donee of a special power to appoint to his wife and children appointed an annuity of £1,200 to his wife, and in case his residuary estate should be insufficient to pay his debts, he directed an additional annuity of

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(*z*) 4 Drew. p. 601; and see *Wellesley* v. *Mornington*, 2 K. & J. 143.

(*a*) And see *Pryor* v. *P.*, 2 De G. J. & S. 205, at p. 210; *Roach* v. *Trood*, 3 Ch. D. 429.

(*b*) See *Re Crawshay*, 43 Ch. D. 615; *Re Perkins*, [1893] 1 Ch. 283; *Roach* v. *Trood*, 3 Ch. D. 429; *Alexander* v. *A.*, 2 Ves. Sen. 640; *Stroud* v. *Norman*, Kay, 313; *Re Sondes' Will*, 2 Sm. & G. 416; *Agassiz* v. *Squire*, 18 B. 431; *Rowley* v. *R.*, Kay, 242; *D'Abaddie* v. *Bizoin*, 5 Ir. Eq. R. 205; *Cooke* v. *C.*, 38 Ch. D. 202; *Topham* v. *Portland*, 31 B. 525, 1 De G. J. & S. 517; 11 H. L. Cas. 32; nom. *Portland* v. *Topham*; *Re Witty*, [1913] 2 Ch. 666; *Re Holland*, [1914] 2 Ch. 595; Farwell (3rd ed.), pp. 488 *et seq.*

(*c*) (1911) 1 Ch. 37.

£500 to be paid to her so long as his debts remained unpaid, or for ten years from his death, on condition that she should expend £400 in every year on the payment of his debts, and on the expiration of the period he appointed her an additional annuity of £100 instead of the £500 if she should have fulfilled the condition. It was held that the condition could not be separated, and that the appointment of the additional annuities was bad as being for a purpose foreign to the power.

Relations between Appointor and Appointee.—Although questions of this nature generally arise upon a fraudulent arrangement between husband and wife, or between parent and child, the interference of equity is by no means confined to cases in which the donee and object of the power stand in that relation towards each other; for an arrangement between *any person* having a power, even although he may have been by a voluntary deed the original donor of the power, and any of the objects of it, in fraud of the original intention with which the power was created, will render an appointment void in equity. In *Lee* v. *Fernie* (*d*), A. B., being desirous of settling property on the female descendants then in existence of C. D., by a voluntary deed reciting this desire, and that certain persons therein named were the only descendants then living of C. D., settled a part of the property on the persons so named, and reserved to himself a power of appointing the remaining part of the property, amongst such several persons before named, which, in default of appointment, was given to those several persons. A. B. afterwards discovered that there were other descendants in existence of C. D. who had been omitted, and, to remedy the omission, he appointed a part of the fund to an object of the power, upon his executing bonds for the payment to the persons newly discovered of the amount when received. The appointment was held void.

Where the donee of a power intends to appoint, and the appointee intends to settle the property, and there is no bargain or understanding, the appointment will be valid, although the appointee by a deed executed soon after, or even by the same deed, settles the property upon persons who are not objects of the power. This often takes place when a parent, on the marriage of a child, makes an appointment in favour of the child who is the object of the power, and the child, either by the same or a subsequent deed, settles the property upon (amongst others) her intended husband

(*d*) 1 B. 483.

and the children of the marriage, who are not objects of the power (*e*).

And where, after an appointment made by a father to his infant daughter previous to marriage, the intended husband in the marriage settlement gave up to the father an interest in the sum appointed, to which otherwise he (the husband) would be entitled, by his marital right, the appointment has been held not to be thereby invalidated, at any rate, where the father was not, on making it, influenced by what the husband gave up to him (*f*).

The mere conferring a benefit upon a person not the object of the power will not avoid its exercise, if made with the approbation of the real objects (*g*). And if the objects of the appointment be to secure a benefit for all the objects of the power, the appointment is not bad, although the appointor may to some extent participate in such benefit (*h*).

Previous Compact with Appointee "Causa sine qua non."—Where, however, the reason of an appointment being made to the appointee arises from a previous contract by him with the donee of the power to settle the property upon persons who are not objects of the power, not being within the consideration of marriage, on the marriage of the appointee, then the appointment is invalid, as being a fraud upon the power, the contract being the "*causa sine qua non*" of the appointment (*i*), and to answer the question whether it is or not, all the circumstances must be looked at (*k*).

Liability of Appointor.—A person making a fraudulent appointment will be held liable to make good the whole loss occasioned

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(*e*) See *White* v. *St. Barbe*, 1 V. & B. 399; *Wade* v. *Paget*, 1 Bro. Ch. 363; *Irwin* v. *I.*, 10 Ir. Ch. R. 29, 40; *Wright* v. *Goff*, 22 B. 207; *FitzRoy* v. *Richmond*, 27 B. 190; *Daniel* v. *Arkwright*, 2 Hem. & M. 95; *Roach* v. *Trood*, 3 Ch. D. 429; *Re Crawshay*, 43 Ch. D. 615; *Re Perkins*, *supra*; cf. *Re Boileau's Will Trusts*, [1921] W. N. 222; *secus*, where there is an understanding, *Salmon* v. *Gibbs*, 3 De G. & Sm. 343; or negotiation, *Cuninghame* v. *Anstruther*, L. R. 2 H. L. Sc. 223; Farwell (3rd ed.), 471—3.

(*f*) *Cooper* v. *C.*, L. R. 5 Ch. 203; and see *Topham* v. *Portland*, 1 De G. J. & S. 555; *Wicherley's Case*, 2 Eq. Ca. Abr. 391, pl. 4; *Shirley* v. *Fisher*, 47 L. T. 109; *Re Turner's S. E.*, 28 Ch. D. 205.

(*g*) *Re Turner's S. E.*, 28 Ch. D., p. 216; *Beere* v. *Hoffmister*, 23 B. 101; and see *White* v. *St. Barbe*, *supra*; *Wright* v. *Goff*, *supra*; *FitzRoy* v. *Richmond*, 27 B. 190; Farwell, p. 465.

(*h*) *Re Huish's Charity*, 10 Eq. 5. And see *Palmer* v. *Locke*, 15 Ch. D. 294, 304; *Henty* v. *Wrey*, 21 Ch. D. 332.

(*i*) See *Birley* v. *B.*, 25 B. 299; *Pryor* v. *P.*, 2 De G. J. & S., p. 210; *Cooper* v. *C.*, L. R. 5 Ch. 203; *Re Wright*, [1920] 1 Ch. 108; *Re Boileau's Will Trusts*, [1921] W. N. 222; Farwell (3rd ed.), p. 475.

(*k*) *Re Turner's S. E.*, 28 Ch. D., p. 217.

to the trust estate by such fraudulent appointment, and not merely to repay what he has received (*l*).

2. Excess where Severable.

A question sometimes arises, whether a fraudulent arrangement as to part of the property appointed vitiates the appointment *in toto*, or such part merely to which the fraud extends (*m*).

Where a fraudulent appointment has been made in pursuance of a power of jointuring, the wife, in whose favour the power is exercised, being the sole object of the power, it appears to be now settled that the appointment may be severed, and held good to the extent to which the jointress is entitled, but bad with reference to the corrupt and improper use that may be made of the surplus (*n*). A power to jointure stands on a peculiar footing in that a donee thereof may exercise it in favour of his wife in pursuance of a bargain by which he himself is benefited, provided that such benefit is not obtained by diverting from the wife any part of the jointure. A husband may obtain from his wife as consideration for her jointure a payment to himself or his creditors, provided such payment is out of the wife's own property (*o*).

Where the power is to appoint to several objects, an appointment to one of them, fraudulent in part, will ordinarily be set aside *in toto*. In *Daubeny* v. *Cockburn* (*p*), there was a voluntary settlement of personal property, in trust for such one or more of his children as the settlor should appoint. He appointed to one child exclusively, upon a secret understanding that she should assign a part of the fund to or in favour of a stranger. Grant, M.R., held the appointment void *in toto*. "Upon principle," said his Honour, "I do not see how any part of a fraudulent agreement can be supported, *except where some consideration has been given that cannot be restored; and it has consequently become impossible to rescind the transaction in toto, and to replace the parties in the same situation*" (*q*).

(*l*) *Re Deane*, 42 Ch. D. 9.

(*m*) See *e.g.*, *Re Cohen*, *supra*.

(*n*) *Lane* v. *Page*, Amb. 233; *Aleyn* v. *Belchier*, *supra*; *Rowley* v. *R.*, Kay, 259, *per* Page-Wood, V.-C.

(*o*) *Baldwin* v. *Roche*, 5 Ir. Eq. R. 110; *Saunders* v. *Shafto*, [1905] 1 Ch. 126.

(*p*) 1 Mer. 626.

(*q*) See *Farmer* v. *Martin*, 2 Si. 502; *Arnold* v. *Hardwick*, 7 Si. 343; *Lee* v. *Fernie*, 1 B. 483; Farwell (3rd ed.), p. 488.

But in *Whelan* v. *Palmer* (*r*), Kekewich, J., said: "Notwithstanding a contrary view in some cases it has now been, I think, definitely settled, and particularly by the judgment in *Topham* v. *Portland* (*s*), that where you can see your way to sever the honest part from the dishonest part, using the words in the legal sense—that is to say, that which is legally right from that which is legally wrong—then you may give effect to that which is legally right, notwithstanding that you are obliged to avoid that which is legally wrong." If the Court can see the boundaries, it will be good for the execution of the power, and void as to the excess (*t*).

3. Purchasers for Value.

An appointment might either (i) vest the legal estate in the appointee, or (ii) give the appointee merely an equitable interest, as in appointments of personalty or equitable interests in realty (*u*). In cases falling within (i) a fraudulent appointment is only voidable and a purchaser from the appointee can set up the defence of purchaser for value without notice; but in cases falling within (ii) a fraudulent appointment is void and the defence of purchase for value without notice is not as a rule (*x*) available (*y*). "The payment of a money consideration," said Grant, M.R., in *Daubeny* v. *Cockburn* (*z*), "cannot make a stranger become the object of a power created in favour of children; he can only claim under a valid appointment executed in favour of some or one of the children." The purchaser in such a case can rely only on defences which avail the owner of an equitable interest later in point of time against the owner of a prior equitable interest (*y*). The fact that the appointed fund while still reversionary is carried

(*r*) 39 Ch. D. 648, 659. Although this case was overruled in *Saunders* v. *Shafto*, *supra*, the above *dictum* (which was unnecessary to the decision) is believed to be a correct expression of the law. See *Viant* v. *Cooper*, 103 L. T. Jo. 222.

(*s*) 1 De G. J. & S. 570.

(*t*) *Per Cur.*, *Alexander* v. *A.*, 2 Ves. Sen. 640, 644; *Re Perkins*, [1893] 1 Ch. 283, 289. See also *Rowley* v. *R.*, Kay, 242; *Carver* v. *Richards*, 1 De G. F. & J. 548; *Harrison* v. *Randall*, 9 Ha. 397; *Askham* v. *Barker*, 12 B. 499; *Agassiz* v. *Squire*, 18 B. 431; *Watt* v. *Creyke*, 3 Sm. & G. 362; *Sadler* v. *Pratt*, 5 Si. 632; *McDonald* v. *M.*, L. R. 2 H. L. Sc. 482; *Re Cohen*, [1911] 1 Ch. 37; *Re Witty* [1913] 2 Ch. 666; *Re Holland* [1914] 2 Ch. 595; Farwell, p. 488.

(*u*) Powers of appointment over real estate will usually operate only in equity, L. P. Act, 1925, s. 1, sub-s. 7; Wolst. and Cherry, vol. II, p. 370.

(*x*) See, however, section 157 of the L. P. Act, 1925.

(*y*) *Cloutte* v. *Storey*, [1911] 1 Ch. 18.

(*z*) 1 Mer. 626.

to the separate account of the purchaser in an action in which the validity of the appointment is not in question is not equivalent to giving him the legal estate (*a*).

But a purchaser, having the legal estate, must, it seems, have actual notice of a fraud upon a power, in order to be affected by it; circumstances which may give rise to *mere grounds of suspicion* or probability of fraud are not sufficient (*b*).

And it seems that the Court would be reluctant to impeach an appointment as fraudulent, after a great lapse of time, and where there have been subsequent dealings with the funds, such, for instance, as subsequent appointments thereof on the marriage of daughters or the establishment of sons in the world (*c*).

See further, as regards the protection of purchasers in good faith from an appointee under a power improperly exercised, the Law of Property Act, 1925, s. 157.

4. Family Arrangements.

Family arrangements, if *bona fide*, are regarded favourably by the Court, and effect has been given to them in cases where, if entered into between strangers, they would not have been held binding (*d*). Where there is such an arrangement for settling the interests of *all* the branches of a family, children may contract *with each other* to give a parent, who had a power to distribute property among them, some advantage, which the parent, without their contract with each other, could not have (*e*). And a re-settlement upon persons not objects of the power, in pursuance of an agreement entered into before the execution of the power with the only object thereof, may be supported upon the ground of its being a family arrangement (*f*). But if any such transaction taken as a whole appears not to be a *bona fide* family arrangement, but to have been entered into in fraud of the power, for the purpose of giving a

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(*a*) *Cloutte* v. *Storey*, [1911] 1 Ch. 18.

(*b*) *M'Queen* v. *Farquhar*, 11 V. 467. See also *Alexander* v. *Mills*, L. R. 6 Ch. 124; *Cockroft* v. *Sutcliffe*, 2 Jur. (N.S.) 323; 25 L. J. Ch. 313; *Laurie* v. *Bankes*, 4 K. & J. 142; *Green* v. *Pulsford*, 2 B. 70; *Hamilton* v. *Kirwan*, 8 Ir. Eq. R. 278; *Warde* v. *Dickson*, 5 Jur. (N.S.) 698 (cases of mortgage); *Thompson* v. *Simpson*, 8 Ir. Eq. R. 55.

(*c*) *Cooper* v. *C.*, L. R. 5 Ch. 203, 212, 213.

(*d*) See *Stapilton* v. *S.*, Vol. I.

(*e*) *Davis* v. *Uphill*, 1 Swans. 129; *Rhodes* v. *Cook*, 2 S. & S. 488; *Skelton* v. *Flanagan*, 1 Ir. R. Eq. 362.

(*f*) *Wright* v. *Goff*, 22 B. 207; cf. *Re Turner's S. E.*, 28 Ch. D. 205; *Re Boileau's Will Trusts*, [1921] W. N. 222.

benefit to a person who was by the donor excluded from being an appointee or from deriving any advantage from the exercise of the power, it will be void (*g*).

5. Appointments to Infants and Sick and Dying Persons.

Where a donee of a power of charging portions on real estate has by its terms authority to fix the times at which portions shall vest, there is no rule of law which prevents an appointment of the portion to vest immediately. But the circumstances may show that such an appointment was a fraud upon the power. Where a father appointed to a son, then in a state of mental and bodily disease of which he died within a year, the appointment was inferred to have been made for the benefit of the father, and was set aside as a fraud on the power (*h*). Similarly where a daughter of the appointor was entitled to a portion of £10,000 on attaining the age of twenty-one or marrying, and her father under a power given to him of directing the same to be raised at any time, appointed the sum to her when she was fourteen, and well known to be in a state of consumption, a bill by the father, as her administrator, to have the sum raised for his own use was dismissed (*i*).

In *Henty* v. *Wrey* (*k*) Sir B. P. Wrey, having a power of charging portions under a settlement which gave him in the clearest terms *power to fix the ages and times at which the portions should vest, and contained no provision for raising portions in default of appointment*, and having three daughters, aged nine, seven, and one, appointed by deed in 1828 £10,000 (being the full amount he was entitled to charge) for the portions of his daughters, to be a *vested interest in the three daughters respectively*, immediately on the execution of the deed, the portions to be paid to them at such times and in such proportions as he should by deed or will appoint, and in default of appointment to be paid to them, share and share alike, at twenty-one or marriage, if the same age or time should happen after his decease, but if in his lifetime, then the payment to be postponed till after his death, unless he should signify his consent in writing to their being raised and paid in his

(*g*) *Agassiz* v. *Squire*, 18 B. 431; and see *Cuninghame* v. *Anstruther*, L. R. 2 H. L. Sc. 223; *Scroggs* v. *S.*, Amb. 272.

(*h*) *Wellesley* v. *Mornington*, 2 K. & J. 143; cf. *Beere* v. *Hoffmister*, 23 B. 101; *Roach* v. *Trood*, 3 Ch. D. 429.

(*i*) *Hinchinbroke* v. *Seymour*, 1 Bro. Ch. 395. But see Jessel, M.R., in *Henty* v. *Wrey*, 21 Ch. D., p. 339 *et seq.*; *Keily* v. *K.*, 4 Dru. & War. 38, 55.

(*k*) 21 Ch. D. 332.

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lifetime; and the deed contained a power of revocation. In 1832 he by deed confirmed the appointment. One daughter married and attained twenty-one, and in 1851 Sir B. P. Wrey appointed £5,000 (part of the £10,000) to her. The other two died infants and spinsters, one in 1836, the other in 1845. Sir B. P. Wrey assigned to the plaintiff for value in 1875 the £5,000 appointed to his two deceased daughters, and after his death the plaintiff brought an action to have it raised. It was held by the Court of Appeal (reversing Kay, J.), that where the donee of a power of charging portions on real estate has, under the terms of the power, clear authority to fix the times at which the portions shall vest, and appoints a portion to vest immediately, there is no rule of law which prohibits its being raised in the event of the child dying under twenty-one and unmarried, and that the decision of the Court below could not be supported upon the ground that the appointment, in making the portions vest immediately, was a fraud on the power, as being made with a view to secure a benefit to the appointor. Having regard to the fact that if the father had died without making any appointment, the children would have been unprovided for, it was for the benefit of the children that the father should make an appointment, and there was nothing to lead to the conclusion that when the appointments were made the children were likely to die young. There was no ground, in the opinion of the Court, for attributing to the appointor an intention to benefit himself by making the portions vest immediately. The Court accordingly directed the £5,000 to be raised.

Lindley, L.J., laid down as the result of the cases the following propositions :—1. That powers to appoint portions charged on land ought, if their language is *doubtful*, to be construed so as not to authorise appointments vesting those portions in the appointees before they want them, that is before they attain twenty-one or (if daughters) marry. 2. That where the language of the power is clear and unambiguous, effect must be given to it. 3. That where, upon the true construction of the power and the appointment, the portion has not vested in the lifetime of the appointee the portion is not raisable, but sinks into the inheritance. 4. That where upon the construction of both instruments the portion has vested in the appointee, the portion is raisable even though the appointee dies under twenty-one or (if a daughter) unmarried. 5. That appointments vesting portions in children of tender years who die soon afterwards are looked at with suspicion;

and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so.

With reference to the appointment being void for fraud it is immaterial whether the power relates to charges on land or to the appointment of personal estate (*l*), and an appointment to an infant child before he wants it, of a sum *already set apart*, will not be invalid, merely because the appointor may, in the event of the child's death, derive some benefit from it to the disappointment of those entitled in default of appointment (*m*). *A fortiori* will the appointment be good if the father himself can derive no benefit from it (the appointment being to children living at his death), although upon the death of the child the mother takes as such child's representative to the exclusion of the persons who would have been entitled in default of appointment (*n*).

The objection that an appointment is invalid as a fraud on the power is applicable to the exercise of a power of advancement (*o*); and it is also applicable to the revocation of an appointment made under the power (*p*).

Where a father has power to appoint and divide at his discretion among his children a fund to which they are entitled in default of appointment, he cannot in making appointments to them enter into a bargain by which he can derive any benefit in the residue of the trust fund which may remain unappointed (*q*).

6. Release of Power.

The donee of a power of appointment may release the power, though testamentary (*r*), and although such release may result in a benefit to himself (*s*).

In *Re Radcliffe* (*t*), a marriage settlement in 1852 gave the

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(*l*) *Per* Lindley, L.J., *ibid.*, p. 354.

(*m*) *Butcher* v. *Jackson*, 14 Si. 444; *Hamilton* v. *Kirwan*, 2 Jo. & Lat. 393; *Beere* v. *Hoffmister*, 23 B. 101; *Hemming* v. *Griffith*, 2 Gif. 403; *Knapp* v. *K.*, *K.*, 12 Eq. 238; Farwell (3rd ed.), p. 68.

(*n*) *Fearon* v. *Desbrisay*, 14 B. 641; *Domville* v. *Lamb*, 1 W. R. 246; *FitzRoy* v. *Richmond*, 28 L. J. Ch. 752.

(*o*) See *Lawrie* v. *Bankes*, 4 K. & J. 142; Farwell, p. 459.

(*p*) *Re Jones' Settlement*, [1915] 1 Ch. 373.

(*q*) *Cuninghame* v. *Anstruther*, L. R. 2 H. L. Sc. 223.

(*r*) *Smith* v. *Death*, 5 Madd. 371; *Smith* v. *Houblon*, 26 B. 482; *Re Radcliffe*, *infra*; *Re Evered*, [1910] 2 Ch. 147. See L. P. Act, 1925, s. 155.

(*s*) *Re Somes*, [1896] 1 Ch. 250.

(*t*) [1892] 1 Ch. 227.

husband a life interest in real and personal estate, and also a life interest to his wife who predeceased him. Power was also given to the husband to appoint to children of the marriage, and in default the fund was to go to the children equally, vesting at twenty-one or marriage. There were three sons; one died an infant, two attained twenty-one, but one of these died intestate and unmarried. The father took out administration to the intestate, released the power, and called upon the trustees for a transfer of a moiety of the settled property. Held, that on surrendering his life estate so as to effect a merger, he was so entitled (*u*). In *Re Somes* (*x*) certain property, the subject of a settlement made in 1862, belonged in 1887, in the events which had happened, to a father for life and then to his daughter and her issue in such shares and in such manner as the father should by deed from time to time appoint. In 1893 the father released this power to enable his daughter to join with him in raising money for his immediate wants. The mortgage was for £10,000, the whole of which was paid to the father. Chitty, J., following *Smith* v. *Houblon* and *Re Radcliffe*, *supra*, held the release was valid : that there was a fallacy in attempting to apply the doctrine applicable to the fraudulent exercise of such a power, to the release of it : that there is no duty imposed upon the donee of such a power to make any appointment : that there is no fiduciary relationship between the possessor of such a power and the object except that of exercising it honestly : that the mere fact that the release of it will benefit him does not make it fraudulent or void. But where the power is coupled with a duty, or is in the nature of a trust, it cannot be released (*y*).

The Court cannot release a special power exercisable by a lunatic (*z*), nor (it seems) can a trustee in bankruptcy release a special power exercisable by a bankrupt, the release of which would have enlarged the bankrupt's estate (*a*).

Powers conferred by the Settled Land Act, 1925, on a tenant for life are not capable of assignment or release (*b*).

(*u*) *Smith* v. *Houblon*, 26 B. 482, followed; *Cunynghame* v. *Thurlow*, 1 R. & M. 436, not followed.

(*x*) [1896] 1 Ch. 250.

(*y*) *Re Eyre*, 49 L. T. 259; *Saul* v. *Pattinson*, 34 W. R. 561; *Re Somes*, [1896] 1 Ch. at p. 255; *Re Weekes*, [1897] 1 Ch. 289.

(*z*) *Re Hirst*, [1892] W. N. 177.

(*a*) *Re Rose*, [1904] 2 Ch. 348, Farwell, J.; [1905] 1 Ch. 94.

(*b*) Section 104; and see section 19, sub-section 4. But see section 105 giving a life tenant a power to surrender his interest to the person next in remainder.

7. Consent of Trustees and others to Exercise of Power.

If the consent of another person to the exercise of a power is requisite, and that consent is obtained by misrepresentation, the appointment will be set aside (*c*). The consent of trustees, moreover, is only to be given with a view to benefit the *cestuis que trust*; so where by a marriage settlement land was settled by the father of the lady upon the wife for life, remainder to the husband for life, remainder to the children of the marriage, and there was a power to the father of the lady and the husband and wife, with the consent of the trustees in writing, by deed absolutely to revoke and make void all or any of the uses or trusts, and also by the same or any other deed to limit and declare new uses and trusts in substitution for those revoked, and the father of the lady, and the husband and wife, with the consent of the trustees, revoked the settlement so far as was necessary, and appointed the property to one of the trustees by way of mortgage to secure a sum of money advanced to the husband, and the estate was afterwards sold under a power contained in the mortgage deed, it was held by Romilly, M.R., that a good title could not be made under it . . . "How," said his Honour, "could it be said that this is a fair exercise of the discretion of the trustees in favour of their *cestuis que trust*, if they exercise it in such a manner so as totally to defeat the whole beneficial interest of those persons whom, as trustees, they are bound to protect?" (*d*).

8. Bond or Covenant to Appoint.

A covenant to exercise a special testamentary power in a particular way is void (*e*). Such a covenant cannot be the subject of specific performance or have any legal operation (*f*). But an exercise of the power by will is not rendered invalid by reason of the fact that the appointor has covenanted to make such an appointment, there being no other circumstances which might render the appointment invalid apart from the covenant (*g*), and the donee of a special testamentary power may covenant not to exercise it, or

(*c*) *Scroggs* v. *S.*, Amb. 272.

(*d*) *Eland* v. *Baker*, 29 B. 137, 142; Farwell, p. 463.

(*e*) *Thacker* v. *Key*, 8 Eq. 408; L. R. 6 Ch. 160; *Re Bradshaw*, [1902] 1 Ch. 436, 446; *Re Cooke*, [1922] 1 Ch. 292.

(*f*) *Re Evered*, [1910] 2 Ch., 147, 156.

(*g*) *Coffin* v. *Cooper*, 2 Dr. & Sm. 365; *Palmer* v. *Locke*, 15 Ch. D. 294; *Re Evered*, [1910] 2 Ch. 147, 156; *Re Cooke*, [1922] 1 Ch. p. 299.

not to exercise it in a particular way, and thereafter the power can only be exercised subject to the limitation or fetter imposed by that negative covenant, such a covenant operating *pro tanto* as a release of the power (*h*). The covenant cannot, however, operate affirmatively as an appointment (*i*). A tenant for life with a power to charge portions may covenant with his mortgagees not to exercise the power (*k*).

In *Re Cooke* (*l*), a donee of a special power of testamentary appointment amongst children, upon the marriage of a son covenanted forthwith to exercise the power by appointing in his favour not less than £4,000, and that she would not execute any document whereby the appointment so covenanted to be made would be affected. Contemporaneously the appointer made a will appointing the £4,000 and the son assigned it by his marriage settlement. Subsequently the testatrix made a new will revoking the earlier will and appointing the total fund subject to the power (which amounted to £6,000) equally between her son and daughter. It was held that the covenant in the son's favour could not be enforced, that the first will was effectually revoked, and the funds passed under the last will.

If the power is a general testamentary one, the donee may deal with it as he pleases (*m*), and if he covenants to exercise it in a particular way his estate will be liable to make good the loss occasioned by a breach of covenant, although specific performance of such covenant will not be granted (*n*). If a general power be exercised in pursuance of such a covenant the appointee will not gain thereby any preference over the creditors of the appointor. "A covenant to bequeath property by will does not alter the character of the property bequeathed in accordance with the covenant. What is so bequeathed is still a gift by will and not a preferential debt" (*o*). A covenant to exercise a general power by deed (but not by will (*p*), is valid and specifically enforceable (*q*).

(*h*) *Re Evered*, [1910] 2 Ch. 147, 156.
(*i*) *Ibid*; *Re Cooke*, *supra*.
(*k*) *Hurst* v. *H.*, 16 B. 372; and see *Miles* v. *Knight*, 12 Jur. 666.
(*l*) [1922] 1 Ch. 292.
(*m*) *Re Bradshaw*, [1902] 1 Ch. 436, 446.
(*n*) *Re Parkin*, [1892] 3 Ch. 510. Cf. *Robinson* v. *Ommanney*, 21 Ch. D. 780, 23 Ch. D. 285.
(*o*) *Per* Lord Lindley, *Beyfus* v. *Lawley*, [1903] A. C. 411, 413.
(*p*) Farwell (3rd ed.), p. 376.
(*q*) *Re Dykes*, 7 Eq. 337.

9. Illusory Appointments.

In another class of cases Courts of equity formerly interposed, *viz.*, where a person having a non-exclusive power of appointing property amongst a class, although with full discretion as to the amount of their shares, has exercised it by appointing to one or more of the objects a merely nominal share. Such an appointment, although valid at law, was formerly liable to be set aside as *illusory*, as not being exercised *bona fide* for the end designed by the donor.

The doctrine, which applied to appointments of real as well as of personal estate (*r*), and was the cause of much litigation, has been abolished by statute.

By section 158 of the Law of Property Act, 1925 (replacing 11 Geo. 4, and 1 Will. 4, c. 46, and 37 & 38 Vict. c. 37), it is provided that no appointment made in exercise of any power to appoint any property among two or more objects shall be invalid on the ground that an illusory or nominal share only is appointed to or left to devolve upon any one or more of such objects, or that any object of the power is excluded. But this enactment does not affect any provision in the instrument creating the power which declares the amount of any share from which any object of the power is not to be excluded (*s*).

10. Burden of Proof.

As in all other cases imputing fraud, the burden of proof lies on the person who seeks to set aside an appointment as fraudulent. Thus in *Campbell* v. *Home* (*t*), where a lady who had a life interest in a fund, with power to appoint to one or more of her children, exclusively of the others, appointed the whole to one child, who had attained the age of twenty-one, and assigned her life interest to such child, one of the trustees refused to join in the transfer to the daughter. Knight-Bruce, V.-C., upon a bill being filed against the trustee by the daughter, held that he was bound to join in the transfer. "What may be the intention," said his Honour, "of

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(*r*) *Pocklington* v. *Bayne*, 1 Bro. Ch. 450.

(*s*) See *Re Deakin*, [1894] 3 Ch., p. 577; *Re Capon*, 10 Ch. D. 484. As to the law before the Acts, *Gainsford* v. *Dunn*, 17 Eq. 405; *Wilson* v. *Piggott*, 2 Ves. 351.

(*t*) 1 Y. & C. Ch. 664; *Cochrane* v. *C.*, [1922] 2 Ch. pp. 246-7; Farwell (3rd ed.), p. 469.

this lady in regard to the disposition of her money, is not a question with which the Court has to deal. If it can ever be shown that this deed was executed from improper motives, those who are interested in doing so can apply to set it aside."

But if the transaction on the face of it shows good ground for suspicion, the trustee may refuse to convey, and will be protected by the Court (*u*). The intention of the donor is to be gathered from the instruments (*x*), but that of the appointor may be proved by parol evidence (*y*).

The burden of proof may be altered by circumstances. Thus where the fair inference from the facts is, that the appointor *before* the execution of an appointment intended to derive for himself a benefit therefrom, the burden rests on those who support the transaction to show that the intention had been abandoned at the time of the execution of the deed (*z*).

It is, however, clear that where an appointment has been set aside by reason of what has taken place between the donee of a power and an appointee, a second appointment by the same donee to the same appointee cannot be sustained, otherwise than by clear proof on the part of the appointee that the second appointment is perfectly free from the original taint which attached to the first (*a*). And the same rule it seems is applicable to all cases, whether the fraudulent appointment has been set aside by the Court, or revoked by the appointor (*b*).

Where there is no fraud equity will not advert to the circumstances of anger and resentment, under which it may be alleged that an appointment has been made, as there would be no end of such objections if they were admitted as grounds for questioning appointments, since in almost all these cases, where there has been an inequality in the appointment, something of that kind has existed (*c*).

(*u*) *Hannah* v. *Hodgson*, 30 B. 19; *King* v. *K.*, 1 De G. & J. 663.

(*x*) Farwell (3rd ed.), p. 480.

(*y*) *Topham* v. *Portland*, 11 H. L. Cas. 32.

(*z*) *Humphrey* v. *Olver*, 7 W. R. 334; *Shirley* v. *Fisher*, 47 L. T. 109. Cf. *Cochrane* v. *C.*, [1922] 2 Ch. pp. 246–7.

(*a*) *Topham* v. *Portland*, L. R. 5 Ch. 40, 62.

(*b*) *Hutchins* v. *H.*, 10 Ir. Eq. R. 453, 457.

(*c*) *Vane* v. *Dungannon*, 2 Sch. & L. 118, 130; *Supple* v. *Lowson*, Amb. 729.

HARDING *v.* GLYN.

1739. 1 Atk. 469 (*a*).

Powers in the Nature of a Trust—Precatory Trusts.

H, by will, gives a leasehold house and furniture, goods and chattels therein, and also plate, jewels, etc., to his wife; but did desire her, at or before her death, to give the same unto and amongst such of his own relations as she should think most deserving and approve of. The wife by her will gave the leasehold house to S, who was the son of one of the next-of-kin, and, after giving several legacies, bequeathed the residue of her personal estate to the defendant G and two other persons, but neither gave, at or before her death, the goods in the house, or the jewels, to her husband's relations. It was held, that the wife was intended to take beneficially only during her life; that the appointment to S, being a relation of the testator's, though not one of his next-of-kin, was a good execution of the power; and that so much of the goods and jewels not disposed of by the wife, according to the power given to her by her husband, in case they remained in specie, or the value thereof, ought to be divided equally among such of the relations of the testator as were his next-of-kin at the time of the death of his wife.

Nicholas Harding, in 1701, made his will and thereby gave "to Elizabeth his wife all his estate, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing apparel, but *did desire her*, at or before her death, to give such leases, house, furniture, goods and chattels, plate and jewels, *unto and amongst such of his own relations as she should think most deserving and approve of*"; and made his wife executrix, and died January 23, 1736, without issue.

Elizabeth, his widow, made her will on June 12, 1737, "and thereby gave all her estate, right, title, and interest to Henry

(*a*) S. C., 5 V. 501, stated from Reg. Lib. 1738 A.

Swindell (*b*), in the house in Hatton Garden, which her husband had bequeathed to her in manner aforesaid; and, after giving several legacies, bequeathed the residue of the personal estate to the defendant Glyn and two other persons, and made them executors," and soon after died, without having given, at or before her death, the goods in the said house, or without having disposed of any of her husband's jewels to his relations (*c*).

The plaintiffs, insisting that Elizabeth Harding had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband's relations, which she had not done, brought their bill in order that they might be distributed amongst his relations, according to the rule of distribution of intestate's effects.

The Hon. John Verney, M.R.—The first question is, if this is vested absolutely in the wife? And the second, if it is to be considered as undisposed of, after her death, who are entitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life. There are no technical words in a will; but the manifest intent of the testator is to take place; and the words "willing" or "desiring" have been frequently construed to amount to a trust (*d*); and the only doubt arises upon the persons who are to take after her.

Where the uncertainty is such that it is impossible for the Court to determine what persons are meant, it is very strong for the Court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word "relations" is a legal description, and this is a devise to such relations, and operates as a trust, in the wife, by way of power of naming and apportioning; and her non-performance of the power

(*b*) The bequest to Swindell was held good, although he was not one of the next-of-kin of the testator, and would, not, therefore, have taken anything in the absence of the bequest; but, being a son of one of the next-of-kin, he was a relation, and, therefore, within the power when exercised by the testatrix. See *Brown* v. *Higgs*, 5 V. 501; 8 V. 572; and see *Wright* v. *Atkyns*, G. Coop. 118.

(*c*) It appears that the testatrix by her will bequeathed the plate to Caleb Harding, and it was declared by the decree that it was a good bequest, as being pursuant to the power in her husband's will. See statement from the Reg. Lib., 5 V. 501.

(*d*) *Eeles* v. *England*, Prec. Ch. 200; 2 Vern. 466.

shall not make the devise void, but the power shall devolve on the Court; and though this is not to pass by virtue of the Statute of Distributions, yet that is a good rule for the Court to go by; and, therefore, I think it ought to be divided among such of the relations of the testator Nicholas Harding, who were his next-of-kin at her death; and do order, that so much of the said household goods in Hatton Garden, and other the personal estate of the said testator Nicholas Harding, devised by his will to the said Elizabeth Harding his wife, which she did not dispose of according to the power given her thereby, in case the same remains *in specie*, or the value thereof be delivered to the next-of-kin of the said testator Nicholas Harding, to be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding.

NOTES.

1. Precatory trusts.—Generally.
2. Certainty of subject-matter, p. 294.
3. Certainty of object, p. 297.
4. Interests taken by donees of precatory trusts, p. 299.
5. Trust implied from powers of selection and distribution, p. 303.

1. Precatory Trusts.

Generally.—The doctrine of precatory trusts is thus stated by Lindley, L.J. (*e*): "There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to show an intention to impose an obligation, and is definite enough to enable the Court to ascertain what the precise obligation is and in whose favour it is to be performed. There is also abundant authority for saying that, if property is left to a person in confidence that he will dispose of it in a particular way as to which there is no ambiguity, such words are amply sufficient to impose an obligation. . . . But still in each case the whole will must be looked at; and unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist; yet, moreover, in some of the older cases

(*e*) *Re Williams*, [1897] 2 Ch. 12, 18.

obligations were inferred from language which in modern times would be thought insufficient to justify such an inference. . . . It would, however, be an entire mistake to suppose that the old doctrine of precatory trusts is abolished. Trusts—*i.e.*, equitable obligations to deal with property in a particular way—can be imposed by any language which is clear enough to show an intention to impose them. The term 'precatory' only has reference to forms of expression. Not only in wills but in daily life an expression may be imperative in its real meaning although couched in language which is not imperative in form. A request is often a polite form of command. A trust is really nothing except a confidence reposed by one person in another, and enforceable in a Court of equity" (*f*).

This statement shows that in order to establish the existence of a precatory trust three requisites must be shown to co-exist (*g*).

1. There must on the construction of the whole instrument (*h*) be an intention to impose an obligation.

2. The obligation so imposed must be ascertainable with precision.

3. The persons in whose favour the obligation is imposed must also be ascertainable with precision.

Such a trust may be created by a settlement as well as by a will (*i*), and possibly by parol, but where the Court is asked to establish such a trust from the report of a conversation it will be slow to impute an intention which is not actually expressed in the words used (*k*).

Imperative Words.—As laid down in the principal case, no technical words are necessary, but the Court will be guided by the intention of the testator apparent in the will, and not by any decisions on any particular form of words, and if it comes to the conclusion that no trust is intended, it will say so, although previous Judges have said the contrary on some wills more or less similar to the one before the Court (*l*). The following expressions have

(*f*) See also *Re Oldfield*, [1904] 1 Ch. 549.

(*g*) Cp. *per* Langdale, M.R., *Knight* v. *K.*, 3 B. 172, and comments thereon of Rigby, L.J., in *Re Williams*, [1897] 2 Ch. p. 29.

(*h*) *Re Croome*, 61 L. T. 814; *Re Adams and Kensington Vestry*, 27 Ch. D. p. 410; *Re Hamilton*, [1895] 2 Ch. 370; *Comiskey* v. *Bowring Hanbury*, [1905] A. C. 84.

(*i*) *Liddard* v. *L.*, 28 B. 266.

(*k*) *Hill* v. *H.*, [1897] 1 Q. B. 483, 487.

(*l*) See *Re Hamilton*, [1895] 2 Ch. p. 373; *Hill* v. *H.*, [1897] 1 Q. B. 483.

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been held to be imperative, and to amount to a trust in the circumstances of the particular instrument in which they were used: "Willing or desiring" (*m*), "advise" (*n*), "order and direct" (*o*), "request" (*p*), "wish" (*q*), "wish and request" (*r*), "desire him to give" (*s*), "absolutely desire" (*t*), "wish and desire" (*u*), "last wish" (*x*), "dying request" (*y*), "recommend" (*z*), "entreat" (*a*), "not doubting" (*b*), "under the firm conviction" (*c*), "in the full confidence" (*d*), "in the fullest confidence" (*e*), "heartily beseech" (*f*), "beg she will apportion" (*g*), "authorise and empower" (*h*), "hope" (*i*), "full assurance and confident hope" (*k*), "trusting" (*l*), "absolutely trusting" (*m*), "well know" (*n*), "of course he will give" (*o*), "in consideration he has promised to give" (*p*). The above cases must be read in the light of the remarks of the Court of

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(*m*) *Eeles* v. *England*, 2 Vern. 466.

(*n*) *Parker* v. *Bolton*, 5 L. J. Ch. 98.

(*o*) *Broad* v. *Bevan*, 1 Russ. 511 (n.).

(*p*) *Eade* v. *E.*, 5 Madd. 118. See *Hill* v. *H.*, [1897] 1 Q. B. p. 497.

(*q*) *Re Burley*, [1910] 1 Ch. 215.

(*r*) *Foley* v. *Parry*, 5 Si. 138; 2 My. & K. 138.

(*s*) *Mason* v. *Limbury*, cited Amb. p. 4. But see *Re Diggles*, 39 Ch. D. 253; *Re Oldfield*, [1904] 1 Ch. 549; *Re Conolly*, [1910] 1 Ch. 219.

(*t*) *Cruwys* v. *Colman*, 9 V. 319; *Godfrey* v. *G.*, 11 W. R. 554.

(*u*) *Liddard* v. *L.*, 28 B. 266.

(*x*) *Hinxman* v. *Poynder*, 5 Si. 546.

(*y*) *Pierson* v. *Garnet*, 2 Bro. Ch. 38, 226.

(*z*) *Tibbits* v. *T.*, 19 V. 656; *Horwood* v. *West*, 1 S. & S. 387; *Malim* v. *Keighley*, 2 V. 333, 539; but see *Re Hamilton*, [1895] 2 Ch. 370; *Ford* v. *Fowler*, 3 B. 146; *Cholmondeley* v. *C.*, 14 Si. 590; *Pierson* v. *Garnet*, 2 Bro. Ch. 46; *Pushman* v. *Filliter*, 3 V. 9; *Johnston* v. *Rowlands*, 2 De G. & Sm. 356.

(*a*) *Prevost* v. *Clarke*, 2 Madd. 458.

(*b*) *Parsons* v. *Baker*, 18 V. 476; *Taylor* v. *George*, 2 V. & B. 378; *Massey* v. *Sherman*, Amb. 520.

(*c*) *Barnes* v. *Grant*, 26 L. J. Ch. 92.

(*d*) *Curnick* v. *Tucker*, 17 Eq. 320; *Le Marchant* v. *Lee M.*, 18 Eq. 414; *Ware* v. *Mallard*, 21 L. J. Ch. 355; *Comiskey* v. *Bowring Hanbury*, [1905] A. C. 84.

(*e*) *Wright* v. *Atkyns*, 17 V. 255; 19 V. 299; *Palmer* v. *Simmonds*, 2 Drew. 221; *Shovelton* v. *S.*, 32 B. 143; but see *Re Williams*, [1897] 2 Ch. 12.

(*f*) *Meredith* v. *Heneage*, 1 Si. 553.

(*g*) *Corbet* v. *C.*, 7 Ir. R. Eq. 456.

(*h*) *Brown* v. *Higgs*, 4 V. 708; 5 V. 495; 8 V. 561; 18 V. 192.

(*i*) *Harland* v. *Trigg*, 1 Bro. Ch. 142; *Paul* v. *Compton*, 8 V. 375.

(*k*) *Baker* v. *Mosley*, 12 Jur. 740.

(*l*) *Macnab* v. *Whitbread*, 17 B. 299.

(*m*) *Irvine* v. *Sullivan*, 8 Eq. 673.

(*n*) *Bardswell* v. *B.*, 9 Si. 323; *Briggs* v. *Penny*, 3 Mac. & G. 546, 554; *Re Fleetwood*, 15 Ch. D. 594; but see *Stead* v. *Mellor*, 5 Ch. D. 225.

(*o*) *Robinson* v. *Smith*, 6 Madd. 194.

(*p*) *Clifton* v. *Lombe*, Amb. 519.

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Appeal in *Re Hamilton* (*q*) and in *Re Atkinson* (*r*), and the tendency of the later decisions is against construing any particular precatory or recommendatory words as trusts, unless the will as a whole points clearly to that construction (*s*). Words formerly treated as imposing a trust are now generally regarded as expressing the motive of the gift, rather than as a fetter upon it (*t*), and the opinion of James, V.-C. (*u*), that "the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts was a very cruel kindness indeed," has been frequently approved (*x*).

If, therefore, the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative, or to interfere with the absolute discretion of the legatee (*y*), or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request, no trust will be created (*z*). Thus, the words "free and unfettered," accompanying the strongest expressions of request, were held to prevent the words of request from being imperative (*a*). So, where there was a gift of stock to a person, and to it was added, parenthically, "to enable him to assist such children of my deceased brother as he may find deserving of encouragement," it was held an absolute bequest, and that no trust was created for the children (*b*).

So, where it was declared in a will that a bequest of property

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(*q*) [1895] 2 Ch. 370.

(*r*) 80 L. J. Ch. 371 *et seq.*, *per* Cozens-Hardy, M.R.

(*s*) *Sale* v. *Moore*, 1 Si. 534; *Lambe* v. *Eames*, L. R. 6 Ch. 597; *Re Diggles*, 39 Ch. D. 253; *Re Hamilton*, [1895] 2 Ch. 370; *Nepean* v. *Nantes*, 13 T. L. R. 315; *Re Williams*, [1897] 2 Ch. 12; *Re Oldfield*, [1904] 1 Ch. 549; *Re Conolly*, [1910] 1 Ch. 219; *Re Hill*, [1923] 2 Ch. 259.

(*t*) *See Hill* v. *H.*, [1897] 1 Q. B. p. 488-9; Farwell (3rd ed.), p. 543.

(*u*) *Lambe* v. *Eames*, L. R. 6 Ch. p. 599.

(*x*) *Re Adams, etc.*, 27 Ch. D. p. 407; *Re Hamilton*, [1895] 2 Ch. 370; *Hill* v. *H.*, [1897] 1 Q. B. p. 488; *Re Hill*, [1923] 2 Ch. p. 264.

(*y*) *Johnston* v. *Rowlands, supra; Huskisson* v. *Bridge*, 4 De G. & Sm. 245; *Williams* v. *W.*, 1 Si. (N.S.) 358, 370; *Webb* v. *Wools*, 2 Si. (N.S.) 267; *Thorp* v. *Owen*, 2 Ha. 607; *Lefroy* v. *Flood*, 4 Ir. Ch. R. 1; *Scott* v. *Key*, 35 B. 291; *Shepherd* v. *Nottridge*, 2 John. & H. 766; *Eaton* v. *Watts*, 4 Eq. 151; *M'Cormick* v. *Grogan*, 1 Ir. R. Eq. 313; *Greene* v. *G.*, 3 Ir. R. Eq. 90, 629; *Creagh* v. *Murphy*, 7 Ir. R. Eq. 182; *Re Bond*, 4 Ch. D. 238; and see Hawkins on Wills (3rd ed.), p. 192 *et seq.*

(*z*) *Bull* v. *Vardy*, 1 V. 270; *Meggison* v. *Moore*, 2 V. 630; *Knight* v. *K.*, 3 B. 148; *Scott* v. *Key*, 35 B. 291; but see *Atkinson* v. *A.*, 62 L. T. 735.

(*a*) *Meredith* v. *Heneage*, 1 Si. 542; *Hoy* v. *Master*, 6 Si. 568.

(*b*) *Benson* v. *Wittam*, 5 Si. 22; *Wright* v. *Atkyns*, T. & R. 157, 163. Cp. *Re Booth*, [1894] 2 Ch. 282.

to a legatee was " in his entire power " (*c*), or " left entirely to his good judgment " (*d*); and where a testator " recommended but did not absolutely enjoin " a distribution among daughters (*e*); or if a testator gives " property to his wife to be used by her in such ways and means as she may consider *best* for her own benefit and that of my three children " (*f*), " to be at her disposal in any way she may think *best* for the benefit of herself and family " (*g*), " well knowing her *sense of justice and love to her family*, and feeling perfect confidence that she will manage the same to the best advantage for the benefit of her children " (*h*); and where a testator gave the residue of his property to legatees, " my desire being that they shall distribute such residue as they think will be most agreeable to my wishes " (*i*), it was held there was no trust. In *Re Hill* (*k*), a testator bequeathed his residuary estate " in equal shares to my brothers and sisters *for the benefit of themselves and their respective families* "; it was held that there was no trust.

A recommendation may, in many cases, amount to a direction and create a trust, yet, that being a flexible term, if such a construction be inconsistent with any positive provision in the instrument, it is to be considered as a recommendation, and nothing more. For instance, in *Shaw* v. *Lawless* (*l*), the House of Lords held that words in a will desiring that a particular person should be *continued* in the management of property, being inconsistent with the positive provisions of the will, did not create a trust in favour of such person (*m*).

In *White* v. *Briggs* (*n*) the testator gave his consumable articles, linen, china, etc., *entirely to his wife's use*, and added that the same, together with all his jewels, trinkets, clocks, watches and ornaments, *might be finally appropriated as she pleased, with the sum of £4,000 in money, but which sum he recommended her to divide in shares*, which he specified, amongst persons whom he

(*c*) *Eaton* v. *Watts*, 4 Eq. 451, 151.
(*d*) *M'Cormick* v. *Grogan*, L. R. 4 H. L. 82.
(*e*) *Young* v. *Martin*, 2 Y. & C. Ch. 582.
(*f*) *M'Alinden* v. *M'A.*, 11 Ir. R. Eq. 219; but see *Comiskey* v. *Bowring Hanbury*, [1905] A. C. 84, discussed *infra*, p. 293.
(*g*) *Lambe* v. *Eames*, 10 Eq. 267; L. R. 6 Ch. 597.
(*h*) *Greene* v. *G.*, *supra*.
(*i*) *Stead* v. *Mellor*, *supra*.
(*k*) [1923] 2 Ch. 259.
(*l*) 5 Cl. & Fin. 129.
(*m*) See also *Finden* v. *Stephens*, 2 Ph. 142; *Knott* v. *Cottee*, 2 Ph. 192; *Johnston* v. *Rowlands*, 2 De G. & Sm. 356; *Foster* v. *Elsley*, 19 Ch. D. 518.
(*n*) 15 Si. 33, 34.

named. It was held by Lord Lyndhurst (reversing Shadwell, V.-C.) that no trust was created.

In *Re Adams and the Kensington Vestry* (*o*) the testator gave all his property to the *absolute use* of his wife, "in full confidence that she will do what is right as to the disposal thereof between my children either in her lifetime or by her will." The Court of Appeal held that there was no trust, and the wife took absolutely (*p*).

In *Re Diggles* (*q*), a testatrix left all her property to her daughter, her heirs and assigns, "and it is my desire that she allows to my relative and companion A. G. now residing with me, an annuity of £25 during her life, and that the said A. G. shall, if she desire it, have the use of such portions of my household furniture, linen, etc., as may not be required by my daughter." Held by the Court of Appeal, that there was no obligation on the daughter to pay the annuity.

In *Re Hamilton* (*r*), a testatrix bequeathed to her nieces legacies of £2,000 each, "for their sole and separate use independent of their husbands, and I wish them to bequeath the same equally between the families of my nephew S. O., and niece Mrs. P., in such mode as they shall consider right." The Court of Appeal held there was no trust.

In *Re Williams* (*s*), a testator gave his residuary estate to his wife, her heirs, executors, administrators and assigns *absolutely*, "in the fullest confidence that she will carry out my wishes in the following particulars." It was held by the Court of Appeal that the widow took the residuary estate of the testator absolutely, and unfettered by any condition or trust.

In *Re Conolly* (*t*), a testator, after bequeathing legacies to his two sisters, proceeded: "I specially desire that the sums hereby bequeathed shall be specifically left by the legatees to such charitable institutions of a distinct Protestant nature as my sisters shall select, and in such proportions as they may determine." It was held that the sisters took their legacies absolutely. So, also, in *Re Atkinson* (*u*), the words of the gift were: "To my father

(*o*) 27 Ch. D. 394.
(*p*) *Re Hutchinson and Tenant*, 8 Ch. D. 540; *Re Hill*, *supra*.
(*q*) 39 Ch. D. 253.
(*r*) [1895] 2 Ch. 370.
(*s*) [1897] 2 Ch. 12; and see *Re Atkinson*, [1911] 80 L. J. Ch. 370 (C. A.).
(*t*) [1910] 1 Ch. 219.
(*u*) 103 L. T. 860.

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if living at my death, and if not, to my younger sister . . . I bequeath absolutely £5,000, but it is my specific wish that the said sum shall be distributed as follows—£4,000 to the C. School; £500 to the M. School; £500 to be given to ten (or more as may be deemed proper) deserving young people connected with the Latymer Congregational Chapel, eight of whom shall be females." It was held by the Court of Appeal (reversing Joyce, J.) that the bequest was free from any trust.

Although the foregoing cases would seem to show that where a gift is expressed to be absolute it will not be cut down by subsequent precatory words, there is no rule to that effect, and a gift *prima facie* absolute, will yield to subsequent imperative words where the whole tenor of the will demands it. In *Comiskey* v. *Bowring Hanbury* (*x*) the testator gave to his wife all his real and personal estate "absolutely in full confidence that she will make such use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit, *and in default of any such disposition thereof by her will or testament I hereby direct* that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces." Kekewich, J., held that the real and personal estate was given to the widow absolutely, and this decision was affirmed by the Court of Appeal (Vaughan-Williams and Stirling, L.JJ., Cozens-Hardy, L.J., dissenting), but the House of Lords (Earl of Halsbury, L.C., and Lords Macnaghten, Davey, James and Robertson, Lord Lindley dissenting) held that there was an absolute gift to the testator's widow subject to an executory gift at her death to such of the testator's nieces as should survive her equally if more than one, so far as the widow should not dispose by will of the estate in favour of such surviving nieces, or any one or more of them. With regard to the word "absolutely," Lord Davey said (*y*), "I do not myself attach any great importance to the use of the word 'absolutely.' Reading it as qualifying or expressing the estate which the wife had to take, it does not seem to me to do more than give her a fee simple. It is now admitted that she had a fee simple, and the question is whether there is a good executory limitation capable of taking effect upon her death. The use of the

(*x*) [1905] A. C. 84.
(*y*) [1905] A. C. pp. 89, 90.

word 'absolutely,' as defining the amount of the estate which is given to the wife, must of course be subject to any executory limitation or any other valid limitation or exception which you find engrafted on that estate." This decision, therefore, turned upon the point that, in the view taken by the House of Lords, the words of the will created an executory limitation over.

Where a legacy is given absolutely by a will, and the testator subsequently executes a codicil with regard thereto in precatory words, this may be sufficient to create a trust (*z*).

2. Certainty of Subject-matter.

"If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust, because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be —his appeal to the conscience of the first taker—to be imperative words" (*a*).

In *Buggins* v. *Yates* (*b*), a testator having devised real property to his wife, to be sold for payment of his debts and legacies, in aid of his personal estate, declared that he *did not doubt but his wife would be kind to his children*, it was insisted that this constituted a trust of the personal estate; but the Court was of opinion that these words gave a right to no child in particular, nor a right *to any particular part of the estate*, and that the clause was void for uncertainty (*c*).

In *Sale* v. *Moore* (*d*), the testator bequeathed to his wife the remainder of what he died possessed of, after the payment of debts and legacies, "*not doubting, as she has no relations of her own family, but that she will consider my near relations, should she survive me, as I should consider them myself in case I should survive her.*" It was held by Hart, V.-C., that there was no

(*z*) *Re Burley*, [1910] 1 Ch. 215.

(*a*) *Mussoorie Bank* v. *Raynor*, 7 A. C., p. 331; and see *Re Diggles*, 39 Ch. D. 253; *Wynne* v. *Hawkins*, 1 Bro. Ch. 179; *Re Conolly*, [1910] 1 Ch. 219; Farwell (3rd ed.), p. 545.

(*b*) 9 Mod. 122.

(*c*) See also *Re Bond*, 4 Ch. D. 238.

(*d*) 1 Si. 534.

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trust for the next-of-kin, but that the wife took the residue absolutely. "The word 'consider,'" said the V.-C., "is a relative term. How is she to consider them as he would have done? How is the Court to find out how he would have considered his relations?" (*e*).

So, in an absolute devise or bequest to a person, "well knowing that he will remember" certain objects (*f*), or will "do justice to" or "deal justly and properly to and by them" (*g*), or "make ample provision for them" (*h*), will not be construed as a trust, because no particular property is pointed out as the object of it. In *Mussoorie Bank* v. *Raynor* (*i*), a testator gave his widow all his property "feeling confident that she will act justly to our children in dividing the same when no longer required by her." It was held that not only would there be a difficulty in executing the trust by reason of the uncertainty of the subject-matter of the gift, but also that the gift was absolute (*k*).

Upon the same principle it has been held that the recommendation to appoint a person as agent, receiver and manager cannot be construed as imperative, where the subject is uncertain; thus in *Finden* v. *Stephens* (*l*), the testator expressed it as his wish and desire that a certain person should be employed as agent, receiver and manager of his estates whenever his trustees should have occasion for the services of a person in that capacity; Cottenham, C., held that no trust was created which such person could enforce (*m*).

Words of recommendation in a will are not to be construed as imperative if an intention appear in any part of the will to give to the devisee a right or power to spend the estate; for the Court conceives it to be inconsistent with the intention to create an imperative trust, that the party should have the right or power to dispose of the property at his pleasure and by using that

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(*e*) And see *Hoy* v. *Master*, 6 Si. 568; *Dawson* v. *Clark*, 15 V. 409; *Lechmere* v. *Lavie*, 2 My. & K. 197.

(*f*) *Bardswell* v. *B.*, 9 Si. 319.

(*g*) *Le Maitre* v. *Bannister*, Prec. Ch. by Finch, 200 (n.), 1; *Pope* v. *P.*, 10 Si. 1.

(*h*) *Winch* v. *Brutton*, 14 Si. 379; *Fox* v. *F.*, 27 B. 301.

(*i*) 7 A. C. 321.

(*k*) And see *Flint* v. *Hughes*, 6 B. 342; *Macnab* v. *Whitbread*, 17 B. 299; *Reeves* v. *Baker*, 18 B. 372; *Greene* v. *G.*, 3 Ir. R. Eq. 629.

(*l*) 2 Ph. 142.

(*m*) See also *Shaw* v. *Lawless*, 5 Cl. & Fin. 129; *Foster* v. *Elsley*, 19 Ch. D. 518; cf. *Williams* v. *Corbet*, 8 Si. 349.

privilege, leave either nothing, or more or less, to remain the subject of the trust (*n*).

Where there is an absolute gift of property to a person, and a recommendation to give to a certain object, "what shall be left" at his death, or "what he shall die seised or possessed of" (*o*); or what "he may have saved" out of an estate given for life (*p*); or "the bulk of his said residuary estate" (*q*); or a gift of all property to a wife "for her to do justice to those relations on my side such as she think worthy of consideration, but under no restriction to any stated property, but quite at liberty to give and distribute what and to whom" she "may please" (*r*); the subject will be considered as uncertain.

In *Eade* v. *E.* (*s*), the testator bequeathed the residue of his personal property to his wife, requesting that she would at her death leave £200 to each of the Miss Nortons, and leave the remainder of *her* property to his nephews George and William Eade, in such proportions as she thought proper. Leach, V.-C., held that the Miss Nortons were entitled to the £200 each, but that no trust was created for the nephews. "If," observed his Honour, "the testator had requested his wife at her death to leave the remainder of *his* property to George and William Eade, there would have been a clear trust in their favour, because the remainder of the testator's property could have been ascertained. I cannot say that, by the remainder of *her* property at her death, he meant the remainder of *his* property. It must be understood to mean such property as she happened to possess at her death, from whatever source derived. This testator having, therefore, in effect, left his wife at liberty to deal with the remainder of *his* estate as she pleased, his request as to the *uncertain* property of which she might be possessed at her death, cannot create a trust."

But the Court in all these cases merely requires that the intention of the testator should be manifested with sufficient

(*n*) *Meredith* v. *Heneage*, 1 Si. 556; *Curtis* v. *Rippon*, 5 Madd. 434; *House* v. *H.*, 23 W. R. 22; *Lefroy* v. *Flood*, 4 Ir. Ch. R. 1; *Eaton* v. *Watts*, 4 Eq. 151.

(*o*) *Wynne* v. *Hawkins*, 1 Bro. Ch. 179; *Sprange* v. *Barnard*, 2 Bro. Ch. 585; *Bland* v. *B.*, 2 Cox, 349, 354; *Pushman* v. *Filliter*, 3 V. 7; *Wilson* v. *Major*, 11 V. 205; *Att.-Gen.* v. *Hall*, Fitzg. 714; *Lechmere* v. *Lavie*, 2 My. & K. 197; *Pope* v. *P.*, 10 Si. 1; *Green* v. *Marsden*, 1 Drew. 646, 651; *Parnall* v. *P.*, 9 Ch. D. 96.

(*p*) *Cowman* v. *Harrison*, 10 Ha. 234; *Bardswell* v. *B.*, 9 Si. 319.

(*q*) *Palmer* v. *Simmonds*, 2 Drew. 221.

(*r*) *Re Bond*, 4 Ch. D. 238.

(*s*) 5 Madd. 118.

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definiteness. A recommendation in a will that a legatee shall leave in a particular way whatever he shall be possessed of under the will at the time of his death, may be controlled by other words in the will so as to render certain the extent of the property subject to the recommendation. Thus, in *Horwood* v. *West* (*t*), the testator gave to his wife all his personal estate, *relying* that if she should marry again she would secure *whatever she should possess under his will* for her separate use; and he *recommended* her to give, by her will, *what she should die possessed of* under his will to certain persons whom he named: Leach, V.-C., held that the wife's executor was a trustee of the whole of the property possessed by her under the will, for the persons named.

3. Certainty of Object.

Where there is a clear or admitted intention to create a trust, but the objects are not defined, the trustees will hold the property for the persons entitled under an intestacy (*u*). But in these cases the question to be decided is, is there a trust? And where in such cases the object is left indefinite or uncertain, the Court will infer from that fact that no trust is intended (*x*). For a similar difficulty arises to that in which the subject-matter is left indefinite, and the inference arises that the words of confidence, hope, etc., are not used imperatively, and therefore do not create a trust (*y*). So where property was left to a legatee for life with power to dispose of it "as she might judge best and wisest" (*z*), and where the testator expressed his desire that his residuary legatees should distribute the residue "as they shall think will be most agreeable to my wishes" (*a*), it was held that the legatees took absolutely (*b*).

Although words are used, such as "family," "relations," "heirs," etc., to which the Court would give a meaning in a direct

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(*t*) 1 S. & S. 387.

(*u*) *Stubbs* v. *Sargon*, 2 Keen, 255; *Re Boyes*, 26 Ch. D. 531; *Briggs* v. *Penny*, 3 Mac. & G. 546, *infra*, p. 302; Jarman (6th ed.), pp. 481, 881. But see as to uncertain gifts to charities, *Williams* v. *Kershaw*, 5 Cl. & Fin. 111 (n.); *Re Jarman*, 8 Ch. D. 584; *Re Sutton*, 28 Ch. D. 464; *Re Douglas*, 35 Ch. D. 472; *Re Best*, [1904] 2 Ch. 354.

(*x*) *Morice* v. *Durham*, 10 V. 521; *Re Diggles*, 39 Ch. D. 253, 357.

(*y*) See *Mussoorie Bank* v. *Raynor*, *supra*, p. 295.

(*z*) *Reid* v. *Atkinson*, 5 Ir. R. Eq. 373.

(*a*) *Stead* v. *Mellor*, 5 Ch. D. 225.

(*b*) See also *Creagh* v. *Murphy*, 7 Ir. R. Eq. 182. *Re Hutchinson and Tenant*, 8 Ch. D. 540; *Re Harbison*, [1902] 1 Ir. R. 103; *Sullivan* v. *S.*, [1903] 1 Ir. R. 193.

gift, no trust will be implied if it is uncertain what the testator meant by them (*c*).

A *power* to appoint to a person's " family " will, it seems, be limited to his children, if any (*d*); if there are none, the donee may select relations not within the degree of next-of-kin (*e*); if the power is not exercised, the statutory next-of-kin are entitled (*f*). If it is doubtful whom the donor meant, the gift may be void for uncertainty (*g*).

In *Harland* v. *Trigg* (*h*), where a testator gave *leaseholds* to his " brother for ever, *hoping* he will continue them in the *family*," Thurlow, C., held that no trust was created.

In *Green* v. *Marsden* (*i*), the request to the devisee of *freeholds* was to distribute them " amongst such members of her own *family* as she should think most deserving." It was held that the description was too uncertain.

In *Griffiths* v. *Evan* (*k*), A devised an estate to his daughter B in tail : and for want of issue of her body, " he empowered and authorised " her to settle and dispose of the estate to such person or persons as she should think fit by an instrument being her last will, " confiding " in his said daughter that she would not by the said instrument transfer the estate from his " nearest family." B died without issue, having by her will appointed to her husband for life, with remainders over. It was held by Langdale, M.R., that a trust was raised; that such appointment was void, the expression " nearest family " being equivalent to heirs; and that the co-heirs of the testator were entitled.

In *Meredith* v. *Heneage* (*l*), the testator gave *real and personal estate* to his wife, in full confidence she would distinguish *the heirs* of his late father by devising the whole of his estate, together and entire, to such of his father's *heirs* as she might think best deserved her preference. The Court thought the objects were not certain—whether the testator had pointed out the heirs-at-law of

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(*c*) See Theobald (8th ed.), pp. 361—2; Jarman (6th ed.), p. 1582 *et seq.*

(*d*) *Re Hutchinson and Tenant*, 8 Ch. D. 540; *Jarman* (6th ed), p. 1586, note (*b*).

(*e*) *Grant* v. *Lynam*, 4 Russ. 292.

(*f*) *Cruwys* v. *Colman*, 9 V. 319.

(*g*) *Neo* v. *N.*, L. R. 6 P. C. 381.

(*h*) 1 Bro. Ch. 141. Cf. *Wright* v. *Atkins*, 17 V. 255; 19 V. 299; Sugd. Prop., p. 388.

(*i*) 1 Drew. 646.

(*k*) 5 B. 241.

(*l*) 1 Si. 542.

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his father as the objects to take the personal as well as the real estate, or the heirs and next-of-kin, or the next-of-kin only—and that no trust was created (*m*).

Where the power is to be exercised by the donee by will, or at his death, or, as in the principal case, "at or before his death," the objects will be those who answer a particular description at the death of the donee, and there will be no uncertainty (*n*).

A request that jewels might be left as "heirlooms" is uncertain in its object (*o*).

4. Interests taken by Donees of Precatory Trusts.

In the creation of a precatory trust the property may, as in the principal case, be given to the donee beneficially, but *subject to the trust imposed* (*p*); in which case all that is not required for the purposes of the trust belongs to the donee (*q*), and there is no resulting trust (*r*). And all the rights and incidents of property—for instance, the right of felling timber—will remain in the donee to the extent of the estate vested in him. Thus, in *Wright* v. *Atkyns* (*s*), a testator gave all his leasehold, freehold and copyhold estates unto his mother, Charlotte Atkyns, and her heirs for ever, *in the fullest confidence that, after her decease, she would devise the property to his family*; and he charged the premises with the payment of his debts, and gave to her all his personal estate, and appointed her his executrix. It was held eventually by the House of Lords that there was a trust for the testator's heir, but that Mrs. Atkyns took an estate in fee subject thereto, and that she was entitled to cut timber in a workmanlike manner, as having a qualified estate in fee, paying the money into Court.

In *Irvine* v. *Sullivan* (*t*), the testator, after a devise of all his property to three trustees (whom he afterwards appointed executors) upon trust to sell, directed that the moneys arising therefrom, after

(*m*) See also *Williams* v. *W.*, 1 Si. (N.S.) 358; *Re Conolly*, [1910] 1 Ch. 219; *Re Hill*, [1923] 2 Ch. 259.

(*n*) *Pierson* v. *Garnet*, 2 Bro. Ch. 38, 226; *Wright* v. *Atkyns*, *infra*; *Meredith* v. *Heneage*, *supra*; *Knight* v. *K.*, 3 B. 173; 11 Cl. & Fin. 513; cf. *Re Price*, [1887] W. N. 216.

(*o*) *Hill* v. *H.*, [1897] 1 Q. B. 483.

(*p*) *Burrough* v. *Philcox*, 5 My. & C. 73, 91.

(*q*) *Irvine* v. *Sullivan*, *infra*. As to order of administration of assets in such a case, see *Re Maddock*, [1902] 2 Ch. 220.

(*r*) *Wood* v. *Cox*, 2 My. & C. 684.

(*s*) 1 V. & B. 314.

(*t*) 8 Eq. 673.

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payment of his debts, funeral and testamentary expenses, should be paid by his trustees to E. D. Irvine, widow, absolutely, "*trusting* that she will carry out my wishes with regard to the same, with which she is fully acquainted." The testator had, shortly before the date of his will, expressed to E. D. Irvine, to whom he had been for some time engaged to be married, his wish that she would, out of the property he should leave her, make gifts to certain persons. E. D. Irvine, after leaving the testator, wrote down his wishes, but the paper was not submitted to or signed by him. It was held by James, V.-C., that E. D. Irvine took the testator's estate *beneficially, subject* only to the performance of the testator's wishes communicated to her, which were treated as legacies carrying interest at £4 per cent. from the expiration of one year from the testator's death (*u*).

In *Re Falkiner* (*x*), a testatrix, after appointing A and B to be her executors and trustees and giving to them all her estate upon trust for sale, conversion and investment, bequeathed (by clause 5) to the said A and B by name "absolutely as joint tenants one-half of the residuary trust moneys with the request that they will dispose of the same in accordance with any memorandum or paper signed by me and deposited with this my will or left among my papers at my death." The other moiety (subject, however, to a life interest) was bequeathed (by clause 7) in similar terms. Clause 8 of the will provided that "any such memorandum or paper referred to in clauses 5 and 7 shall not be deemed to have any testamentary character, and the above expression of my wishes as to the disposal of the said sums shall not create any trust or legal obligation even if the same shall be communicated to my trustees in my lifetime." A and B were partners in the firm of solicitors who prepared her will, and an earlier will which was similar in terms. Before the first will, the testatrix sent to A a list of the persons she wished to benefit, and he tried in vain to persuade her to allow the names to be inserted in the ordinary way. Subsequently the testatrix sent the firm a revised list, and she afterwards wrote further letters making alterations in the lists, which letters were duly acknowledged. It was held by Tomlin, J., that A and B only agreed to give effect to the testatrix's wishes

(*u*) See also *Shelley* v. *S.*, 6 Eq. 540; *Baker* v. *Mosley*, 12 Jur. 740. As to the effect on administration of treating such wishes as specific bequests, see *Re Maddock*, [1902] 2 Ch. 220.

(*x*) [1924] 1 Ch. 88. Cf. *Re Spencer's Will*, 57 L. T. 519.

in accordance with the scheme of the will, including as part of such scheme clause 8, and that accordingly they took the property free from any trust. But if the gift is *upon trust*, *prima facie* the donee takes the whole upon trust for the trust declared, or for the heir-at-law or next-of-kin if those purposes fail, or are not exhaustive, or are not declared (*y*). Thus, where a testator bequeathed to his wife all his property, but without words giving her a beneficial interest, " under the firm conviction that she would dispose of and manage the same for the benefit of their children," it was held that she was merely a trustee (*z*). But even where the gift is *upon trust*, comparatively small indications of a contrary intention will take a case out of the rule. Thus, in a recent case (*a*), a testator, after making certain bequests, proceeded: " All my effects, including rubber and all other shares, I leave *absolutely* to my sister Margaret *upon trust* to pay to my wife per annum £300 with income tax, £100 to be free of income tax." The property included in this bequest was more than sufficient to satisfy the annuity. It was held by Sargant, J., that the testator's sister was entitled beneficially to the balance, and that she was not a trustee thereof for the next-of-kin.

In *Re Croome* (*b*), a testator gave to his brother all his real estate " *on trust nevertheless* to pay thereout " two sums of £800 and £300 and certain annuities, and he gave all his personal estate after payment of his funeral expenses and his debts, " except the two above-mentioned sums of £800 and £300 " to his said brother and to his sister as tenants in common. It was held that the brother was entitled to the real estate as beneficial owner subject to the charges.

If an estate is given to A *upon condition* that he shall apply the rents for the benefit of B, that is a gift *upon trust* (*c*). But if lands are devised to an individual, with a condition annexed that he shall make certain payments, if the devise is accepted the condition must be fulfilled, but the land is the land of the devisee subject to the performance of the condition (*d*).

(*y*) *Re West*, [1900] 1 Ch. 84; Theobald, Wills (8th ed.), p. 550.

(*z*) *Barnes* v. *Grant*, 26 L. J. Ch. 92; *Greene* v. *G.*, 3 Ir. R. Eq. 629; *Corbet* v. *C.*, 7 Ir. R. Eq. 456; *Re West*, [1900] 1 Ch. 84.

(*a*) *Re Foord*, [1922] 2 Ch. 519.

(*b*) 59 L. T. 582; 61 L. T. 814; and see *Williams* v. *Roberts*, 27 L. J. Ch. 177; *Morrison* v. *M'Ferren*, [1901] 1 Ir. R. 160.

(*c*) *Per* Lord Cairns, *Att.-Gen. etc.* v. *Wardens of Wax Chandlers Co.*, L. R. 6 H. L. 1, at p. 21.

(*d*) *Ibid.*, p. 19; and see *Re Foord*, [1922] 2 Ch. 523.

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Although vagueness in the objects may prevent a trust in their favour from being effectual, nevertheless the intention to create a trust may appear with sufficient clearness to prevent the legatee or donee from taking beneficially. In *Briggs* v. *Penny* (*e*), the testatrix, after giving among other legacies a sum of £3,000 to Sarah Penny, and a like sum of £3,000 in addition for the trouble she would have in acting as executrix, bequeathed all her residuary personal estate and effects unto the said Sarah Penny, "well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes." It was held that Sarah Penny did not take the residue for her own benefit. "There is nothing," said Truro, L.C., (*f*) "on the face of the words which necessarily implies what is vague or indefinite, as in those cases where the Court has held that the uncertainty of the object has afforded evidence that no trust was intended. . . . I agree with the Vice-Chancellor in interpreting 'views and wishes' to mean 'designs and desires,' and the very expression of confidence that Miss Penny would make a good use and dispose of the property in a manner in accordance with the testatrix's designs and desires or intentions, appears to me to amount to a declaration, that Miss Penny was to hold the property for that purpose, or in other words, to the same import, *upon trust*. It seems to me to be tantamount to a bequest upon trust, and if so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained, such trust be left undeclared; but still in such case it is clear a trust was intended, and that is sufficient to exclude the legatee from a beneficial interest. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, . . . or though he declares it imperfectly . . . the legatee is excluded, and the next-of-kin take. . . . In this case, however, we are not left to spell out a trust from the residuary clause alone : the fact that, besides a legacy of £3,000, another legacy is expressly given to Miss Penny, 'in addition for the trouble she will have in acting as executrix,' clearly shows that she was not intended to take the residue beneficially" (*g*).

In *Stead* v. *Mellor* (*h*), a testatrix gave all her residuary estate

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(*e*) 3 Mac. & G. 546.

(*f*) *Ibid.*, pp. 555-7.

(*g*) See *Re Boyes*, 26 Ch. D. 531; *Re Hetley*, [1902] 2 Ch. 866; Farwell (3rd ed.), p. 547.

(*h*) 5 Ch. D. 225.

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in trust for her nieces, her "*desire being that they shall distribute such residue as they think will be most agreeable to my wishes.*" Jessel, M.R., criticised both the judgment and decision in *Briggs* v. *Penny*, and proceeded, "it is distinguishable from the present case, *and as the words are not the same, and I am not bound to regard it as a binding authority on the construction of the particular will now before me, I am free to inquire what the testatrix did really mean*, and unless I find in the will something equivalent to a declaration that the residuary legatees take as trustees, I must hold that they take a beneficial interest" (*i*).

In *Re Booth* (*k*), a testator gave the residue of his estate to his executors on trust to pay or permit his wife to receive the annual income during her life "for her use and benefit and for the maintenance and education of my children." North, J., held the wife took the income subject to a trust for the maintenance and education of the children, and directed an inquiry whether any and which of the children required maintenance.

Where a testatrix bequeathed a sum of £4,000 to A "for the charitable purposes agreed upon between us" it was held that the gift on the face of the will being of the capital, evidence was not admissible to show that the agreement between the testatrix and A was that only the income of the £4,000 during the life of A should be devoted to charitable purposes (*l*).

5. Trust implied from Powers of Selection and Distribution.

It is said by Lord St. Leonards to be "an immutable rule, that the non-execution of a power shall never be aided" (*m*), but he qualifies this by saying that this broad rule does not apply to powers in the nature of trusts. "It is perfectly clear that where there is a mere power of disposing, and that power is not executed, this Court cannot execute it." It is equally clear that "wherever *a trust* is created, and the execution of that trust fails by the death of the trustee, or by accident, the Court will execute the trust. * * * There are not only a mere trust and a mere power, but there is also known to this Court a power which

(*i*) See *Re Fleetwood*, 15 Ch. D. 594; *Re Hetley*, [1902] 2 Ch. 866; *Re Eyre*, 49 L. T. p. 260; *Re Conolly*, [1910] 1 Ch. 219; *Re Foord*, [1922] 2 Ch. 519; *Re Falkiner*, [1924] 1 Ch. 88.

(*k*) [1894] 2 Ch. 282. The Court can administer such a trust, *Re G.*, [1899] 1 Ch. 719; Farwell (3rd ed.), p. 546.

(*l*) *Re Huxtable*, [1902] 2 Ch. 793. Cf. *Re Spencer's Will*, 57 L. T. 519.

(*m*) Sugden on Powers (8th ed.), 588.

the party to whom it is given is entrusted and required to execute; and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place. Upon that principle, the case of *Harding* v. *Glyn* proceeded " (*n*). And the Court, moreover, may exercise the power retrospectively (*o*); and where, for instance, by the death of the trustees in the life of the testator (*p*), or by their not accepting the office (*q*), or by their inability to agree among themselves as to the manner in which the power ought to be executed (*r*), or, as in the principal case, by their deaths before having exercised their powers (*s*); or where by accident the trustees have not exercised their power (*t*), the Court itself, as far as it properly can, will take upon itself the duties of the trustees by the exercise thereof.

Two classes of cases may be distinguished (*u*). First: cases in which the instrument creating the power imposes a duty upon the donee to exercise the power, and at the same time " gives him an interest extensive enough to enable him to discharge the duty " (*x*). Here a trust is created, the objects of the power are *cestuis que trust*, and if the donee fails to exercise the power, the trust will be enforced against his representatives. In this class of cases the instrument gives, in the first instance, the property to the donee absolutely, but subsequent words limit his beneficial interest to a life estate and give him a power of selection among certain persons, usually children. Cases falling under this head are closely related to those discussed under Precatory Trusts, the Court here finding in the words creating the power a trust for the

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(*n*) *Per* Eldon, C., in *Brown* v. *Higgs*, 8 V. pp. 570-571; 5 My. & C. 92. Twice heard before Lord Alvanley (4 V. 708, 5 V. 495), whose judgment was affirmed by Eldon, C., greatly doubting, 8 V. 561, and finally by the H. L., 5 My. & Cr. 92. See *Re Weekes' Set.*, [1897] 1 Ch. 289; *Re Hughes*, [1921] 2 Ch. 208; *Re Combe*, [1925] Ch. 210.

(*o*) *Edwards* v. *Grove*, 2 De G. F. & J. 210; *Maberly* v. *Turton*, 14 V. 499.

(*p*) *Att.-Gen.* v. *Hickman*, 2 Eq. Ca. Abr. 193; *Att.-Gen.* v. *Lady Downing*, Wilm. 7; *Maberly* v. *Turton*, 14 V. 499.

(*q*) *Gude* v. *Worthington*, 3 De G. & Sm. 389; *Izod* v. *I.*, 32 B. 242; *Doyley* v. *Att.-Gen.*, 2 Eq. Ca. Abr. 194.

(*r*) *Moseley* v. *M.*, Rep. t. Finch, 53; *Wainwright* v. *Waterman*, 1 V. 311.

(*s*) See also *Flanders* v. *Clark*, 1 Ves. Sen. 8; *Hewett* v. *H.*, 2 Eden, 332; *Grieveson* v. *Kirsopp*, 2 Keen, 653; *Re Hargrove's Trusts*, 8 Ir. R. Eq. 256; *Croft* v. *Adam*, 12 Si. 639.

(*t*) *Brown* v. *Higgs*, *supra*; *Att.-Gen.* v. *Stephens*, 3 My. & K. 347.

(*u*) See *Moore* v. *Ffolliot*, 19 L. R. Ir. 499, at 501.

(*x*) See *Brown* v. *Higgs*, 8 V., at p. 574.

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class in question (*y*). Secondly : cases in which the donee of the power takes in terms only a life estate, and the power cannot in any event take effect out of any estate vested in him. Here we must distinguish between (*α*) cases in which by the words of the instrument a gift is made to the objects of the power and the donee is given only a power of selection among them, and (*β*) cases in which no direct gift is made, and the gift if any must be implied, and the power is not merely one of selection but is general in its terms. In cases falling within (*α*), the authorities show that if the power is not executed the Court will divide the property equally between the objects of the power (*z*). Cases falling within (*β*) present more difficulty. In *Re Weekes' Settlement* (*a*) (supra), Romer, J., decided that where there is a gift to the donee of the power for life with power to appoint among a class, but no gift to that class, the Court is not bound merely by reason of the absence of a gift over in default of appointment to imply a gift to the class in the event of the non-exercise of the power. " In order that such a gift to the objects may be implied, you must find in the will an indication that the testatrix did intend the class, or some of the class, to take—intended in fact that the power should be in the nature of a trust—only a power of selection being given, as, for example, a gift to A for life with a gift over to such of a class as A shall appoint " (*b*).

In *Re Combe* (*c*), a testator gave all his property to trustees upon trust for sale and to pay debts, etc., and directed his trustees to stand possessed of the residue in trust to pay the income to his wife during widowhood, and after her death or remarriage, for his son for life, and after his death " in trust for such person or persons as my said son shall by will appoint, but I direct that such appointment must be confined to any relation or relations of mine of the whole blood." The will contained no gift over in default of appointment. It was held that the Court would not imply a gift in default of appointment to the objects of the power, and that, accordingly, if the testator's son released his power the property would go (subject to the two life interests) as on an intestacy.

(*y*) See *e.g.*, *Brown* v. *Higgs*, *supra*; *Forbes* v. *Ball*, 3 Mer. 437; *Re Hughes*, [1921] 2 Ch. 208.

(*z*) See *Re Weekes' Settlement*, [1897] 1 Ch. 289; *Burrough* v. *Philcox*, 5 My. & Cr. 73; *Jones* v. *Torin*, 6 Si. 255; *Grieveson* v. *Kirsopp*, 2 Keen, 653; *Winn* v. *Fenwick*, 11 B. 438; *Lambert* v. *Thwaites*, 2 Eq. 151; *Wilson* v. *Duguid*, 24 Ch. D. 244.

(*a*) [1897] 1 Ch. 289.

(*b*) And see *Clibborn* v. *Horan*, [1921] 1 Ir. R. 93.

(*c*) [1925] Ch. 210.

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A gift over in default of *objects* of the power assists the construction that the intention was that the property should not go over if there were any objects of the power (*d*).

An express gift over in default of appointment, however, is inconsistent with a gift to the objects (*e*) even though that gift is void (*f*); but a residuary gift is not equivalent to a gift over in default for this purpose (*g*). The terms of the instrument may make it impossible for the Court to construe it as a gift to the objects on a failure to exercise the power. Thus the donee of the power may be given an absolute discretion to dispose of capital and income as he sees fit in favour of X or the other beneficiaries under a will (*h*), or the donor of the power may in the instrument recite that he has already made provision for the objects (*i*).

The mode in which the Court will execute a power in the nature of a trust, depends upon the terms of the instrument by which the property is settled. If, for instance, in such instrument a rule is laid down for the guidance of the trustees which they have not acted upon, then the Court will act upon it, exercising the same judgment as the trustees might have done. "Where trustees have power," said Lord Hardwicke in *Gower* v. *Mainwaring* (*k*), "to distribute *generally, without any object pointed out or rule laid down*, the Court interposes not, unless in case of a charity, which is different, the Court exercising a discretion as having the general government and regulation of charity (*l*). But *here is a rule laid down. The trustees are to judge of the necessity and occasion of the family; the Court can judge of such necessity of the family. That is a judgment to be made on facts existing, so that the Court can make the judgment as well as the trustees*, and when informed by evidence of the necessity can judge what is equitable and just on this necessity" (*m*).

(*d*) *Butler* v. *Gray*, L. R. 5 Ch. 26; *Re Llewellyn's Settlement*, [1921] 2 Ch. 281, 290. Cf. *Hopper* v. *St. John's Coll. Cambridge*, 31 T. L. R. 139.

(*e*) *Richardson* v. *Harrison*, 16 Q. B. D., pp. 103-4; *Pattison* v. *P.*, 19 B. 638; *Goldring* v. *Inwood*, 3 Giff. 139; *Re Lyons and Carrol's Contract*, [1896] 1 Ir. R. 383; Farwell (3rd ed.), pp. 534-5.

(*f*) *Re Sprague*, [1880] W. N. 151; 43 L. T. 236.

(*g*) *Re Brierley*, 43 W. R. 36, and see *Forbes* v. *Ball*, 3 Mer. 437; 3 K. & J. 529; Farwell, p. 529.

(*h*) *Re Eddowes*, 1 Dr. & Sm. 395; and see *Re Combe*, [1925] Ch. 210.

(*i*) *Carberry* v. *M'Carthy*, 7 L. R. Ir. 328.

(*k*) 2 Ves. Sen. 87.

(*l*) See as to charities, *Salusbury* v. *Denton*, 3 K. & J. 529, *infra*; *Pocock* v. *Att.-Gen.*, 3 Ch. D. 342; cf. *Crawford* v. *Forshaw*, [1891] 2 Ch. 261; *Re Smith*, [1904] 1 Ch. 139; *Re Clarke*, [1923] 2 Ch. 407.

(*m*) And see *Hewett* v. *H.*, 2 Eden, 332; Anon., 1 P. W. 327; *Widmore* v.

Harding v. Glyn.

Where, however, no rule has been laid down in the instrument creating the power as to the mode in which it is to be executed, the Court, not being able to exercise the discretion vested in the donee (*n*), and acting upon the maxim that *equality is equity*, will make an equal division among the persons who are objects of the power in the nature of a trust. Thus in *Doyley* v. *Att.-Gen.* (*o*), the testator gave property in trust for certain purposes, and subject thereto the trustees and the survivor of them, and the heirs and executors of such survivor, were to *dispose of it* to such of his relations on his mother's side who were most deserving, and in such manner as they should think *fit*, *and* for such charitable uses and purposes as they should also think most proper and convenient. The power having devolved on the Court, Jekyll, M.R., directed that one-half of the property should go to the testator's relations on the mother's side, and the other half to charitable uses. He said the known rule that equality is equity was the best measure to go by.

So in *Salusbury* v. *Denton* (*p*), a testator by will gave a fund to be at the disposal of his widow by her will, " therewith to apply a part " for a charity, " the remainder to be at her disposal among my relations, in such proportions as she may be pleased to direct." The widow died without exercising the power of determining the proportions in which each were to take. Page Wood, V.-C., held that the Court would divide the fund in equal moieties, and give one of such moieties to charitable purposes, and the other moiety to such of the testator's relatives as were capable of taking within the Statute of Distributions (*q*).

Period for ascertaining class.—If the instrument itself gives the property to a class but gives a power to A. to appoint in what shares and in what manner the members of that class shall take,

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Woodroffe, Amb. 636; *Brunsden* v. *Woolredge*, Amb. 507; *Att.-Gen.* v. *Buckland*, cited 1 Ves. Sen. 231; *Att.-Gen.* v. *Price*, 17 V. 371; *Green* v. *Howard*, 1 Bro. Ch. 33; *Mahon* v. *Savage*, 1 Sch. & L. 111; *Maberly* v. *Turton*, 14 V. 499; *Liley* v. *Hey*, 1 Ha. 580; *Re Phene's Trusts*, 5 Eq. 346; *Butler* v. *Gray*, L. R. 5 Ch. 26, 31; *Farwell* (3rd ed.), p. 540.

(*n*) See Sugden on Powers (8th ed.), p. 601.

(*o*) 2 Eq. Ca. Abr. 194, 4 Vin. Abr. 485 (*e*), pl. 16.

(*p*) 3 K. & J. 529.

(*q*) See also *Gough* v. *Bult*, 16 Si. 45, 231; *Longmore* v. *Broome*, 7 V. 124; *Penny* v. *Turner*, 2 Phill. 493; *Fordyce* v. *Bridges*, *ibid.*, 497; *Re White's Trusts*, John. 656; *Jones* v. *J.*, 5 Ha. 440; *Little* v. *Neil*, 10 W. R. 592; *Hutchinson* v. *H.*, 13 Ir. Eq. R. 332; *Pocock* v. *Att.-Gen.*, 3 Ch. D. 342; *Gray* v. *G.*, 13 Ir. Ch. R. 404; *Izod* v. *I.*, 32 B. 242; *Power* v. *Quealy*, 4 L. R. Ir. 20. Cf. *Re Conolly*, [1910] 1 Ch. 219.

the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment. Thus, in *Lambert* v. *Thwaites* (*r*), by a post-nuptial settlement, certain freehold property was conveyed to trustees *upon trust* to pay the rent to W. and his wife during their lives, and after the decease of the survivor *upon trust* to sell and *divide the proceeds amongst all and every the children* of W. in such shares and proportions *as he should by will appoint*. There were seven children living at the date of the settlement, one of whom died before W., who died without executing the appointment. It was held by Kindersley, V.-C., that the property was vested in all the children, liable to be divested by the execution of the power; and the power not having been executed, the representatives of the deceased child were entitled to his share (*s*). If in such a case the power had been exercised in favour of the surviving children, they only would have taken.

But if the instrument does not contain a gift of the property to any class or in default of appointment, but only a power to the donee to give it as he may think fit among the members of that class, those only can take in default of appointment (when any gift in default of appointment can be implied) who might have taken under an exercise of the power (*t*). Thus, in *Walsh* v. *Wallinger* (*u*), a testator bequeathed the residue of his estate to his wife for her own use and benefit, "*trusting that she would at her decease give and bequeath* the same to the children in such manner as she should appoint." Here there was no gift in express terms to the children by the testator, nor any direction that they were to take in default of appointment; and as the power was only to be exercised *by will*, it was held that only those children who survived the wife could take (*x*).

A gift by will to A for life, and "at" or "after" his decease to such persons as he shall appoint, gives A a life interest with a

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(*r*) 2 Eq. 151; *Wilson* v. *Duguid*, 24 Ch. D. 244; *Re Llewellyn*, [1921] 2 Ch. 281; *Re Clarke*, [1923] 2 Ch. 407.

(*s*) See also *Wilson* v. *Duguid*, 24 Ch. D. 244; *Davy* v. *Hooper*, 2 Vern. 665; *Madoc* v. *Jackson*, 2 Bro. Ch. 588; *Hockley* v. *Mawbey*, 1 V. 143; *Jones* v. *Torin*, 6 Si. 255; *Falkner* v. *Wynford*, 9 Jur. 1006; *Fenwick* v. *Greenwell*, 10 B. 412; *Bradley* v. *Cartwright*, L. R. 2 C. P. 511; *Re Master's Settlement*, [1911] 1 Ch. 321; *Sheehy* v. *Nugent*, [1915] 1 Ir. R. 42.

(*t*) See *Lambert* v. *Thwaites*, 2 Eq., p. 155.

(*u*) 2 Russ. & My. 78.

(*x*) See also *Kennedy* v. *Kingston*, 2 J. & W. 431; *Freeland* v. *Pearson*, 3 Eq. 658; *Sinnott* v. *Walsh*, 5 L. R. Ir. 27.

power of appointment, either by instrument *inter vivos* or by will (*y*).

Where the power is created by a will in favour of the relations of the testator, and the power is not suspended by the existence of any preceding estate for life, it has been held that those who are to take as " relations " are such as answered the description of next-of-kin of the testator at his death (*z*), and the same persons will take when the donee of the power having a life interest dies in the lifetime of the testator (*a*).

When, as in the principal case, the *donee* of such a power has a *life* interest in the subject of the power, which he might exercise *by will only* in favour of the members of such a class; those who compose that class at the *death of the donee* will take (*b*).

Where the donee of the power takes no interest, but an estate for life is given to some other person, it would seem that the death of the longest liver of such tenant for life and the donee of the power would be the time for ascertaining the class (*c*), but this will depend upon the terms of the particular will (*d*).

Where the power may be exercised either by *deed or will*, the authorities are conflicting as to whether the objects to take, in default of appointment by the donee, through the intervention of the Court are those members of the class, being objects of the power, who were in existence at the death of the original testator or at the date of the settlement or born afterwards as the case may be (*e*), or, as was decided in the principal case, those only who were in existence at the death of the donee (*f*). The question in each case is one of the construction of the particular instrument.

Where a power in the nature of a trust gives the trustees liberty to distribute a fund *unequally*, they may do so, but if the Court interpose on default by the trustees it will divide the fund among

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(*y*) *Re Jackson's Will*, 13 Ch. D. 189.

(*z*) *Cole* v. *Wade*, 16 V. 27; *Walter* v. *Maunde*, 19 Ves. 424; Farwell (3rd ed.), p. 572. For the alteration in the law of descent, see A. E. Act, 1925, ss. 46 and 47.

(*a*) *Penny* v. *Turner*, 2 Ph. 493; *Hutchinson* v. *H.*, 13 Ir. Eq. R. 332.

(*b*) See *Doyley* v. *Att.-Gen.* 2 Eq. Ca. Abr. 194, pl. 15; *Witts* v. *Bodington*, 3 Bro. Ch. 95; *Cruwys* v. *Colman*, 9 V. 319, 325; *Birch* v. *Wade*, 3 V. & B. 95; *Finch* v. *Hollingsworth*, 21 B. 112; *Re Caplin's Will*, 34 L. J. Ch. 578; *Re Swan*, [1911] 1 Ir. R. 405.

(*c*) Farwell, Powers (3rd ed.), pp. 537—8.

(*d*) Cf. *Re White's Trusts*, John. 656.

(*e*) *Hands* v. *H.*, 1 T. R. 437 (n.), cited; *Grieveson* v. *Kirsopp*, 2 Keen, 653; *Wilson* v. *Duguid*, 24 Ch. D. 244.

(*f*) *Doyley* v. *Att.-Gen.*, 2 Eq. Ca. Abr. 195; *Pope* v. *Whitcombe*, 3 Mer. 689; see Sugd. Powers (8th ed.), pp. 663, 693.

the objects *equally* (*g*). But if such power authorises only an *equal* distribution, this will be equivalent to a gift to the objects, because the trustees can only exercise the power in the same manner as the Court would do (*h*).

Relations.—Where the non-exercised power is in favour of " relations," " relatives," etc., the rule adopted has been that the relations who are to take in default of the exercise of the power, are those who are the next-of-kin according to the Statute of Distributions, and they will take *per capita* (*i*).

It should be observed that in all these cases in which reference is made to the " next-of-kin according to the Statute of Distributions," it would seem that, since the legislation of 1925, the words " the persons entitled as on an intestacy " should be taken to have been substituted (*k*).

In exercising a power of *selection*, the donee may go beyond the rule adopted by the Court, and exercise it in favour of relations of the donor, who are not within the degree of those who would take on an intestacy (*l*). The same rule has been applied with respect to personal estate, where the words " relations " or " friends " (*m*), or where the word " family " (*mm*) has been used in place of " relations " (*n*).

If the word " relations " or the like words, are applied thus, " to the relations of A," and A is illegitimate, such words may include those persons who would have been the relations, etc., of A if A had been legitimate (*o*); provided that the testator was aware of the illegitimacy (*oo*).

(*g*) *Hands* v. *H.*, cited 1 T. R. (n.) 437; *Pope* v. *Whitcombe*, 3 Mer. 689; 2 Sugd., Powers, 650; and see *Doyley* v. *Att.-Gen.*, *supra*; *Salusbury* v. *Denton*, 3 K. & J. 529; *Re Llewellyn's Settlement*, [1921] 2 Ch. 281.

(*h*) *Phillips* v. *Garth*, 3 Bro. Ch. 64; *Rayner* v. *Mowbray*, *ibid.*, 234.

(*i*) *Tiffin* v. *Longman*, 15 B. 275; *Pope* v. *Whitcombe*, 3 Mer. 689 (as to which see *Finch* v. *Hollingsworth*, 21 B. 112); *Re Deakin*, [1894] 3 Ch. 565; *Re Patterson*, [1899] 1 Ir. R. 324; *Sheehy* v. *Nugent*, [1915] 1 Ir. R. 42; *Wilson* v. *Duguid*, 24 Ch. D., at p. 251; cf. *Eagles* v. *Le Breton*, 42 L. J. Ch. 362 (also reported 15 Eq. 148, but the headnote is not in accordance with the judgment).

(*k*) See the A. E. Act, 1925, ss. 46, 47.

(*l*) *Harding* v. *Glyn*, *supra*; *Wilson* v. *Duguid*, 24 Ch. D., at p. 251; *Re Deakin*, [1894] 3 Ch. 565; *Supple* v. *Lowson*, Amb. 729; *Spring* v. *Biles*, 1 T. R. 435 (n.); *Cruwys* v. *Colman*, 9 V. 324; *Mahon* v. *Savage*, 1 Sch. & L. 111; *Forbes* v. *Ball*, 3 Mer. 437; *Grant* v. *Lynam*, 4 Russ. 292; *Salusbury* v. *Denton*, 3 K. & J. 529; *Snow* v. *Tweed*, 9 Eq. 622; *Sheehy* v. *Nugent*, [1915] 1 Ir. R. 42.

(*m*) *Re Caplin's Will*, 2 Dr. & Sm. 527; 34 L. J. Ch. 578.

(*mm*) See *Re Hill*, [1923] 2 Ch. 259.

(*n*) *Cruwys* v. *Colman*, 9 V. 319; *Grant* v. *Lynam*, 4 Russ. 297.

(*o*) *Re Deakin*, [1894] 3 Ch. 567. Cf. *Re Wood*, [1902] 2 Ch. 542.

(*oo*) *Re Cullum*, [1924] 1 Ch. 540.

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Where the donee has merely a power of *distribution*, and not a power of *selection*,—if, for instance, he has a power to appoint among relations, and not amongst such of them as he thinks fit, or words to that effect, an appointment to relations not being those who would take on an intestacy would, it seems, be void (*p*).

The words "near relations" are of uncertain meaning, but there is no uncertainty in the words "nearest relations"; and there is therefore no need to resort to construction either to confine or extend their meaning. So under a bequest to "my nearest surviving relations," those nearest in relationship to the testator will take to the exclusion of those who take as representing their parent (*q*); but a gift to the testator's "nearest relations" as A may appoint, was held to authorise an appointment to next-of-kin under the statute (*r*).

Where a gift is to "poor relations," then if it is to be considered as being a charitable gift, as where a fund in perpetuity is created (*s*), or the context shows a charity was intended (*t*), the Court will not confine the term "relations" to those who would take on an intestacy; *secus* if the gift is not to be considered charitable (*u*).

Difficulties in executing power.—Although the subject be not capable of division, or one object out of a class is to be selected by the trustee, the Court will, if possible, execute the power, on the default of the trustee (*x*).

The exercise of a power otherwise imperative as a trust, may be made dependent upon the good behaviour of the objects of the power to the donee, and in the absence of any declaration of ill-

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(*p*) *Pope* v. *Whitcombe*, 3 Mer. 689; and see *Clapton* v. *Bulmer*, 10 Si. 426, 5 My. & C. 108; *Finch* v. *Hollingsworth*, 21 B. 112; *Lawlor* v. *Henderson*, 10 Ir. R. Eq. 150; *Wilson* v. *Duguid*, 24 Ch. D. 251; cf. *Re Deakin*, *supra*.

(*q*) *Smith* v. *Campbell*, 19 V. 400, 406; *Edge* v. *Salisbury*, Amb. 70; *Goodinge* v. *G.*, 1 Ves. Sen. 231; *Re Nash*, 71 L. T. 5; and see *Re Gray*, [1896] 2 Ch. 802.

(*r*) *Goodinge* v. *G.*, 1 Ves. Sen. 231; *Edge* v. *Salisbury*, Amb. 70; Farwell (3rd ed.), pp. 572—3.

(*s*) *White* v. *W.*, 7 V. 423; *Att.-Gen.* v. *Price*, 17 V. 374; *Isaac* v. *De Friez*, Amb. 595; 17 V. 373 (n.); *Gillam* v. *Taylor*, 16 Eq. 581, the *dictum* of Wickens, V.-C., being disapproved in *Att.-Gen.* v. *Northumberland*, 7 Ch. D. 745.

(*t*) *Mahon* v. *Savage*, 1 Sch. & L. 111.

(*u*) *Widmore* v. *Woodroffe*, Amb. 636. Jarman, Wills (6th ed.), vol. ii, pp. 16, 34.

(*x*) *Richardson* v. *Chapman*, 7 Bro. P. C. 318; *Moseley* v. *M.*, Rep. t. Finch, 53; *Browns* v. *Higgs*, 5 V. 504; *Matthews* v. *Kierman*, [1916] 1 Ir. R. 289.

behaviour on their part made by the donee, the Court will execute the power in their favour. In *Cruwys* v. *Colman* (*y*), the testatrix bequeathed to her sister B, for life, declaring that it was her *absolute desire* that B "bequeaths to those of her own family what she has in her own power to dispose of, that was mine, *provided they behave well to her with decency and affection.*" B, by her will, declared she meant to make no disposition of her sister's property. Grant, M.R., held that, as all that B said was, that she did not intend to execute the power, the trust remained unexecuted, and was consequently to be executed by the Court in favour of the next-of-kin of B. But, his Honour said, that a difficulty might have arisen if B had declared her own relations had behaved ill to her, and therefore she had resolved not to give them any part of the property. The question then would have been, whether she was not constituted sole judge of the propriety of the behaviour of her family, and whether it was not an intestacy in the testatrix, the condition failing.

Discretionary powers, control of Court over.—Where absolute discretion as to the exercise of a power, as distinguished from a trust, is given to trustees, the Court will not compel them to exercise it, but if they propose to exercise it, the Court will see that they do not exercise it improperly (*z*).

But when the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, although it will not interfere with the discretion of the trustees as to the time, mode, and other details as to its exercise when they are acting in good faith (*a*). If the trustees are exercising their powers capriciously, the Court will interfere (*b*).

In *Re Johnston* (*c*), a testator gave to trustees all his property upon certain trusts and directed that certain sums should be invested for the benefit of his four sons on their attaining twenty-one, such sums *to be applied as the trustees in their discretion*

(*y*) 9 V. 319.

(*z*) *Tempest* v. *Camoys*, 21 Ch. D. 571; *Wilson* v. *Turner*, 22 Ch. D. 521; *Gisborne* v. *G.*, 2 A. C. 300; *Re Gadd*, 23 Ch. D. 134; *Re Lofthouse*, 29 Ch. D. 921. See *Re Brown*, 29 Ch. D. 889; *Re Courtier*, 34 Ch. D., p. 141; *Re Bryant*, [1894] 1 Ch. 324; see also *Tabor* v. *Brooks*, 10 Ch. D. 273; *Camden* v. *Murray*, 16 Ch. D. 161; *Re Charteris*, [1917] 2 Ch. 380, 393—4.

(*a*) *Tempest* v. *Camoys*, *supra*; *Re Burrage*, 62 L. T. 752; *Re Bryant*, *supra*; *Re Charteris*, *supra*.

(*b*) *Re Hodges*, 7 Ch. D. 754; *Re Roper*, 11 Ch. D. 272; Farwell (3rd ed.), p. 524.

(*c*) [1894] 3 Ch. 204; *Re Marshall*, [1914] 1 Ch. 192.

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might think fit. Stirling, J., thought that this was an attempt to fetter the enjoyment of a benefit to which a person had become absolutely entitled under the will, and as the sons alone had any beneficial interest in the sums set apart, he held they were entitled absolutely, freed from the exercise of any discretion by the trustees.

SATISFACTION.

Ex p. PYE.

Ex p. DUBOST.

1811. 18 V. 140; 11 R. R. 173.

Satisfaction of a Legacy by a Portion—Ademption.

As a general rule, where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, he is understood to give a portion; and, in consequence of the leaning against double portions, if the parent afterwards advance a portion on the marriage of the child, the presumption arises that it was intended to be a satisfaction of the legacy, either wholly or in part; and the rule is applicable where a person puts himself *in loco parentis*.

No such presumption arises in the case of a stranger, or of a natural child, where the donor has not put himself *in loco parentis*, if the subsequent advance is not proved to be for the very purpose of satisfying the legacy; and, therefore, the legatee will be entitled to both.

William Mowbray, by his will, dated April 10, 1806, giving his wife the residue of his property after payment of his debts, except the sum after-mentioned, among other legacies gave as follows:—"*I give and bequeath the sum of* £4,000 *sterling* to Louisa Hortensia Garos, *daughter* of John Louis Garos, formerly of Berwick Street, Westminster; the like sum of £4,000 to Emily Garos, her sister, and £4,000 to Julia Garos, her other sister; and in case of the death of one of the three, I desire that the legacy may be divided equally betwixt the two surviving sisters: and in case of the death of two of them, I desire the whole £12,000 may be paid to the surviving sister."

The testator also gave to John Louis Garos £600, and "to Marie Genevieve Garos, his wife, the sum of £2,500 sterling, for her own use, and over which her husband is not to have any power, he having lived abroad for many years, and she in this

Ex p. Pye.—Ex p. Dubost.

country, and no correspondence having passed between them during that time. Her own receipt shall be a sufficient authority to my executors for paying her the above legacy."

The testator died on June 8, 1809. His widow became a lunatic. The petitioner Pye was the committee under the commission, and upon her death took out administration to her, and administration *de bonis non* to the testator.

The Master's report stated, from the examination of the petitioner Pye, that Louisa Hortensia, Emily, and Julia Garos, were the three natural daughters of the testator by Marie Genevieve Garos, the wife of John Louis Garos; and that, since the date of the will, Louisa Hortensia Garos married Christopher Dubost; and the testator *advanced as a marriage portion for her*, which by the settlement appeared to have been received by Christopher Dubost, the sum of £3,000; and it being contended *that the said sum of* £3,000, *ought to be considered as an advancement and in part satisfaction of the legacy of* £4,000 and the whole legacy being claimed on the part of Christopher Dubost and his wife (who were both represented to be residing abroad), the Master did not allow the claim.

As to the legacy of £2,500 to Marie Genevieve Garos, the report stated, from the same examination, that since the date and execution of the will the testator caused an annuity to be purchased in France, to which country she had retired for her life, and laid out in such purchase £1,500; and, it being contended by the petitioner Pye, that the said sum of £1,500 ought to be deducted from the legacy of £2,500, *as being an advancement and in part satisfaction*, and the whole legacy being claimed by the legatee, then resident abroad, the Master had not allowed such claim, but left it open to the party to prosecute, when in a situation to do so.

By a further report the Master found, as to the French annuity, that, by a letter written by the testator to Christopher Dubost in Paris, on November 25, 1807, the testator authorised him to purchase in France an annuity of £100, for the benefit of the said Marie Genevieve Garos for her life, and to draw on him for £1,500 on account of such purchase; and under that authority Dubost purchased an annuity of that value; but that,

as she was married at the time, and also deranged, the annuity was purchased in the name of the testator; and the testator sent to Dubost, by his desire, a power of attorney authorising him to transfer to Marie Genevieve Garos the said annuity, dated June 10, 1808.

The report further found, upon the affidavit of Dubost and the copy of the deed, that the first intimation he received of the death of the testator, who died in June, 1809, was in November, 1809; and that, in ignorance of such death, Dubost on October 21, 1809, exercised the power vested in him, by executing to Marie Genevieve Garos, her late husband being then dead, and she of sound mind, a deed of gift of the said annuity; and the Master found, that by the law of France (*a*), if an attorney be ignorant of the death of the party who has given the power of attorney, whatever he has done, while ignorant of such death, is valid. The Master therefore stated his opinion, that the annuity was no part of the personal estate of William Mowbray.

The first petition prayed, that so much of the report as certified the French annuity to be no part of the testator's personal estate might be set aside; and that it might be declared, that the said annuity was part of his personal estate.

The other petition, by Dubost and his wife, prayed a transfer of Three per cent. Bank Annuities in satisfaction of £1,000 of the legacy of £4,000 bequeathed to Louisa Hortensia (the wife of Christopher Dubost); and that so much of the Bank Annuities as will be sufficient to raise £3,177 3s. 6d., the residue of the said legacy and interest, might be sold, etc.

An affidavit was offered by Dubost, that upon the treaty of marriage, the testator assured him, that, independent of the £3,000 then given, he had already bequeathed to Louisa Hortensia £4,000, and that Dubost might depend upon his not altering it. A letter was also produced to the testator from Dubost, previous to the marriage, stating that he would not believe the information he had received, that the testator, being

(*a*) By the Code Napoléon, Art. 2003, "Le mandat finit par la mort naturelle . . . soit du mandant, soit du mandataire." But an exception is introduced in the following article, Art. 2008: "Si le mandataire ignore la mort du mandant, ce qu'il a fait dans cette ignorance est valide." And see the L. P. Act, 1925, ss. 124, 126 and 127.

asked whether he would remember the young ladies in his will, answered, "You cannot expect that"; that he had said to Mrs. Dubost, that he did not see why there should be a difference between the sisters; and, asking if, according to the custom in France, he would give, besides the portion, £100 to be laid out in jewels, etc. This letter was found after the testator's death among his papers.

Sir Arthur Piggot, Mr. Richards, Mr. Wingfield, Mr. Horne, and Mr. Wear, for different parties, in support of the first petition.

The French annuity being purchased in the testator's name, and no third person interposed as a trustee, the interest could not be transferred from him without certain acts, which were not done at the time of his death. It was therefore competent to him during his life to change his purpose, and to make some other provision for this lady by funds in this country, conceiving, perhaps, that she might return here.

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With regard to the other petition, and the objection to the letter offered as evidence, the circumstances resemble those of *Shudal* v. *Jekyll* (*b*), before Lord Hardwicke; *Powel* v. *Cleaver* (*c*), before Lord Thurlow; and *Trimmer* v. *Bayne* (*d*), before your Lordship; and the conclusion is, that the evidence is admissible.

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Sir Samuel Romilly, and Mr. Bell, in support of the second petition (referring, in opposition to the other petition, to the present law of France, declaring, that if the mandatory is unacquainted with the death of the mandant, or any other cause, which put an end to the mandate, whatever he has done while he was so unacquainted, is valid).

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In this case the legacy clearly is not given to the legatee as the child of the testator; and no evidence can be received to show that it was given to her in that character, the will contain-

(*b*) 2 Atk. 516. (*c*) 2 Bro. Ch. 499.
(*d*) 7 V. 508.

ing an express statement, by way of description certainly, that she is the child of another man.

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Lord Chancellor Eldon.—These petitions call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the Court.

With regard to the French annuity, the Master has stated his opinion as to the French law, perhaps without sufficient authority or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case; but it is not necessary to pursue that; as, upon the documents before me, it does appear that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant.

The other question is one of great difficulty; whether a sum of money, advanced upon the marriage of one of these young ladies, when a settlement was executed, is to be taken to be a satisfaction of a legacy, not given upon the face of the will as a portion, not given to a person stated upon the will to be an adopted child of the testator, or described merely by name, but given to an individual, a stranger, described in the will as the child of another person, who is designated as the father of that child. It not only does not appear that the testator represented himself as *in loco parentis*, but he has designated another individual as being the parent; and, therefore, according to Lord Thurlow's opinion in *Grave* v. *Lord Salisbury* (*e*), the testator has expressed himself in terms anxiously calculated to conceal the fact, that he was the reputed father of that child, if he was so.

Without going through all the cases that were cited and those referred to in them, having compared the case in Atkyns (*f*) with manuscript notes of that case, and looked into some other cases, one in Ambler (*g*), and some earlier, I may state, as the

(*e*) 1 Bro. Ch. 425.
(*f*) *Shudal* v. *Jekyll*, 2 Atk. 516.
(*g*) *Watson* v. *The Earl of Lincoln*, Amb. 325.

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unquestionable doctrine of the Court, that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion; and by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole, or in part; and in some cases it has gone a length, consistent with the principle, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction in some instances upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it; and though at the time of making the will, he thought he could not discharge that debt with less than £10,000, yet by a change of his circumstances, and of his sentiments upon that moral obligation, it may be satisfied by the advance of a portion of £5,000 (*h*).

The Court seems, in the older cases, to have met with some difficulty in determining whether this rule should be confined to those who stood in the actual relation of parent and child; and it has accordingly been urged in argument, but not supported by decision, except where accounted for by evidence of declarations, that the Courts have said they did not mean to confine this doctrine to persons standing in that actual relation; but, perhaps, it might apply to a person placing himself *in loco parentis*, undertaking the care of an orphan. But what is to be the evidence of that, whether written evidence in the will and settlement, or the conduct observed at the marriage, or to be derived from mere declarations, is left so much afloat, that there is considerable difficulty in making a judicial decision upon it.

In *Grave* v. *Lord Salisbury* (*i*), the first case before Lord

(*h*) See, however, *Pym* v. *Lockyer*, 5 My. & C. 29, and *Kirk* v. *Eddowes*, 3 Ha. 509, which establish that a portion of less amount than the provision by will is a satisfaction *pro tanto* only, overruling, therefore, the cases alluded to by Lord Eldon.

(*i*) 1 Bro. Ch. 425.

Ex p. Pye.—Ex p. Dubost.

Thurlow, Lord Salisbury had several natural children, to whom he had given legacies by his will, making afterwards a provision for them during his life, not *ejusdem generis*; giving the living of Hatfield to one; a farm and stock to another; upon which the question arose. It was contended that this was a satisfaction; that he intended by the legacy to make a provision, or, in other words, to discharge the obligation he owed to that child; and he had the same intention, advancing the portion, and the farm and stock. Lord Thurlow felt the extreme hardship, as it is evidently, that, in the case of children, whose relation, as such, the law recognises, the doctrine of presumption is, that a subsequent advancement is a satisfaction of a legacy to such a child; but, as the law does not recognise the relation between the putative father and illegitimate child, as imposing this debt of nature, the father in that case stands as a stranger; and no such presumption arises, in that case, where the subsequent advance is not proved to have been for the very purpose of satisfying the legacy, and therefore the legatee is entitled to both. Lord Thurlow directed a reference to the Master to inquire into the circumstances, who did not report the relation which the testator had to those children; and his lordship, being pressed to send it back on that account, refused to do so; observing, that the object might have been to conceal the circumstance of that relation; and, therefore, the Court would not make the inquiry; but without deciding what would have been the case if that relation appeared, it was enough that it stood as the case of a stranger; and therefore the other provision was not a satisfaction.

In the subsequent case of *Powel* v. *Cleaver* (*k*), where the provision made was described as a portion, Lord Thurlow stated expressly that, if the legacy is given, not as a portion, by a stranger, who advances money on the marriage of the legatee, denominating that advance a portion, that denomination will not have the same effect in the case of a stranger, as it would in the case of parent and child; and Lord Thurlow asserts that there is no authority contradicting that.

If that is right, it comes to this: that, where a father gives

(*k*) 2 Bro. Ch. 499.

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a legacy to a child, the legacy coming from a father to his child must be understood as a portion, though it is not so described in the will; and afterwards advancing a portion for that child, though there may be slight circumstances of difference between that advance and the portion, and a difference in amount, yet the father will be intended to have the same purpose in each instance; and the advance is therefore an ademption of the legacy (*l*); but a stranger giving a legacy, is understood as giving a bounty, not as paying a debt: he must, therefore, be proved to mean it as a portion, or provision, either upon the face of the will, or, if it may be, and it seems that it may, by evidence applying directly to the gift proposed by that will; and, recollecting how artificial the rules are, where a person has educated a child through life, considering himself as standing in the relation of putative father to that child, having a father acknowledged, describing that child as the child of a mother named, and a father named, and also making a provision for that father and mother, it would be too much upon such a will to say, this is the case of a person meaning to pay, not what the Court calls a debt of nature, but a debt he meant to contract: in other words, meaning to put himself *in loco parentis* (*m*), in the situation of the person described as the lawful father of that child.

That brings the question to this—whether this advance of a portion of £3,000 is an ademption of the legacy between strangers, on the ground that this subsequent advance is treated as a portion or fortune? and whether the testator, having given that legacy of £4,000, and afterwards giving to that legatee a portion on marriage, the mere circumstance of giving that as a portion or fortune is to be taken as evidence that, when the will was made, it was meant as paying a debt of nature? or whether it was not to be understood, as in the first instance giving a bounty, and in the other making an addition to that bounty? In this case, as in *Shudal* v. *Jekyll*, more was intended to be given,

(*l*) But *pro tanto* only if of less amount; *Pym* v. *Lockyer*, 5 My. & C. 29; *Kirk* v. *Eddowes*, 3 Ha. 509.

(*m*) This definition of a person putting himself *in loco parentis* is approved of and adopted by Lord Cottenham, in *Powys* v. *Mansfield*, 3 My. & C. 366, 367. But see both passages discussed by Stirling, J., in *Re Ashton*, [1897] 2 Ch., pp. 577—578.

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but in the case of a stranger no authority says the advance of a less sum shall be an ademption of the whole. This letter, if it is to be admitted in evidence, shows how little such evidence can be trusted, as no one would have supposed, upon the correspondence, that the testator had such a will in his desk. Upon the authority of *Powel* v. *Cleaver*, unless you can show that, at the time of making the will, the testator meant to give a portion as parent, or as standing *in loco parentis*, and meant to satisfy that, in the whole or in part, by the subsequent advance, the Court is not authorised by the artificial rules of equity to hold it a satisfaction.

I am not much impressed by the objection, that he had not altered his will. The answer is, that the subsequent advance operates a revocation, and therefore actual revocation was unnecessary; but it is too much to say, upon such circumstances as are before me, that this advance of £3,000 is an ademption of the legacy of £4,000 and the contingent interest; and though I believe I am disappointing the actual intention, and that this lady will get more than was intended, I am bound by the rule of the Court to say that this is not a satisfaction.

1811. *June* 28.

Under this judgment the order was pronounced, dismissing the first petition, and directing a transfer and sale of the Bank Annuities according to the prayer of the other; upon which it was contended, that this should be considered as an appropriation of the stock to this legacy at the date of the Master's report; and the funds having since fallen, the legatee was entitled only to so much stock as would at that time have produced what remained due on account of the legacy.

The Lord Chancellor said the broad principle of the Court is, that no attention whatever is paid to the rise or fall of the stock; and upon that ground it is considered equal, whether the appropriation is on one day or another. The party takes the rise or fall as it happens; and therefore the petitioners are entitled to have the sum reported due to them now raised.

SIR JOHN TALBOT *v.* THE DUKE OF SHREWSBURY.

1714. Pr. Ch. 394.

Satisfaction of a Debt by a Legacy.

A debtor, without taking notice of the debt, bequeaths a sum as great as, or greater than, the debt, to his creditor: this shall be a satisfaction; *secus*, if it were bequeathed on a contingency, or if it were less than the debt.

In this case it was said by Mr. Vernon, and agreed to by Sir J. Trevor, M.R., that if one being indebted to another in a sum of money, does, by his will, give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, that this shall, nevertheless, be in satisfaction of the debt, so as that he shall not have both the debt and the legacy; but if such a legacy (*a*) were given upon a contingency, which, if it should not happen, the legacy would not take place, in that case, though the contingency does actually happen and the legacy thereby became due, yet it shall not go in satisfaction of the debt; because a debt which is certain shall not be merged or lost by an uncertain and contingent recompense; for whatever is to be a satisfaction of a debt ought to be so in its creation, and at the very time it is given, which such contingent provision is not; and cited the case of one Pollexfen to be so adjudged by the Lord Harcourt, and affirmed on an appeal in the House of Lords. And as it is in the case of a will, so it will be likewise if the provision were by a deed; if the provision be absolute and certain, it shall go in satisfaction of the debt; but if it be uncertain and contingent, it can be no satisfaction, because it could not be so in its creation, and the happening of the contingency afterwards will not alter the nature of it.

(*a*) "Debt" in the text, evidently by mistake. See notes, part 7, *infra*.

CHANCEY'S CASE (*a*).

1717. 1725. 1 P. W. 408.

Satisfaction of a Debt by a Legacy.

Although it is a general rule, that if a legacy from a debtor to his creditor be equal to or greater than the debt, it will be presumed to be a satisfaction of it, slight evidence of the intention will take the case out of the rule. Thus where one being indebted to his servant for wages in £100, had given her a bond for that sum, as due for wages, and afterwards, by will, gave her £500, for her long and faithful services, and directed that all his debts and legacies should be paid, it was held that the legacy was not a satisfaction for the debt due on the bond.

One being indebted for wages to a maidservant, who had lived with him for a considerable time, gave her a bond for £100, and in the condition of the bond, it appeared to be *for wages*. Afterwards the testator by his will, among other things, gave a legacy of £500 to this maidservant; and it was mentioned in the will to be given to her *for her long and faithful services;* [and he directed that *all his debts and legacies should be paid*].

The maidservant having, on her master's death, possessed herself of divers goods that were his, the plaintiff Chancey, who was the executor, brought his bill against her for an account, but paid to her the £100 and interest secured to her by the bond.

For the defendant it was objected that she should have both the money due on the bond and also the legacy; for the legacy was a further reward for her services, and intended to be a gift *in toto:* whereas, if the bond were to be taken out of it, it would be only a gift of £400; and as to the old notion, that the testator must be just before he is bountiful, that was nothing where the testator had wherewithal to be both just and bountiful (*b*).

Besides that this was not insisted upon by the bill; so that the defendant had no notice or warning to prove that the testator

(*a*) *Chancey* v. *Wootton*, and *è contra*, Reg. Lib. a. fol. 449; Sel. Ch. Ca. 44; 2 Eq. Ca. Abr. 354, pl. 18.

(*b*) Salk. 155.

Chancey's Case.

intended to give her the full legacy of £500 over and above the bond; which proof (though by parol only) had yet been frequently admitted.

Also, for that it appeared the executor himself had paid the bond, and taken a receipt for it.

Sir J. Trevor, M.R.—It is sufficient that it appears the creditor has a greater legacy given her, and the plaintiff, the executor, prays relief, which is as much as if he had prayed that he might not be compelled to pay both the debt and legacy.

This is stronger than the usual case; for the bond is *for service*, and the £500 legacy is *also for service*; so that it is a greater reward and satisfaction for the same thing. Neither is it material that the executor has paid it, for he was bound to pay the bond at law, and his only method is to stop it out of the legacy; but clearly, such a legacy is not a satisfaction for service done to the testator (*c*) after the making of the will.

Lord Chancellor King afterwards reversed this decree, upon which occasion his Lordship said, he was not for breaking in upon any general rule (*d*), though he did not see any great reason why, if one owed £100 to A by bond, and should afterwards give him a legacy of £500, this legacy must go in satisfaction of the debt; for if so, the whole £500 would not be *given*, in regard £100 of it would be *paid* towards a just debt, which the testator could not help paying; and therefore the whole £500 would not be *given*, against the express declaration of the testator, who says he *gives* the same; and though it seemed to have obtained as a rule *that a man should be just before he is bountiful*, yet when a man left such an estate and fund for his debts and legacies as that he might thereout be both just and bountiful, and especially when there seemed to be not only *an intention*, but also *express words* to that purpose; in such case his Lordship did not see but it would be as reasonable that the whole legacy should take effect as a legacy, and that the debt should be paid besides.

(*c*) *Vide* Salk. 508; 2 P. W. 343; 3 P. W. 355.

(*d*) See the rule stated in *Talbot* v. *Duke of Shrewsbury*, *ante*, p. 323.

Chancey's Case.

And it was said at the bar, by Mr. Talbot, to have been a strange resolution, that if I owe a man £100 and give him a £100 legacy, then I give him nothing, but only pay him what I am bound to do; but if the legacy be twenty shillings less, *viz.*, £99, here it is a good gift and legacy, exclusive of the debt.

However, the Court said they were not by this resolution overturning the general rule; but that this case was attended with particular circumstances varying it from the common case, *viz.*, that the testator, by the express words of his will, had devised "*that all his debts and legacies should be paid*"; and this £100 bond being *then a debt*, and the £500 being a *legacy*, it was as strong as if he had directed that both the bond and legacy should be paid; that when the testator gave a bond for the £100 arrear of wages, it was the same thing as paying it; and as if he had actually paid it, and had afterwards given the legacy of £500, the executor could not have fetched back the £100 and made the defendant refund; so neither should the bond in this case be satisfied by the bequest of the legacy.

His lordship also observed that the executor (the plaintiff, Mr. Chancey) did not himself take this £500 legacy to be a satisfaction for the bond, as appeared by his having voluntarily paid the £100 to the defendant, and that his lordship was of the same opinion.

So the decree at the Rolls was reversed, and the defendant (the maidservant) had both her debt and legacy.

NOTES.

1. Generally.
2. Ademption of a legacy by a portion, p. 328.
3. Satisfaction of a portion by a legacy, p. 333.
4. Satisfaction or ademption of a legacy—
   (a) given by a person *in loco parentis*, p. 338.
   (b) given by a person not in the natural or assumed relation of parent, p. 340.
5. Election in cases of satisfaction, p. 341.
6. The admission of extrinsic evidence, p. 342.
7. The satisfaction of a debt by a legacy, p. 343.

1. Generally.

Satisfaction may be defined to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken,

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either wholly or in part, in extinguishment of some prior claim of the donee (*e*).

When a testator gives a legacy to a child or to any other person towards whom he has taken upon himself parental obligations, and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions of the two gifts) there is a presumption, *prima facie*, that both gifts were made to fulfil the same natural or moral obligation of providing for the legatee; and consequently that the gift *inter vivos*, is either wholly or in part a substitution for or an "ademption" of the legacy (*f*).

Where the intention to satisfy is expressly declared, that intention is effectuated: thus, if a donor expressly declares that a gift is in satisfaction of a prior demand, the donee cannot claim both (*g*), and a legacy may be adeemed by a payment made in express satisfaction by the testator (*h*). Similarly, where a testator erroneously recites that a legatee owes him a particular sum or advance, and directs the legatee to bring the sum "hereinbefore recited to have been advanced" into hotchpot, or otherwise shows an intention to charge the legatee with the sum mentioned, that sum whether due or not must be brought into hotchpot (*i*). But if the testator merely directs the alleged advance "or so much thereof as shall remain unpaid" at his death or at the time of distribution to be brought into hotchpot, he *prima facie* intends the amount actually due, and not the alleged advance less repayments to be brought into hotchpot (*k*).

The cases in which the presumption may arise that a subsequent donation is intended to be in satisfaction of a prior claim fall into three classes—(a) the satisfaction of *legacies* by *portions*, which is a form of ademption; (b) the satisfaction of *portions* by *legacies*; and (c) the satisfaction of *debts* by *legacies*.

(*e*) See *Lord Chichester* v. *Coventry*, L. R. 2 H. L., p. 95.

(*f*) *Per* Selborne, L.C., *Re Pollock*, 28 Ch. D. 552, 555.

(*g*) *Hardingham* v. *Thomas*, 2 Drew. 353.

(*h*) *Shudal* v. *Jekyll*, 2 Atk. 516; *Hall* v. *Hill*, 1 Dr. & W., p. 117; *Kirk* v. *Eddowes*, 3 Ha., p. 518; *Re Ashton*, [1898] 1 Ch. 142; *Re Shields*, [1912] 1 Ch. 591.

(*i*) *Re Wood*, 32 Ch. D. 517. Cf. *Re Kelsey*, [1905] 2 Ch. 465.

(*k*) *Re Taylor's Estate*, 22 Ch. D. 495; *Re Kelsey*, [1905] 2 Ch. 465, 469—470.

2. Ademption of a Legacy by a Portion.

The rule is thus laid down by Lord Eldon in the principal case, "that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion; and, by a sort of artificial rule—upon an artificial notion, and a sort of feeling upon what is called a leaning against double portions—if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole, or in part."

The doctrine is not favoured by the Courts. "We should not, perhaps, invent it in these days," observed Lindley, L.J., in *Re Lacon* (*l*), "but we have inherited it." "Whatever may be the view taken of the rule against double portions," said Bowen, L.J., in *Montagu* v. *Earl of Sandwich* (*m*), "it is a rule that exists, and there is nothing worse than frittering away an existing rule. . . . Feeling no confidence that in applying the doctrine in this case we are giving effect to the real intention of the testator. . . . I record my judgment in favour of the appeal as a sacrifice made upon the altar of authority."

The application of the rule rests on two presumptions, *viz.*: (1) that whatever gifts are made by a father to a child with a view to establishing him in life are portions within the rule; (2) that the gift *inter vivos* was intended to be an advancement *pro tanto* of the gift under the bequest (*n*). And either of those presumptions may be rebutted by the circumstances under which the advancement was made in any particular case (*o*); or by the evidence furnished by the different nature of the gifts (*p*). The gift of a portion of less amount than a legacy operates as an ademption of the legacy only *pro tanto* (*q*).

For the purposes of ademption, the value of the advance must be taken as at the time it was made (*r*).

(*l*) [1891] 2 Ch., p. 490.

(*m*) 32 Ch. D., p. 544.

(*n*) See *per* Bowen, L.J., *Re Lacon*, [1891] 2 Ch., p. 498; *Re Scott*, [1903] 1 Ch., pp. 9—10.

(*o*) *Re Lacon*, [1891] 2 Ch. 482; *Re Scott*, [1903] 1 Ch. 1.

(*p*) See *infra*, p. 332.

(*q*) *Pym* v. *Lockyer*, 5 My. & C. 29, and see also *Kirk* v. *Eddowes*, 3 Ha. 509; *Hopwood* v. *H.*, 7 H. L. Cas. 728; *Re Pollock*, 28 Ch. D. 552; *Re Moore Rents*, [1917] 1 Ir. R. 244. Cf. *Re Jupp*, [1922] 2 Ch. 359.

(*r*) *Watson* v. *W.*, 33 B. 576; *Re Crocker*, [1916] 1 Ch. 25, 29; and see *Re Beddington*, [1900] 1 Ch. 771.

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It is not essential, in order to raise the presumption against double portions, that the subsequent gift should be strictly a portion; an advancement by paying a premium for a son or purchasing a business for him may be within the rule (*s*).

An advancement may be made to a child as a portion, at other times than that of marriage, and the presumption against double portions will then arise. For instance, a gift may be described in a writing as a portion (*t*). And if an advancement be made not evidenced by writing, evidence is admissible to show the nature of the transaction. But the Court will not add up small sums which a parent may give to a child, to show they were intended as a portion (*u*).

So also a legacy by a parent or a person *in loco parentis* is not satisfied by occasional small gifts in the testator's lifetime (*x*), or by annual sums paid by way of annual allowances (*y*); and a sum of money given by a father to his daughter for a wedding outfit and a wedding trip has been held not to be an ademption of a legacy (*z*).

In determining what is and what is not a portion, the cases upon the construction of the term "advancement by portion" in section 5 of the Statute of Distributions (22 & 23 Car. 2, c. 10) are of assistance. In *Taylor* v. *Taylor* (*a*), Jessel, M.R., said that an advancement by way of portion is something given by a parent to establish the child in life, or to make what is called a provision for him—not a mere casual payment. And he held that sums given for (1) payment of the admission fee to one of the Inns of Court in the case of a child intended for the Bar, (2) the price of a commission and outfit of a child entering the army, (3) the price of plant and machinery and other payments for the purpose of starting a child in business were advancements by portion, but that sums given for (1) payment of a fee to a special pleader in the case of the child intended for the Bar, (2) price of outfit and passage money of

(*s*) *Stevenson* v. *Masson*, 17 Eq. 78; *Leighton* v. *L.*, 18 Eq. 458, 468; *Kirk* v. *Eddowes*, 3 Ha. 509.

(*t*) Cf. *Re Pollock*, 28 Ch. D. 552.

(*u*) See *Swisse* v. *Lowther*, 2 Ha. 434; *Scholfield* v. *Heap*, 27 B. 93; *Re Lacon*, [1891] 2 Ch. 482.

(*x*) *Watson* v. *W.*, 33 B. 574; *Re Peacock's Estate*, 14 Eq. 236, 240; cf. *Ferris* v. *Goodburn*, 27 L. J. Ch. 574.

(*y*) *Hatfeild* v. *Minet*, 8 Ch. D. 136, 144; and see *Re Merrall*, [1924] 1 Ch. 45.

(*z*) *Ravenscroft* v. *Jones*, 32 B. 669; 33 L. J. Ch. 482; 4 De G. J. & S. 224.

(*a*) 20 Eq. 155.

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an officer in the army and his wife on going out to India with his regiment, (3) payment of debts incurred by an officer in the army (*b*), (4) assisting a clergyman in paying his housekeeping and other expenses, were not advancements by portion (*c*).

The rule against double portions is applicable to a case where a father makes an appointment by will among his children under a special power and subsequently appoints by deed to one of the appointees (*d*). But in *Re Ashton* (*e*) where a mother had a power of appointment amongst her children and appointed equally amongst them by will, and subsequently appointed to one of them by deed, it was held by Stirling, J., that the rule had no application, the mother not being *in loco parentis* to her children. The decision was reversed by the Court of Appeal (*f*) on the ground that it appeared by the evidence that the child to whom an appointment had been made by deed had in the lifetime of the appointor accepted the sum so appointed in prepayment of the sum appointed by will. The question of law dealt with by Stirling, J., was not discussed.

What circumstances will repel the presumption.—So strong is the presumption against double portions that it will not, as observed by Lord Eldon in the principal case, be repelled, "though there may be slight circumstances of difference between the advance and the portion." It will not be rebutted by the circumstance of the portion and legacy being payable at different times (*g*); nor by the circumstance that the limitations of the portion under the will are different from the limitations in the settlement (*h*). A bequest of a sum of money absolutely is adeemed by the settlement of that or a larger amount on the marriage of the child; if a smaller amount is settled, it is an ademption *pro tanto* (*i*). A promise

(*b*) And see *Re Scott*, [1903] 1 Ch. 1.

(*c*) See further *Hatfeild* v. *Minet*, 8 Ch. D. 136; *Harte* v. *Meredith*, 13 L. R. Ir. 345; *Re Ford*, [1902] 2 Ch. 605; *Re Gist*, [1906] 2 Ch. 280; *Re Roby*, [1908] 1 Ch. 71; *Re Merrall*, [1924] 1 Ch. 45.

(*d*) *Montague* v. *M.*, 15 B. 565; *Re Peel's Sett.*, [1911] 2 Ch. 165.

(*e*) [1897] 2 Ch. 574.

(*f*) [1898] 1 Ch. 142; and see *Re Peel's Sett.*, [1911] 2 Ch., pp. 171—2; *Re Eardley's Will*, [1920] 1 Ch. 397.

(*g*) *Hartopp* v. *H.*, 17 V. 184; *Stevenson* v. *Masson*, 17 Eq., p. 84.

(*h*) *Trimmer* v. *Bayne*, 7 V. 508; *Monck* v. *M.*, 1 Ball & B. 298; *Sheffield* v. *Coventry*, 2 Russ. & M. 317; *Platt* v. *P.*, 3 Si. 503; *Davys* v. *Boucher*, 3 Y. & C. Ex. 411; *Powys* v. *Mansfield*, 3 My. & C. 359, 374; *Lord Durham* v. *Wharton*, 3 Cl. & Fin. 146, 10 Bli. (N.S.) 526; *Re Furness*, [1901] 2 Ch. 346.

(*i*) *Lord Chichester* v. *Coventry*, L. R. 2 H. L., p. 92; see also *Montefiore*

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of additional help after the presumption of satisfaction has arisen will not rebut the presumption (*k*).

If the will contains both an absolute gift and a settled gift, a sum settled upon marriage will be taken as an ademption of the settled gift in the first instance (*l*). A bequest to a daughter for life, with remainder to her children, will be adeemed by a gift to the daughter and her husband made subsequently to the will (*m*).

A gift of a sum of money to the husband of a daughter by her father *simpliciter*, after the marriage, and not in consequence of any promise made previous to the marriage taking place, will not be an ademption of a legacy given by the father to his daughter (*n*). But such ademption will take place where a sum is given to a daughter's husband in consideration of his making on his marriage a settlement upon her and her children (*o*), or to furnish a house for her (*p*).

A substitutionary gift to issue on the death of the parent will not be satisfied by a gift to the parent in his lifetime (*q*).

There is no presumption of law that the payment of a sum of money to a child before the date of the will (even by a father) is to go against a legacy to that child (*r*). And a gift by the will of a father to a child for life with remainder to the issue of such child, would not be adeemed by an advance to the child made long before the will, although the testator, when he made the advance, verbally intimated that his intention was that it should have that effect (*s*).

A legacy which has been adeemed will not be revived by a codicil republishing the will (*t*).

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v. *Guedalla*, 1 De G. F. & J. 93; *Phillips* v. *P.*, 34 B. 19; *Dawson* v. *D.*, 4 Eq. 504; *Stevenson* v. *Masson*, 17 Eq. 78; *Re Blundell*, [1906] 2 Ch. 222.

(*k*) *Nevin* v. *Drysdale*, 4 Eq. 517.

(*l*) *Re Furness*, [1901] 2 Ch. 346, 349—350.

(*m*) *Kirk* v. *Eddowes*, 3 Ha. 509. See also *Carver* v. *Bowles*, 2 Russ & M. 301; *Delacour* v. *Freeman*, 2 Ir. Ch. R. 633, 640; *Re Blundell*, *supra*.

(*n*) *Ravenscroft* v. *Jones*, 32 B. 669, 670, 4 De G. J. & S. 224; and see *M'Clure* v. *Evans*, 29 B. 422; but see *Ferris* v. *Goodburn*, 27 L. J. Ch. 574.

(*o*) *Lord Durham* v. *Wharton*, 3 Cl. & Fin. 146.

(*p*) *Nevin* v. *Drysdale*, 4 Eq. 517.

(*q*) See *Rose* v. *Rogers*, 39 L. J. Ch. 791; *Hewitt* v. *Jardine*, 14 Eq. 58.

(*r*) *Taylor* v. *Cartwright*, 14 Eq. 167, 176; *Re Peacock's Estate*, 14 Eq. 236; and see *Upton* v. *Prince*, Cas. t. Talbot, 71.

(*s*) *Taylor* v. *Cartwright*, 14 Eq. 167, 176.

(*t*) *Powys* v. *Mansfield*, 3 My. & C. 359, 376; *Monck* v. *M.*, 1 Ball & B. 298; *Montague* v. *M.*, 15 B. 565, 571.

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The presumption of satisfaction being intended may be repelled by the intrinsic evidence furnished by the *different nature of the gifts*; where, for instance, the testamentary portion and subsequent advancement are not *ejusdem generis, e.g.*, where the legacy is money and the gift stock-in-trade (*u*). But a pecuniary bequest may be adeemed by a gift of a different subject-matter, where such subject-matter is given by reference to its value or in such a way as to make it equivalent to a gift of money (*x*). In *Re Jupp* (*y*) a legacy of £500 was held to be adeemed *pro tanto* by a subsequent gift of £500 War Loan 5 per cent. bearer bonds.

A legacy of a sum of money will not be adeemed by an allowance of an annuity (*z*). So, also, where the testamentary portion is certain, and the subsequent advancement depends upon a contingency, the presumption of satisfaction will be repelled (*a*); *secus* where the advancement is voidable only upon a contingency so remote that all the parties concerned treated it as absolute (*b*).

A portion by settlement will be a satisfaction according to the amount, either in full or *pro tanto*, of a previous bequest of a residue (*c*). Any sum of estate duty becoming payable on the portion through the death of the donor must be deducted from the portion in ascertaining the amount adeemed (*d*).

Although a legacy given to a child is limited over upon a contingency, it has been held to be adeemed by a subsequent advancement to the child alone, so as to deprive the person entitled under the limitation over of all benefit (*e*).

The rule against double portions rests on the presumption that a father intends equality between his children, and therefore the rule will only be applied between children against a child and in favour of a child—the term child including any person to whom the testator has placed himself *in loco parentis*. Accordingly, a

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(*u*) *Holmes* v. *H.*, 1 Bro. Ch. 555; *Re Jaques*, [1903] 1 Ch. 267.

(*x*) *Re Lawes*, 20 Ch. D. 81, 87; and see *Re Jaques*, [1903] 1 Ch. 267, 273. Cf. *Re Vickers*, 37 Ch. D. 525.

(*y*) [1922] 2 Ch. 359. This case was not one of double portions.

(*z*) *Watson* v. *W.*, 33 B. 574. Cf. *Re Poyser*, [1918] 1 Ch. 573, n.

(*a*) *Spinks* v. *Robins*, 2 Atk. 493; *Crompton* v. *Sale*, 2 P. W. 553.

(*b*) *Powys* v. *Mansfield*, 3 My. & C., pp. 374—5.

(*c*) *Scholfield* v. *Heap*, 27 B. 93; *Beckton* v. *Barton*, 27 B. 99; *Montefiore* v. *Guedalla*, 1 De G. F. & J. 93; and see *Lady Thynne* v. *The Earl of Glengall*, 2 H. L. Cas. 131; *Meinertzagen* v. *Walters*, L. R. 7 Ch. 670; *Stevenson* v. *Masson*, 17 Eq. 84; *Keays* v. *Gilmore*, 8 Ir. R. Eq. 290.

(*d*) *Re Beddington*, [1900] 1 Ch. 771; *Re Crocker*, [1916] 1 Ch. 25.

(*e*) *Twining* v. *Powell*, 2 Coll. 262; *Dawson* v. *D.*, 4 Eq. 504; *Cooper* v. *Macdonald*, 16 Eq. 258.

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legacy or share of residue given to a child will not be adeemed in favour of a stranger entitled to the residue or a share of the residue (*f*).

3. The Satisfaction of a Portion by a Legacy.

Upon this subject, the rule is, that wherever a legacy given by a parent, or a person standing *in loco parentis*, is as great as, or greater than, a portion or provision previously secured to the legatee upon marriage or otherwise, then from the strong inclination of Courts of equity against double portions, a presumption arises that the legacy was intended by the testator as a complete satisfaction (*g*). The second provision may be by subsequent settlement as well as by will (*h*); but the presumption of satisfaction less readily arises in the instance of gifts by two deeds than in cases where the second gift is by will (*i*).

If the legacy is not so great as the portion or provision, a presumption arises that it was intended as a satisfaction *pro tanto* (*k*). And the like presumption arises where the bequest is of the whole or part of a residue (*l*).

A provision by will may satisfy one part of a covenant without satisfying other parts of it; for instance, if a father on the marriage of his daughter, should covenant to settle £10,000 on her for life, remainder to the children of the marriage, a bequest of £10,000 to that daughter would satisfy her life interest in the £10,000, but would not satisfy or touch the interests of her children (*m*). So a provision for a son by will may be held a satisfaction for the interest he may take under a covenant by his father on his marriage, and he will consequently be put to his election, although

(*f*) *Meinertzagen* v. *Walters*, L. R. 7 Ch. 670; *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343; *Re Heather*, [1906] 2 Ch. 230.

(*g*) *Bruen* v. *B.*, 2 Vern. 439; *Moulson* v. *M.*, 1 Bro. Ch. 82; *Copley* v. *C.*, 1 P. W. 147; *Ackworth* v. *A.*, 1 Bro. Ch. 307 (n.); *Byde* v. *B.*, 1 Bro. Ch. 308 (n.); *S. C.*, 2 Eden, 19, 1 Cox, 44; *Duke of Somerset* v. *Duchess of Somerset*, 1 Bro. Ch. 309 (n.); *Finch* v. *F.*, 1 V. 534; *Hinchcliffe* v. *H.*, 3 V. 516; *Sparkes* v. *Cator*, 3 V. 530; *Pole* v. *Lord Somers*, 6 V. 309; *Bengough* v. *Walker*, 15 V. 507; and see *Lethbridge* v. *Thurlow*, 15 B. 334; *Ferris* v. *Goodburn*, 27 L. J. Ch. 574; *Bennett* v. *Houldsworth*, 6 Ch. D. 671.

(*h*) *Jesson* v. *J.*, 2 Vern. 255; *Davis* v. *Chambers*, 7 De G. M. & G. 386.

(*i*) *Palmer* v. *Newell*, 20 B. 40, *per* Romilly, M.R.; *Richman* v. *Morgan*, 1 Bro. Ch. 63, 2 Bro. Ch. 394; *Bengough* v. *Walker*, 15 V. 507; *Campbell* v. *C.*, 1 Eq. 383.

(*k*) *Warren* v. *W.*, 1 Bro. Ch. 305; 1 Cox, 41.

(*l*) *Lady Thynne* v. *The Earl of Glengall*, 2 H. L. Cas. 131.

(*m*) *Per* Lord Romilly, M.R., in *Lord Chichester* v. *Coventry*, L. R. 2 H. L., p. 95; *Bethell* v. *Abraham*, 3 Ch. D. 590 (n.); 22 W. R. 745.

the provision in the will may not be held a satisfaction to the wife and children for what they take under the covenant (*n*). So also a bequest to the children of the marriage, omitting the parent, may be a satsfaction of so much of the covenant as relates to them, but is no satisfaction of the covenant to the parent (*o*).

Accordingly, in these cases, if the bequest be to the parent, the parent may elect, or if the bequest be to the children of the marriage alone, the children may elect to take under the will instead of taking under the covenant; but this cannot affect the rights of the other covenantees who take no interest under the will (*p*).

Only considerable differences between the settlement and the will are regarded as sufficient to repel the presumption of satisfaction; slight variations, for instance, as to the times of the payment of the portion and legacy, or between the limitations in the settlement and the will, are not sufficient (*q*).

In *Montagu* v. *Earl of Sandwich* (*r*), a father on the marriage of his second son, by deed of settlement covenanted to pay him an annuity of £1,000 for life, and to charge the annuity on a sufficient part of the real estate he might die seised of. The father subsequently made his will, by which he devised his real estate, "subject to the charges and incumbrances thereon," in strict settlement on his first and other sons in tail male; he bequeathed the greater part of his personal estate among his children, giving his second son legacies, the income of which when invested would be considerably more than £1,000 a year. It was held by the Court of Appeal (Cotton and Bowen, L.JJ., Fry, L.J., dissenting) that notwithstanding the use in the will of the words "subject to the charges and incumbrances thereon," the second son was not entitled to both the annuity and the bequest under the will.

The presumption is not rebutted by the fact that the covenant in a settlement is to make a payment *on* the wife's death, and in the husband's will the payment is to be made within *three months after* her death (*s*); or that the settlement gives a power to the

(*n*) *McCarogher* v. *Whieldon*, 3 Eq. 236; *Re Blundell*, [1906] 2 Ch. 223; see also *Bennett* v. *Houldsworth*, 6 Ch. D. 671.

(*o*) *Lord Chichester* v. *Coventry*, L. R. 2 H. L., p. 92; see also *Mayd* v. *Field*, 3 Ch. D. 587; *Campbell* v. *C.*, 1 Eq. 383.

(*p*) *Lord Chichester* v. *Coventry*, L. R. 2 H. L., p. 92; *Re Blundell*, [1906] 2 Ch. 222.

(*q*) *Weall* v. *Rice*, 2 R. & M., p. 268.

(*r*) 32 Ch. D. 525.

(*s*) *Sparkes* v. *Cator*, 3 V. 530; *Copley* v. *C.*, 1 P. W. 146; *Bethell* v. *Abraham*, 22 W. R. 745.

Ex p. Pye.

husband and wife jointly, whereas the will gives it to the wife alone (*t*); or that the settlement provides for children dying before their portions are payable while the will does not do so (*u*); or that the settlement is upon the children of a daughter by a particular marriage, whilst the provision by the will is for all the children (*x*); or that a covenant gives the husband a first life interest, whereas the will gives it to the wife (*y*). Nor will the fact that an absolute life interest is given to the husband under a settlement, and a life interest determinable on bankruptcy or alienation under the will (*z*); nor the fact that while the settlement gives a remainder in tail to children, the will gives them a remainder in fee; nor will the presence of a restraint upon anticipation in the latter instrument and its absence in the former rebut the presumption of satisfaction (*a*).

It has even been held that where the settlement gave a second life interest to the husband, the omission of the life interest of the husband in the will was not sufficient to rebut the presumption (*b*).

The presumption, however, may, as in the former class of cases, be repelled by intrinsic evidence, showing the intention of the parent in favour of double portions (*c*), which may also be sufficiently indicated from the different nature of the gifts. For instance, where the portion is *vested* and the legacy is *contingent*, the presumption will be repelled: for it would be hard to say that a mere contingency should take away a portion absolutely vested (*d*); or where the husband and children of the marriage take an interest under the settlement, but nothing under the will (*e*).

"Where the will precedes the settlement," said Lord Cranworth

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(*t*) *Thynne* v. *Earl of Glengall*, 2 H. L. Cas. 131; *Russell* v. *St. Aubyn*, 2 Ch. D. 398; *Romaine* v. *Onslow*, 24 W. R. 899.

(*u*) *Hinchcliffe* v. *H.*, 3 V. 516.

(*x*) *Thynne* v. *Earl of Glengall*, 2 H. L. Cas. 131; *Russell* v. *St. Aubyn*, 2 Ch. D. 398.

(*y*) *Russell* v. *St. Aubyn*, 2 Ch. D. 398; *Romaine* v. *Onslow*, 24 W. R. 899.

(*z*) *Russell* v. *St. Aubyn*, 2 Ch. D. 398.

(*a*) *Weall* v. *Rice*, 2 Russ. & M. 251.

(*b*) *Mayd* v. *Field*, 3 Ch. D. 587. See also *Sparkes* v. *Cator*, 3 V. 530; *Weall* v. *Rice*, 2 Russ. & M. 251; *Earl of Glengall* v. *Barnard*, 1 Keen, 769; *S. C. nom. Lady Thynne* v. *Earl of Glengall*, 2 H. L. Cas. 131.

(*c*) *Lethbridge* v. *Thurlow*, 15 B. 334.

(*d*) *Bellasis* v. *Uthwatt*, 1 Atk. 426; *Hanbury* v. *H.*, 2 Bro. Ch. 352. And see *Peirce* v. *Locke*, 2 Ir. Ch. R. 205, 215.

(*e*) *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71.

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in *Lord Chichester* v. *Coventry* (*f*), "it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to be in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.' It requires much less to rebut the latter than the former presumption."

A covenant to settle on a daughter a fund upon such trusts as she, with the consent of the trustees, should appoint, and in default in trust for the daughter for her separate use for life, remainder to her husband for life, remainder to the children of the marriage, remainder to the husband absolutely, was held not to be satisfied by a legacy to the daughter to her separate use for life without power of anticipation, and after her decease to such of her children as should attain twenty-one years, in equal shares (*g*).

A covenant in a marriage settlement for the payment in the lifetime of the settlor, or within six months after his decease, of a sum of £2,000 to be held in trust for the wife for her life, and after her decease for the settlor for life, and after the decease of the survivor for the children of the marriage, and of a former marriage, as the husband and wife should jointly appoint, and in default of appointment for the children of both marriages, was held not to be satisfied by the effectuation by the settlor of two policies on his own life, each for £1,000, under section 10 of the Married Women's Property Act, 1870, each policy being expressed to be "for the benefit of his wife and children," the provisions in that Act in respect of such policy moneys being materially different from the provisions of the settlement (*h*).

So, also, where the gift by the will and the portion are not *ejusdem generis*, the presumption will be repelled. Thus, *land* will not be presumed to be intended as a satisfaction for *money*, nor money for land (*i*).

(*f*) L. R. 2 H. L., p. 87; *Re Tussaud's Estate*, 9 Ch. D. 363; *Dawson* v. *D.*, 4 Eq. 504; *McCarogher* v. *Whieldon*, 3 Eq. 236; *Russell* v. *St. Aubyn*, 2 Ch. D. 398; *Paget* v. *Grenfell*, 6 Eq. 7; *Cooper* v. *Macdonald*, 16 Eq. 258; *Keays* v. *Gilmore*, 8 Ir. R. Eq. 290; *Weall* v. *Rice*, 2 R. & M., p. 268.

(*g*) *Re Tussaud's Estate, supra; Re Vernon*, 95 L. T. 48; cf. *Re Blundell*, [1906] 2 Ch. 222.

(*h*) *Cartwright* v. *C.*, [1903] 2 Ch. 306.

(*i*) *Bellasis* v. *Uthwatt*, 1 Atk. 428; *Goodfellow* v. *Burchett*, 2 Vern. 298; *Ray* v. *Stanhope*, 2 Ch. R. 159; *Saville* v. *S.*, 2 Atk. 458; *Grave* v. *Earl of Salisbury*, 1 Bro. Ch. 425; *Pierce* v. *Locke*, 2 Ir. Ch. R. 205, 215; *Lenehan* v. *Wall*, [1922] 1 Ir. R. 59.

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But a thing not *ejusdem generis* may be taken in satisfaction of a portion : where the father in his will enters into a computation of the value of the thing given, showing it to be as great or greater in value than the portion, the presumption of satisfaction arises. Thus in *Bengough* v. *Walker* (*k*), it was held by Grant, M.R., that a bequest by a testator to his son of a share in powder works, to be made up in value to £10,000 charged with an annuity for life of another person, was a satisfaction of a portion of £2,000 to which the son was entitled under the testator's marriage settlement (*l*).

Sometimes a settlement contains a declaration that an advancement by the parent, *in his lifetime*, shall be considered in part or full satisfaction of the portion, unless the contrary is expressly declared by some writing. In such cases a question may arise whether a legacy by will shall be considered as an advancement in the lifetime of the parent. It has been decided that in such case a legacy will not be held a satisfaction of the portion (*m*); *à fortiori* the share of a parent's property under his intestacy will not be considered as an advancement in his lifetime (*n*).

Where, however, the declaration in the settlement is more extensive, as where it was provided that if the father should during his lifetime, *or at the time* of his death, give portions or provisions in advancement on marriage or *otherwise* (*o*); or should bestow a portion on marriage, *or otherwise provide* for (*p*); or settle, give or advance on marriage, *or otherwise* (*q*), a bequest may amount to an advancement within the meaning of the settlement.

Where a father, having power to appoint to a child out of a portions fund, himself advances the money, the presumption is that he does so for the benefit of the children interested in the portions fund, and not for his own benefit or for that of the estate (*r*).

This presumption, however, may be rebutted by evidence of a different intention, as, for example, that the advance was made in

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(*k*) 15 V. 507.

(*l*) See also *Re Lawes*, 20 Ch. D. 81, 87; *Re Jaques*, [1903] 1 Ch. 267, 273.

(*m*) *Cooper* v. *C.*, L. R. 8 Ch. 813; *Douglas* v. *Willes*, 7 Ha. 318.

(*n*) *Twisden* v. *T.*, 9 V. 413.

(*o*) *Richman* v. *Morgan*, 1 Bro. Ch. 63; *S. C.*, 2 Bro. 394, *nom. Rickman* v. *Morgan*.

(*p*) *Leake* v. *L.*, 10 V. 477.

(*q*) *Onslow* v. *Michell*, 18 V. 490; *Golding* v. *Haverfield*, 13 Price, 593; *Fazakerley* v. *Gillibrand*, 6 Si. 591.

(*r*) *Ford* v. *Tynte*, 2 H. & M. 324; *Lee* v. *Head*, 1 K. & J. 620; *Noblett* v. *Litchfield*, 7 Ir. Ch. R. 575.

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substitution for an appointment out of the portions fund for the purpose of giving a sum in cash in lieu of a mere charge (*s*).

All the contemporary circumstances are admissible in evidence of such intention, but subsequent declarations are not admissible (*t*).

Although according to the law of Scotland the presumption of satisfaction of a portion by a legacy from a father to his child does not arise (*u*), it will do so, although the deed by which the portion is covenanted to be paid is Scotch, if the will by which the legacy is given is that of a domiciled Englishman (*x*).

The mere fact that a legacy given by a will is of the same amount as a *donatio mortis causa* previously made to the legatee by the testator does not raise a presumption that the legacy is a satisfaction of the donation (*y*).

4. Satisfaction or Ademption of a Legacy.

(a) given by a Person in Loco Parentis.

Where a person who has made two gifts to another, in such manner as, according to the rules laid down in considering the two classes of cases before discussed, would, in case he stood towards the donee in the relation of parent, raise the presumption that the later gift was intended to be a satisfaction of the former, the question often arises, whether the donor, although not standing to the donee in that relation, has not, by his conduct, placed himself in it, or, as it is usually termed, put himself *in loco parentis*; in which case, as before observed, the presumption will arise equally as in the case of a parent (*z*).

The doctrine of ademption of legacies founded on parental or *quasi* parental relation applies also to cases where a moral obligation other than parental or *quasi* parental is recognised by the will. Thus in *Re Pollock* (*a*), a testatrix by her will bequeathed to a niece of her deceased husband, £500 with these words, " according

(*s*) *Ford* v. *Tynte*, 2 H. & M. 324.
(*t*) *Ibid.*
(*u*) *Johnstone* v. *Haviland*, [1896] A. C. 95.
(*x*) *Campbell* v. *C.*, 1 Eq. 383; Westlake (7th ed.), pp. 156—7.
(*y*) *Hudson* v. *Spencer*, [1910] 2 Ch. 285, 290.
(*z*) The word " parent " in this connection is to be understood as meaning the father, on whom the duty of making a provision for the child *prima facie* falls. The presumption does not, it seems, arise in the case of a mother. See *Re Ashton*, [1897] 2 Ch., pp. 577—578.
(*a*) 28 Ch. D. 552.

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to the wish of my late beloved husband," and she afterwards in her lifetime, paid £300 to such legatee with a contemporaneous entry in her diary that such payment was a legacy from the " legatee's uncle John," and it was held by the Court of Appeal that the presumption was that such legacy was adeemed to the extent of £300 (*b*).

The question, whether a person has put himself *in loco parentis*, must be decided with reference to his intention to assume the office and duty of the father to make *provision* for the child; and upon such a question parol evidence of his acts and declarations is admissible (*c*).

Any relation, or even a mere stranger in no way related to another person, may be held to have meant to put himself *in loco parentis* towards him; but mere relationship, however near, is not of itself sufficient to show that a person means to put himself *in loco parentis* towards another. A father is the only person who for the purposes of the rule against double portions is assumed to have undertaken to provide for his child. The duty may be assumed by any other person, but the burden of proving that to be the case, even as regards the mother of the child (*d*), lies on those who assert it. So neither a great uncle, uncle, grandfather, or putative father, is from his mere relationship to be considered as *in loco parentis*, unless it can be shown that he meant to take upon himself the parent's office and duty of making a provision for the child (*e*).

In *Re Lawes* (*f*), Jessel, M.R., said, " Thomas Lawes, the younger, being the natural son of the testator, the testator stood *in loco parentis* towards him." In that case, however, the testator had clearly placed himself *in loco parentis*, and they had carried on business in partnership. The mere fact that the relationship of putative father and natural child exists does not place the one *in loco parentis* to the other (*g*).

(*b*) See *supra*, as to payment in satisfaction of a legacy.

(*c*) See *Powys* v. *Mansfield*, 3 My. & C. 359; *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343; *Re Pollock*, 28 Ch. D., p. 556; Simpson on Infants (5th ed.), p. 195.

(*d*) *Re Ashton*, [1897] 2 Ch. 574.

(*e*) *Shudal* v. *Jekyll*, 2 Atk. 516, 518; *Powell* v. *Cleaver*, 2 Bro. Ch. 517, 518; *Roome* v. *R.*, 3 Atk. 183; *Perry* v. *Whitehead*, 6 V. 547; *Grave* v. *Salisbury*, 1 Bro. Ch. 425; *Ellis* v. *E.*, 1 Sch. & L. 1; *Twining* v. *Powell*, 2 Coll. 262; and *Lyddon* v. *Ellison*, 19 B. 565, 572; *Curtin* v. *Evans*, 9 Ir. R. Eq. 553; *Re Dawson*, [1919] 1 Ch. 102. Cf. *Re Jupp*, [1922] 2 Ch. 359.

(*f*) 20 Ch. D. 81, 86.

(*g*) See *Lowndes* v. *L.*, 15 Ves. 301.

(b) by a Person not being in the Natural or Assumed Relation of Parent towards the Legatee.

Where a person, not being in the natural or assumed relation of parent towards the legatee, gives a legacy for a *particular purpose*, and afterwards advances money for the *same purpose*, a presumption arises that it was intended as, and it will accordingly be held to be an ademption of it. "The presumptions arising out of the parental relation do not, of course, extend to any case in which the legatee is a stranger to that relation. But numerous authorities have determined that, if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a similar presumption is raised *prima facie* in favour of ademption, and it is clear from the authorities that evidence of the circumstances under which the subsequent gift was made, including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not), may be admissible in such a case. . . . To constitute a particular purpose within the meaning of that doctrine it is not . . . necessary that some special use or application of the money by or on behalf of the legatee (*e.g.*, for binding him an apprentice, purchasing for him a house, advancing him upon marriage or the like) should be in the testator's view. It is not a less purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation (*h*) recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised, or would have presumed to exist" (*i*). A legacy to A in trust for the benefit of B, an infant, is not a legacy for a particular purpose, so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose (*k*).

A gift for the endowment of a hospital is a gift for a particular purpose within the rule; but a gift for the general purposes of the hospital would not be within the rule (*l*).

Where the purpose for which a legacy is given does not

(*h*) But see *Re Jupp*, [1922] 2 Ch. 359, 366—8.

(*i*) *Per* Selborne, L.C., *Re Pollock*, 28 Ch. D., at p. 556; *Monck* v. *M.*, 1 Ball & B. 303; *Rosewell* v. *Bennet*, 3 Atk. 77; *Pankhurst* v. *Howell*, L. R. 6 Ch. 136.

(*k*) *Re Smythies*, [1903] 1 Ch. 259; *Re Jupp*, *supra*.

(*l*) *Re Corbett*, [1903] 2 Ch. 326, 328; *Re Jupp*, [1922] 2 Ch. 359, 368.

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correspond with the purpose for which the advancement is made, the legacy, as is laid down by Lord Eldon in the principal case, will not be adeemed (*m*); nor will ademption take place where the legacy and advancement are given upon different contingencies (*n*).

5. Election in Cases of Satisfaction.

Where the first provision is by a will, it being a revocable instrument, a subsequent advance will be an ademption, either wholly or in part, without reference to the wishes of the person advanced; if, however, the first provision is by settlement or other contract, a subsequent legacy, considered as an advancement, will raise a case of election,—that is to say, the legatee may, at his option, take either the first or last provision (*o*). In *ademption* the former benefit being given by a will, which the testator can alter at pleasure, when, subsequently, he gives benefits by a deed, he may either by express words, or by implication, substitute the second gift for the former. Consequently, in this case, the bequest or devise is thereby *adeemed*, that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he gives benefits by his will to the same objects; and he either states, or the law raises the presumption, that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenant the right to elect whether they will take under the covenant, or whether they will take under the will (*p*).

The doctrine of election is worked out in this manner. Where a person takes a bequest under a will, which is held to be a satisfaction for a sum of money payable under a settlement, he must elect between the bequest and the gift. If he elects to take under the will, inasmuch as the provision by the will is a substitution for the provision by the settlement, the covenant is superseded, and is not to be performed at all. If, on the other hand, he elects to take under the settlement, he must, to the extent of what he takes thereunder, give up what is bequathed to him by the will,

(*m*) *Debeze* v. *Mann*, 2 Bro. Ch. 165, 519; *Robinson* v. *Whitley*, 9 V. 577; *Roome* v. *R.*, 3 Atk. 181.

(*n*) *Spinks* v. *Robins*, 2 Atk. 491.

(*o*) See 2 V. 465 (n.); *Copley* v. *C.*, 1 P. W. 147; *Finch* v. *F.*, 1 V. 534; *Hinchcliffe* v. *H.*, 3 V. 516; *Pole* v. *Lord Somers*, 6 V. 309.

(*p*) See *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 90.

Ex p. Pye.

in order to compensate those who are disappointed by his election (*q*).

A covenantee is not put to his election if he takes no interest directly under the will but is only derivately interested by reason of some disposition made by a legatee (*r*).

6. The Admission of Extrinsic Evidence.

Although, as a general rule, extrinsic evidence cannot be admitted to alter, add to, or vary a written instrument, or to prove with what intention it was executed, it seems to be clear that, where a transaction takes place, *not evidenced by writing*, which, if so evidenced, would raise a presumption that satisfaction of a former gift by will was intended, parol evidence is admissible to prove what the transaction really was. Thus, in *Hoskins* v. *Hoskins* (*s*), the father, after giving £750 to his son by will, purchased a cornetcy for him for £650. Evidence was admitted to show that this was intended as a satisfaction *pro tanto*.

Where, however, *there are two written instruments*, and from the relationship between the author of the instruments and the party claiming under them (as in the actual or assumed relation of parent and child), the law raises the presumption that a gift contained in the second instrument is intended to be in satisfaction of a gift by an instrument of earlier date, evidence may be gone into to show that such presumption is not in accordance with the intention of the author of the gift. And where evidence is admissible for that purpose, counter evidence is also admissible (*t*). But if on the construction of the second instrument it is clear that the second gift was or was not a satisfaction of the first, parol evidence cannot be admitted to show the intention (*u*).

And the rules as to the admission of evidence are the same whether the deed or the will was executed first (*x*).

But in such cases, it is well observed by Wigram, V.-C., " the

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(*q*) *McCarogher* v. *Whieldon*, 3 Eq. 236; see *Lewis* v. *L.*, 11 Ir. R. Eq. 110.

(*r*) *Re Blundell*, [1906] 2 Ch. 222.

(*s*) Pr. Ch. 263; *Kirk* v. *Eddowes*, 3 Ha. 509; *Re Pollock*, 28 Ch. D. 552, 556; see *Twining* v. *Powell*, 2 Coll. 263.

(*t*) See *Debeze* v. *Mann*, 2 Bro. Ch. 165, 519; *Ellison* v. *Cookson*, 3 Bro. Ch. 61; *Trimmer* v. *Bayne*, 7 V. 508, 615; *Curtin* v. *Evans*, 9 Ir. R. Eq. 553; *Re Tussaud's Estate*, 9 Ch. D. 363, 373; *Re Scott*, [1903] 1 Ch. 1.

(*u*) *Hall* v. *Hill*, 1 Dr. & W. 94; *Re Tussaud's Estate*, 9 Ch. D. 374; *Kirk* v. *Eddowes*, 3 Ha. 509.

(*x*) *Re Tussaud's Estate*, *supra*.

evidence is not admitted on either side, for the purpose of proving, in the first instance, with what intent either writing was made, but for the purpose only of ascertaining whether the presumption which the law has raised be well or ill founded" (*y*).

7. The Satisfaction of a Debt by a Legacy.

The general rule, as laid down in *Talbot* v. *Duke of Shrewsbury*, is "that if one, being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, this shall, nevertheless, be in satisfaction of the debt, so that he shall not have both the debt and the legacy" (*z*).

It is a rule which has long prevailed, but which has met with the disapproval of eminent Judges (*a*): it is founded on the maxim, "*Debitor non præsumitur donare.*" Even though the debt be discharged by the testator in his lifetime, it has been held that a legacy of the same amount is not payable, on the ground that the presumption of law puts the matter in the same position as if it had been stated in the will, that the legacy was to pay the debt, and that, consequently, the testator having paid the debt, his estate is relieved from payment of the legacy (*b*).

There is in this class of cases a leaning *against*, as in the two former classes of cases a leaning in *favour* of, the presumption of satisfaction, and the Court lays hold of small circumstances to take a case out of the rule (*c*). Thus, where the legacy is of *less amount* than the debt, the presumption is, that it was not intended to be given in lieu of it; it will, therefore, not be considered a satisfaction, even *pro tanto*, as in the two former classes of cases

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(*y*) 3 Ha. 517. See *Palmer* v. *Newell*, 20 B. 39.

(*z*) See also *Brown* v. *Dawson*, Pr. Ch. 240; *Fowler* v. *F.*, 3 P. W. 353; *Richardson* v. *Greese*, 3 Atk. 68; *Gaynon* v. *Wood*, Dick. 331; *Bensusan* v. *Nehemias*, 4 De G. & Sm. 381; *Shadbolt* v. *Vanderplank*, 29 B. 405; *Atkinson* v. *Littlewood*, 18 Eq. 595; *Ellard* v. *Phelan*, [1914] 1 Ir. R. 76.

(*a*) *Fowler* v. *F.*, 3 P. W. 354; *Lady Thynne* v. *The Earl of Glengall*, 2 H. L. Cas. 153; *Richardson* v. *Greese*, 3 Atk. 65; *Re Rattenberry*, [1906] 1 Ch. p. 670.

(*b*) *Re Fletcher*, 38 Ch. D. 373.

(*c*) *Mathews* v. *M.*, 2 Ves. Sen. 635; *Clark* v. *Sewell*, 3 Atk. 96; *Haynes* v. *Mico*, 1 Bro. Ch. 129; *Jeacock* v. *Falkener*, 1 Bro. Ch. 295; *S. C.* 1 Cox, 37; *Adams* v. *Lavender*, 1 M'Cl. & Y., Exch., 41; *Smith* v. *S.*, 3 Gif. 121; *Hales* v. *Darell*, 3 B. 324; *Crichton* v. *C.*, [1896] 1 Ch. 870; *Re Rattenberry*, [1906] 1 Ch. p. 670.

of satisfaction (*d*), unless by special arrangement with the creditor (*e*).

So if the debt is a first charge and the legacy not (*f*), or, under the old law, if the debt was to the separate use, but the legacy not (*g*).

So, also, the presumption of satisfaction being intended will be repelled where the legacy, though in amount equal to or greater than the debt, is payable at *a different time*, so as not to be equally advantageous to the legatee as the payment of the debt (*h*); and (possibly) where the legacy is payable to different trustees (*i*).

An annuity payable by half-yearly payments under a covenant is not satisfied by an annuity given by will which will not become payable until a year after the testator's death (*k*).

So a legacy of £400, as to which no time of payment was fixed by the testator, was held not to be in satisfaction of a debt of £300 payable to the legatee by the testator within three months of his death (*l*). But the fact that legacies are not payable till one year after the death of the testator does not take a case out of the general rule, even if the debt bears interest. A legacy held to be a satisfaction of a debt, bears interest from the testator's death, if no time is fixed for payment (*m*).

Sums held in trust for a tenant for life are not satisfied by absolute legacies to the tenant for life of the same amounts (*n*).

The presumption will also be repelled where the legacy and debt are of a different nature, either with reference to the subjects themselves, or with respect to the interest given : see *Eastwood* v. *Vinke* (*o*), where it was held that as money and lands were things of a different nature, the one should not be taken in satisfaction of the other (*p*). So also, where the interest given is of a

(*d*) *Cranmer's Case*, 2 Salk. 508; *Atkinson* v. *Webb*, 2 Vern. 478; *Eastwood* v. *Vinke*, 2 P. W. 614, 617; *Minuel* v. *Sarazine*, Mos. 295; *Graham* v. *G.*, 1 Ves. Sen. 263; *Coates* v. *C.*, [1898] 1 Ir. R. 258; *Re Hall*, [1918] 1 Ch. p. 569.

(*e*) *Hammond* v. *Smith*, 33 B. 452.

(*f*) *Hales* v. *Darell*, 3 B. 325.

(*g*) See, *e.g.*, *Bartlett* v. *Gillard*, 3 Russ. 149.

(*h*) *Atkinson* v. *Webb*, Pr. Ch. 236; *Nicholls* v. *Judson*, 2 Atk. 300; *Hales* v. *Darell*, 3 B. 324, 332; *Charlton* v. *West*, 30 B. 124, 127; *Re Roberts*, 50 W. R. 469.

(*i*) See *Pinchin* v. *Simms*, 30 B. 119, 120.

(*k*) *Re Dowse*, 50 L. J. Ch. 285.

(*l*) *Re Horlock*, [1895] 1 Ch. 516.

(*m*) *Re Rattenberry*, [1906] 1 Ch. 667, and cases there cited.

(*n*) *Fairer* v. *Park*, 3 Ch. D. 309.

(*o*) 2 P. W. 614; *Lenehan* v. *Wall*, [1922] 1 Ir. R. 59.

(*p*) See also *Forsight* v. *Grant*, 1 V. 298; *Richardson* v. *Elphinstone*, 2 V.

different nature or not co-extensive with the debt. Thus, a gift of a residue of real and personal estate for life was held not to be a satisfaction for a sum of money to be laid out in lands and conveyed to a person in fee (*q*).

So also, where there is a particular motive assigned for the gift, it will not be presumed to be a satisfaction for a debt (*r*). And the presumption will not be raised where the debt of the testator was contracted *subsequently* to the making of the will; for he could have had no intention of making any satisfaction for that which was not in existence (*s*).

Where the legacy is contingent or uncertain, whether it be given upon the happening of a contingency, as in *Crompton* v. *Sale* (*t*), or is in itself of an uncertain or fluctuating nature, as a gift of the whole or a part of the testator's residuary estate, even though it should prove greater in amount than the debt, it will not be held to be a satisfaction of it (*u*).

The result will be the same, if the debt itself is contingent or uncertain, as a debt upon an open and running account (*x*), or upon a negotiable bill of exchange which may be indorsed over to another person (*y*).

But the presumption that a debt is intended to be satisfied by a legacy will not be rebutted by the circumstance that the debt is liable to decrease; where, for instance, the debt was in respect of deposits made with the testator, the creditor drawing on him from time to time in respect of such deposits (*z*).

Where, as in *Chancey's Case*, there is an express direction in the will for payment of *debts and legacies*, the Court will infer that it was the intention of the testator that both the debt and the legacy

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463; *Byde* v. *B.*, 1 Cox, 49; *Bartlett* v. *Gillard*, 3 Russ. 149; *Fourdrin* v *Gowdey*, 3 My. & K. 409; *Rowe* v. *R.*, 2 De G. & Sm. 294; *Edmunds* v. *Low*, 3 K. & J. 318; *Fairer* v. *Park*, 3 Ch. D. 309; *Coates* v. *C.*, [1898] 1 Ir. R. 258.

(*q*) *Alleyn* v. *A.*, 2 Ves. Sen. 37; *Barret* v. *Beckford*, 1 Ves. Sen. 519. See *Re Vernon*, 95 L. T. 48; *Coates* v. *C.*, *supra*.

(*r*) *Mathews* v. *M.*, 2 Ves. Sen. 635; *Charlton* v. *West*, 30 B. 124, 127.

(*s*) *Cranmer's Case*, 2 Salk. 508; *Thomas* v. *Bennet*, 2 P. W. 343; *Plunkett* v. *Lewis*, 3 Ha. 330; and see 1 Vict. c. 26, s. 24; *Crichton* v. *C.*, [1896] 1 Ch. 870.

(*t*) 2 P. W. 553.

(*u*) *Devese* v. *Pontet*, 1 Cox, 188; *Barret* v. *Beckford*, 1 Ves. Sen. 519; *Lady Thynne* v. *The Earl of Glengall*, 2 H. L. Cas. 154.

(*x*) *Rawlins* v. *Powel*, 1 P. W. 297.

(*y*) *Carr* v. *Eastabrooke*, 3 V. 561; *Re Roberts*, 50 W. R. 469.

(*z*) *Edmunds* v. *Low*, 3 K. & J. 318; 3 Gif. 263.

should be paid to the creditor (*a*). But not where the charge of debts and legacies is by will, and the debtor by codicil gives an equal or larger legacy to a creditor whose debt was contracted after the making of the will (*b*).

A direction to pay debts *alone* was held by Wood, V.-C., not to be sufficient to rebut the presumption of satisfaction (*c*). But the balance of authority is against this decision (*d*), and in *Re Huish* (*e*), Kay, J., after considering the cases, decided that a direction by a testator in a codicil that all just and lawful debts should be paid, was sufficient to exclude the presumption of satisfaction.

The appointment of the creditor as executor is not sufficient to take the case out of the general rule (*f*).

A question has been raised whether a testator in a charge of "debts," includes his liability on a bond or covenant to pay a sum of money after his decease. In the case of *Wathen* v. *Smith* (*g*), a husband covenanted on marriage to pay his wife £1,000 six months after his death. By his will he gave her £1,000, payable three months after his decease, and after giving certain specific legacies, he directed his residue to be applied in payment of *all* his just *debts and legacies*. Leach, V.-C., held that the legacy must be considered as a performance of the covenant, and that the latter was not a debt within the sense in which the testator must be understood to use the word "debts" in his will.

In the case, however, of *Cole* v. *Willard* (*h*), the authority of *Wathen* v. *Smith* is impugned, and in *Re Huish* (*i*) it was cited but not followed. In the last-mentioned case a lady gave a bond to her nephew, to whom she was not *in loco parentis*, to secure the payment of £1,000 within twelve months of her death, payable on an event which happened. She then made her will, by which she

(*a*) *Richardson* v. *Greese*, 3 Atk. 65: *Field* v. *Mostin*, Dick. 543; *Hales* v. *Darell*, 3 B. 324, 332; *Jefferies* v. *Michell*, 20 B. 15; *Hassell* v. *Hawkins*, 4 Drew. 468. See also *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71.

(*b*) *Gaynon* v. *Wood*, 1 P. W. 409 (n.).

(*c*) *Edmunds* v. *Low*, 3 K. & J. 318, 321.

(*d*) *Hales* v. *Darell*, 3 B. 324; *Jefferies* v. *Michell*, 20 B. 15; *Cole* v. *Willard*, 25 B. 568, 573; *Pinchin* v. *Simms*, 30 B. 119; *Charlton* v. *West*, *ibid.*, 124; *Atkinson* v. *Littlewood*, 18 Eq. 595. See also *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71.

(*e*) 43 Ch. D. 260.

(*f*) *Re Rattenberry*, [1906] 1 Ch. 667.

(*g*) 4 Madd. 325.

(*h*) 25 B. 568; and see *Re Hall*, [1918] 1 Ch. 571.

(*i*) 43 Ch. D. 260.

gave him different benefits, real estate, chattels, and a legacy of £3,000. She made a codicil to her will, in which she said she wished all her just and lawful debts to be paid at once. Kay, J., held that the bond was not satisfied by the legacy, but that both were payable (*k*).

But where the liability is to pay or settle a share of the covenantor's estate after his decease, the liability is not a "debt" to be paid before the division of the residue (*l*).

Where a parent gives a legacy to a child to whom he is indebted.—It appears that, so far as the present question is concerned, a legacy given by the will of a parent to a child, is upon no different footing from that of a legacy to a stranger. Therefore, where a father is indebted to his child, a subsequent legacy to that child will not be considered as a satisfaction of the debt, unless it be either equal to, or greater than, the debt in amount; and the presumption of satisfaction, if raised, will be repelled by any of those slight circumstances which will take a bequest to a stranger creditor out of the general rule (*m*). The same applies in the case of a legacy to a wife to whom the husband is indebted (*n*).

And the rule is equally applicable where the debt due is in the shape of an annuity, and an annuity is subsequently given by the will of the debtor to the annuitant (*o*).

Where a parent in his lifetime advances a child to whom he is indebted.—Where a parent is indebted to a child, and in his lifetime makes an advancement to the child upon marriage, or some other occasion, of a portion equal to or exceeding the debt, it will *prima facie* be considered a satisfaction (*p*).

In *Plunkett* v. *Lewis* (*q*), investments representing a trust fund to which a father was entitled for life, and his son and daughter in remainder, were sold, and the proceeds, amounting to £11,445, were received by the father. Subsequently, on the marriage of the

(*k*) See also *Atkinson* v. *Littlewood*, 18 Eq. 595, 605; *Re Franklin*, 52 Sol. Jo. 12; *Re Hall*, [1918] 1 Ch. 562.

(*l*) *Bennett* v. *Houldsworth*, 6 Ch. D. 671; *Re Vernon*, 95 L. T. 48.

(*m*) *Tolson* v. *Collins*, 4 V. 483; *Stocken* v. *S.*, 4 Si. 152.

(*n*) *Fowler* v. *F.*, 3 P. W. 353; *Cole* v. *Willard*, 25 B. 568; *Atkinson* v. *Littlewood*, 18 Eq. 595; *Wathen* v. *Smith*, 4 Madd. 325.

(*o*) *Atkinson* v. *Littlewood*, 18 Eq. 595; *Re Rattenberry*, [1906] 1 Ch., p. 672; but see *Bartlett* v. *Gillard*, 3 Russ. 149; *Re Dowse*, 50 L. J. Ch. 285.

(*p*) *Wood* v. *Briant*, 2 Atk. 521; *Seed* v. *Bradford*, 1 Ves. Sen. 501; *Chave* v. *Farrant*, 18 V. 8.

(*q*) 3 Ha. 316.

daughter, the father settled £16,000 in ready money, and £20,000 payable six months after his decease, besides lands. It was held by Wigram, V.-C., that the claim of the daughter against the father, in respect of her share of the proceeds of the trust fund, must be presumed to be satisfied by the settlement (*r*).

The presumption of satisfaction can only arise where the person making the payment is himself the party bound to pay, or is the owner of the estate charged with the payment (*s*).

Extrinsic evidence.—Where the presumption arises merely from the fact of a legacy to a creditor being equal to or greater than the amount of the debt, it would appear, upon principle, that evidence ought to be admitted to rebut the presumption; and if so, evidence may, on the other hand, be admitted to fortify it (*t*). In *Fowler* v. *F.* (*u*), Lord Talbot refused to admit parol evidence; and this case appears to be approved of by Sir Edward Sugden, in *Hall* v. *Hill* (*x*). This ruling would seem open to question, since, as the case is reported, the evidence would merely have been admitted for the purpose of rebutting a presumption of law. If Lord Talbot had considered that the intention of the testator appeared on the face of the will, the evidence would, of course, have been rightly rejected (*y*).

(*r*) Cf. *Crichton* v. *C.*, [1896] 1 Ch. 870, in which upon the facts a different conclusion was arrived at.

(*s*) *Samuel* v. *Ward*, 22 B. 347; and see *Douglas* v. *Willes*, 7 Ha. 328; *Bannatyne* v. *Ferguson*, [1896] 1 Ir. R. 149.

(*t*) *Plunkett* v. *Lewis*, 3 Ha. 316.

(*u*) 3 P. W. 353.

(*x*) See 1 Dr. & W. 121; 1 Cl. & Fin. 147.

(*y*) See *Wallace* v. *Pomfret*, 11 Ves. 542, 545; Theob. (8th ed.), pp. 146-7

LECHMERE *v.* LADY LECHMERE.

1735. Cas. t. Talbot, 26.

Implied Satisfaction of a Covenant to Purchase and Settle an Estate.

By marriage articles, Lord L. covenanted to lay out £30,000 within one year after the marriage, in the purchase of freehold lands, in fee simple in possession, in the south part of Great Britain, with the consent of trustees; the lands, when purchased, to be settled upon Lord L. for life, and after his death, to pay a jointure to his intended wife, remainder to the first and other sons of the marriage in tail, remainder to trustees for 500 years, to raise portions for daughters, remainder to Lord L., his heirs and assigns for ever. The term to be void if there were no daughters, and until the £30,000 should be laid out in lands, interest was to be paid for the same, after the rate of £5 per cent. per annum, unto the persons entitled to the rents and profits of the land, when purchased. Lord L. was seised of some lands in fee at the time of his marriage. And after his marriage, he purchased some estates for lives, reversionary estates in fee, expectant on lives. Lord L. also purchased, after the marriage but not within one year, or with the consent of the trustees, several estates in fee simple in possession, which were never settled according to the covenant. Lord L. died intestate and without issue, leaving considerable real estate to descend upon his heir-at-law. Upon a bill filed by the heir-at-law against Lord L.'s widow, who took out administration:

Held, first, affirming the decision of the Court below, that the money, agreed by the articles to be laid out in land, ought to be taken as land, and go to the heir. And that there was no difference where the money thus agreed to be laid out and settled, was deposited in the hands of trustees, and where it remained in the hands of the covenantor, the agreement binding in both cases, and making it as land.

Held, also, that the purchases made before the covenant could not go in performance of the subsequent covenant, as they could not have been so intended.

Held, likewise, that the estates for lives, and reversionary estates in fee, expectant on lives, purchased after the marriage, could not go in performance of the covenant, not being estates in fee simple in possession within the meaning of the covenant.

But held, reversing the decision of the Court below, that the purchases of land in fee simple made after the marriage, though made without the consent of the trustees, and though not purchased within a

Lechmere v. Lady Lechmere.

year after the marriage, or settled, must be intended to have been made in part performance of the covenant to lay out £30,000.

The late Lord Lechmere, upon his marriage with the Lady Elizabeth Howard, daughter to the Earl of Carlisle, and in consideration of £6,000, portion, by marriage articles dated April 30, 1719, covenanted with the Earl of Carlisle and the Lord Morpeth, his son, to lay out, within one year after the marriage, the said sum of £6,000, and likewise the further sum of £24,000 in the purchase, with the *consent of* the Earl of Carlisle and Lord Morpeth, of *freehold lands in possession*, in the south part of Great Britain, and which were to be settled upon the Lord Lechmere himself for life, without impeachment of waste, remainder to trustees and their heirs during the life of the Lord Lechmere, to preserve contingent remainders, remainder for so much as would amount to £800 per annum to the Lady Lechmere, for her jointure, remainder of the whole to the first and other sons of the marriage, in tail male, remainder to the trustees for 500 years, for the raising a portion or portions for the daughter or daughters of the marriage, remainder to the *Lord Lechmere, his heirs and assigns for ever*: But if there should be no daughters, that the said term was to cease for the benefit of the Lord Lechmere, his heirs and assigns for ever. And the said Lord Lechmere further covenanted that until the said £30,000 should be laid out in lands as aforesaid there should be paid interest for the same after the rate of £5 per cent. unto the persons entitled to the rents and profits of the lands when purchased.

The marriage took effect, and Lord Carlisle paid £4,000, part of the portion, to Lord Lechmere, and gave his bond for the remaining £2,000, which had also been paid to the defendant, Lady Lechmere.

The Lord Lechmere was seised of some lands in fee at the *time of his* marriage of about £300 per annum.

The Lord Lechmere, after his marriage, purchased several estates in fee simple in possession of about £500 per annum, and contracted for the purchase of some estates in fee in possession, but none of which were ever settled according to the covenant;

he also purchased several terms, estates for life, and reversionary estates in fee subject to lives. None of the purchases or contracts were made by Lord Lechmere with the consent of the trustees.

Lord Lechmere, on June 18, in the year 1727, died intestate and without issue, leaving a considerable real estate (to the value of about £1,800 per annum) to descend upon the plaintiff, his nephew and heir-at-law. The Lady Lechmere took out administration; and the plaintiff brought his bill (*a*) against her for an account of the Lord Lechmere's personal estate and to have the covenant carried into execution (his remainder by the death of Lord Lechmere without issue now taking effect); as also to have some purchases completed which were left incomplete by the Lord Lechmere's death.

The Lady Lechmere insisted by her answer, that the plaintiff, being no way privy to any of the considerations within this covenant, could not compel her to lay out the £30,000 in the purchase of lands for his benefit; but that if he could, the lands which Lord Lechmere had permitted to descend on him, being to the value of £1,800 per annum, ought to be taken in full satisfaction for all the benefit the plaintiff could be entitled to as heir-at-law to the Lord Lechmere, who designed these several purchases to be settled according to the uses specified in the covenant.

The cause was first heard at the Rolls, before Sir Joseph Jekyll, M.R., and it was there decreed for the heir-at-law, Mr. Lechmere, upon both points; *viz.*, That he was entitled to have a specific performance of this covenant; and secondly, That the several estates which descended upon him were not a satisfaction for this covenant, or any part of it; and now coming on to be heard before the Lord Chancellor.

Mr. Pauncefort, Mr. Strange, Mr. Brown, and others argued for the plaintiff (*b*).

Mr. Attorney-General (Sir John Willes), Mr. Solicitor-General

(*a*) See *Lechmere* v. *The Earl of Carlisle*, 3 P. W. 211, from which the statement of the facts in this case has been corrected.

(*b*) This case was elaborately argued for four days; 3 Sug. V. & P. App. p. 62 (10th ed.).

(Sir Dudley Ryder), Mr. Verney (afterwards M.R.), and Mr. Fazakerly argued for the defendant.

Lord Talbot, L.C.—The first question is, whether the plaintiff, the heir-at-law to the Lord Lechmere, be entitled to a specific performance of this covenant? It has been considered by the plaintiff's counsel as an agreement of the Lord Lechmere, and an intent in him to lay out this whole sum of £30,000 in lands at all events; on the other hand, the defendant's counsel have insisted, that the design went no farther than the providing for the Lady Lechmere, and the issue of the marriage. The intent seems to me to be, that the £30,000 should, at all events, be laid out in land; the produce whereof was to be secured to the issue of the marriage, who in this case must have taken as purchasers: but as to the remainder in fee, I do not think that the looking upon the Lord Lechmere either as a purchaser of it or not, will vary the case; since, had the covenant been silent, the remainder must have returned to the person from whom the estate moved; and I think it quite the same whether he is considered as a purchaser or as a volunteer; the dispute not being between the heir and a third person, but between the two representatives of the Lord Lechmere, the one of his real, the other of his personal estate; the heir's being but a volunteer in regard to his ancestor, will not exclude him from the aid of this Court. But, though the question is between two volunteers, the Court will determine which way the right is, and decree accordingly. We must therefore see whether the £30,000 is, upon this covenant, to be looked upon as real or personal estate?

It seems to be allowed on both sides, that had the money been deposited in trustees' hands it must have been looked upon as real estate, and the heir entitled to the benefit of it. This, I say, seems to be granted; and no authority against it, but what has been collected from the case of *Chichester* v. *Bickerstaff* (*c*). It is probable that in that case the Court went upon some reason which induced it to think that Sir John Chichester looked upon the money as personal estate; for, otherwise the authority of that case is not to be maintained; being

(*c*) 2 Vern. 295.

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contrary to all the former resolutions, and to a large one in the House of Lords, by which I am bound, *viz.*, that of *Edwards* v. *The Countess of Warwick* (*d*), where the money was decreed to go as land, though to a collateral heir, who was not within the considerations of the settlement; so that it is now a settled point, that where the securities are appropriated, the money shall go as land, not only to the issue of the marriage, but likewise to a collateral heir or general remainderman; unless there appears some variation in the parties' intent, and indeed it is very reasonable that it should be so; for otherwise the neglect of trustees, or any other accident, might overthrow all men's agreements and contracts entered into upon the best and most valuable considerations. But it has been objected, that this case differs from all those; for, that the money was never deposited, but remained in the Lord Lechmere's own hands; and that he only was the debtor. So now the question is, whether this will make any difference? An heir can no more be looked upon as a creditor against his ancestor than he can be looked upon as a purchaser under him; he takes with the several burdens that his ancestor lays upon him. And as, on the one hand, the Lord Lechmere bound himself, by his covenant, to lay out this sum of £30,000 in land; he, on the other, acquired a right to an estate for life, and to a remainder in fee, which by his death are now severed; and the remainder only descends upon the heir. If a man articles for a purchase, and binds himself, his heirs, executors, and administrators, he may as well be called, in that case, both covenantor and covenantee, as in the present one; but yet the heir is entitled to have the purchase completed, and may compel the executor to do it, because their rights are different; as appears from the case of *Holt* v. *Holt* (*e*). And wherever a man's design appears to turn his personal estate into land, this gives his heir an advantage which this Court will never take from him. None of the cases cited warrant this present distinction that is endeavoured at; and in reason, I am sure, there is nothing to

(*d*) 2 P. W. 171.

(*e*) 2 Vern. 322. See now section 35 of the A. E. Act, 1925, replacing with amendments the Real Estate Charges Acts, 1854, 1867 and 1877.

warrant it; the intent and agreement of the parties being the same in both cases; which if effectual in one case, I cannot see why it should not be so in the other. The only case, from which anything like this distinction can be collected, is that of *Lingen* v. *Sowray* (*f*), but I am no ways satisfied that that case was resolved upon that reason; for, in that case, the husband had altered the trust, and the limitations of it. Besides, in that case nobody had any interest in it but he and his wife; and the Court, as appears by the decree, laid great stress upon the change of his intent, appearing by changing the trust: but here no change appearing, the intent remains as it was at the time of the covenant entered into; and consequently a very wide difference between the two cases. In the case of *Chaplin* v. *Horner* (*g*), the husband alone was to have the benefit of the articles, and therefore not at all like the present case. I therefore think that this case falls within the common known rule, that *money articled to be laid out in land is to be looked upon as land.* The Lord Lechmere was bound at the time of his death to lay out this money in land; by which he gained a right to an estate for life, with a remainder in fee; and the estate for life being determined by the death, the right which he had to the remainder descends upon his heir; and as it comes by his death, nothing that has been done by the Lady Lechmere, either as to the waiver of her jointure, or anything else, can alter or defeat that right. Indeed to suppose it, would be absurd.

The second question is as to satisfaction (*h*), whether what descends to the heir-at-law is to be considered as satisfaction which he is entitled to under this covenant. As to questions of satisfaction, where they are properly so, they have always been between debtor and creditor or their representatives. As to Mr. Lechmere, *I do not consider him as a creditor, but as standing in the place of his ancestor,* and thereby entitled to what would have vested in his ancestor. A constructive satisfac-

(*f*) 1 Eq. Ca. Abr. 175; Pr. Ch. 400; 1 P. W. 172.

(*g*) 1 P. W. 483.

(*h*) This second part of Lord Talbot's judgment is taken from Sug. V. & P. Append. 1117 (11th ed.), where it is given more fully than in Cas. t. Talbot.

tion depends on the intention of the party, to be collected from circumstances. But then the thing given must be of the same kind, and of the same or a greater value. The reason is plain; for a man may be bountiful as well as just; and if the sum given be less than the debt, it cannot be intended as a satisfaction, but may be considered as a bounty; and, if the thing given is of a different nature, then, also, as the intention of the party is not plain, it must be considered as a bounty. But I do not think the question of satisfaction properly falls within this case, for *here it turns on what was the intention of my Lord Lechmere in the purchase made after the articles*; for, as to all the estates purchased precedent to the articles, there is no colour to say, they can be intended in performance of the articles; and as to the leasehold for life, and the reversion in fee expectant on the estates for life, it cannot be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee simple in possession, etc.), though considered as a satisfaction to a creditor, yet they do not answer, because they are not of equal or greater value. Yet why may they not be intended as bought by him with a view to make good the articles?

The Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. Parts of the land purchased are in fee simple in possession, in the south part of Great Britain, and near to the family estate. But it is said they are not bought with the liking of the trustees. The intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, is no reason to hinder why they should not be bought in performance of the articles.

It is objected, that the articles say the land shall be conveyed immediately. It is not necessary that every parcel should be conveyed as soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles.

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Whoever is entitled to a performance of the covenant, the personal estate must be first applied so far as it will go, and if the covenant is performed in part, it must make good the deficiency. But where a man is under any obligation to lay out £30,000 in lands, and he lays out part as he can find purchases, which are attended with all material circumstances, it is more natural to suppose these purchases made with regard to the covenant than without it. When a man lies under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under, than to a voluntary act, independent of the obligation.

Then, as to all the cases of satisfaction, though these purchases are not strictly a satisfaction, yet they may be taken as a *step towards performance*; and that seems to me rather his intention than to enlarge his real estate. The case of *Wilcocks* v. *W.* (*i*), though there are some circumstances that are not here, yet it has a good deal of weight with me. There the covenant was not performed, for the estate was to be settled, but the land was left to descend, and a bill was brought to have the articles made good out of the personal estate; to which it was answered, that the £200 per annum was bought, which descended to you. It is true a settlement hath not been made, but they were bought with an intention to make a settlement, and you can make one. The same will hold as strong in the present case, that these lands were bought to answer the purposes of the articles, and fall within that compass; and it is not an objection, to say they are of unequal value, for a covenant *may be executed in part, though it is not so in satisfaction; and in this particular I differ from the M.R.* There must be an account of what lands in fee simple in possession were purchased [for] after the articles entered into, and so much as the purchase-money of such lands amounts to must be looked on in part satisfaction of the £30,000 to be laid out in land under the articles, and the residue of the £30,000 must be made good out of the personal estate.

(*i*) 2 Vern. 558.

BLANDY *v.* WIDMORE.

1716. 1 P. W. 323 (*a*).

Performance of a Covenant to leave a sum of Money by allowing a Sum to devolve by Intestacy.

Covenant by a man, previous to marriage, to leave his intended wife £620. The marriage takes place, and he dies intestate; the wife's share comes to above £620; this is a satisfaction.

Upon the marriage of A with B, there were articles reciting, that, in consideration of the marriage, and of the portion, it was agreed that if B, the wife, should survive A, her intended husband, A should *leave* B £620; and accordingly A covenanted with B's trustees, that his executors, within three months after his decease, should pay B £620 if she should survive him.

A died intestate and without issue; upon which B the wife, by the Statute of Distribution (*b*), became entitled to a moiety of the personal estate, which was much more than £620; and the question was, whether the distributive share belonging to B, being more than £620, should go in satisfaction of it.

Serjeant Hooper.—This £620 is a debt, and debts must be first paid, after which the distribution is to be made; and if the intestate had made a will, probably he would have given to his wife something additional to this £620. Now, what the statute gives is not his gift, and, being not his gift, is not to be taken as his payment; or, supposing it to be his gift, still it cannot be said to be his payment.

Lord Chancellor Cowper.—I will take this covenant *not to be broken,* for the agreement is to *leave* the widow £620.

(*a*) *S. C.*, 2 Vern. 709.
(*b*) 22 & 23 Car. 2, c. 10.

Now the intestate in this case has left his widow £620 and upwards, which she, as administratrix, may take presently upon her husband's death; wherefore, let her take it, but then it shall be accounted as in satisfaction of, and to include in it, her demand by virtue of the covenant; so that she shall not come in first as a creditor for the £620, and then for a moiety of the surplus.

And Mr. Vernon said, it had been decreed in the case of *Wilcocks* v. *W.* (*c*), Trin. 1706, that if a man covenants to settle an estate of £100 per annum on his eldest son, and he leaves lands of the value of £100 per annum to descend upon his son, this shall be a satisfaction of the covenant to settle; and that this last was a stronger case, it being the case of an heir, who is favoured in equity; also the case of *Phiney* v. *P.* (*d*) was cited.

Whereupon the decree (*e*) made by Sir John Trevor, M.R., was now affirmed by Cowper, L.C. (*f*).

NOTES.

1. Generally.
2. Covenant to purchase and settle land, p. 359.
3. Covenant to leave a sum of money, p. 365.

[The above case of *Lechmere* v. *Lady L.* (with the notes nevertheless abbreviated) has been retained in the present edition of this work, although its importance has been much reduced by the change made in the law of descent by the Administration of Estates Act, 1925. The importance of the rule adopted in *Lechmere* v. *Lady L.* arose from the privileged position held by the heir, in the case of an intestacy, and also from the preference shown for the real over the personal estate in the administration of assets. There is no distinction now, in the event of an intestacy, in the devolution of the real and personal estate; excepting that

(*c*) 2 Vern. 558.
(*d*) 2 Vern. 638.
(*e*) 2 Vern. 709.
(*f*) And again affirmed upon a rehearing. Reg. Lib. A. 1715, fol. 372.

where the estate is solvent and there is a surplus, a surviving husband or wife takes absolutely the deceased's furniture and other articles defined in the Act as "personal chattels." The real and personal estate pass to the personal representative, and are subject to a trust for sale; the deceased's debts have to be paid, without any preference being given to the real estate or its proceeds over the personal estate or the proceeds of the same, and the beneficial interests are the same in the blended proceeds of sale (*g*). In cases where there is no intestacy, but the deceased leaves a will, his real estate being devised to one person and his personal estate to another, the principle, adopted in *Lechmere* v. *Lady L.*, is of course material.]

1. Generally.

Lechmere v. *Lady L.* and *Blandy* v. *Widmore* were decided in accordance with the rule of equity, that, where a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant, he shall be presumed to have done it with that intention (*h*).

2. Covenant to Purchase and Settle Land.

Where a person covenants to *purchase and to settle* lands of a certain value upon himself for life, with a jointure upon his wife, and remainder to his first and other sons in tail, and afterwards purchases lands of equal or greater value which descend *or are devised*, such purchase will be deemed to have been made with the intention of performing the covenant, and the lands will be bound in equity (*i*).

The result will be the same where a person, having no real estate, covenants to *convey and settle*, and he afterwards purchases, but does not convey or settle, real estate (*k*).

Where the lands purchased are of less value than the lands covenanted to be purchased or conveyed and settled, they will be considered as purchased in part performance of the covenant, and the residue of the sum covenanted to be laid out in lands must be

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(*g*) See the A. E. Act, 1925, ss. 1, 32—34, 45, 46, and the First Schedule.

(*h*) See *Sowden* v. *S.*, 3 P. W. 228 (n.).

(*i*) *Wilcocks* v. *W.*, 2 Vern. 558; *Tooke* v. *Hastings*, *ibid.* 97; *Bridges* v. *Bere*, 2 Eq. Cas. Abr. 34.

(*k*) *Deacon* v. *Smith*, 3 Atk. 323; and see *Wellesley* v. *W.*, 4 My. & C. 561; *Ex p. Poole*, De Gex, 581.

made good out of the personal estate of the covenantor as being converted into land (*l*).

And it is immaterial whether the estates are to be purchased within a limited time, and the purchase is not made until after such time has expired, or at different times, and in small parcels; or whether it is to be made with the consent of trustees, and such consent has not been applied for; for the intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, is "no reason to hinder why they should not be bought in performance of the articles" (*m*); nor is it material that the money to make the purchase has been deposited with trustees, or remains in the hands of the covenantor (*n*); or whether the articles say that land shall be conveyed immediately to trustees, and it is not conveyed at all; for it is not necessary that every parcel should be conveyed as soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles (*o*).

The doctrine has also been applied to a case where the covenant was to pay money to trustees, to be laid out by them in a purchase of land; and the covenantor, without having paid the money, but having made a purchase of lands, died intestate without having made a settlement (*p*).

The expenditure, however, by a tenant for life in building on lands vested in trustees will not be taken to be in part satisfaction of a covenant by him to pay a sum of money to the trustees, which they had power to invest in the purchase of lands to be held upon the same trusts (*q*).

The principle upon which *Lechmere* v. *Lady L.* was decided has been held to apply equally to the case where the obligation to purchase lands arose from an Act of Parliament (*r*).

(*l*) *Lechmere* v. *L.*, Cas. t. Talbot, 80; *Sowden* v. *S.*, 1 Bro. Ch. 582; 3 P. W. 228 (n.); *Garthshore* v. *Chalie*, 10 V. 9; and see *Lench* v. *L.*, 10 Ves. 511, 516.

(*m*) *Lechmere* v. *Lady L.*, *ante*, p. 355.

(*n*) *Ibid.*

(*o*) *Ante*, p. 355. See also *Deacon* v. *Smith*, 3 Atk. 329; *Barham* v. *Earl of Clarendon*, 10 Ha. 126.

(*p*) *Sowden* v. *S.*, 3 P. W. 228; reported in a note of Mr. Cox; *S. C.*, 1 Bro. Ch. 582; 1 Cox, 165. See also *Trench* v. *Harrison*, 17 Si. 111.

(*q*) *Horlock* v. *Smith*, 17 B. 572. And see *Wills* v. *Gresham*, 2 Drew. 258, 271, affirmed 3 Eq. R. 116; *Robinson* v. *Sykes*, 2 Jur. (N.S.) 895; *Mathias* v. *M.*, 3 Sm. & G. 552; 3 Jur. (N.S.) 429.

(*r*) See *Tubbs* v. *Broadwood*, 2 Russ. & M. 487.

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Where a person upon his marriage covenanted with trustees to settle an estate upon his wife, but he failed to do so, and subsequently exchanged the estate for another, and the sum of £1,050, it was held that the estate taken in exchange, and the sum of £1,050, ought to be taken in substitution for the estate covenanted to be settled, and that the £1,050 was a specialty debt under the covenant (*s*).

And it is no objection to a purchase being considered as a part performance that it is optional to settle lands *or* a rent-charge, unless the intention to settle a rent-charge be shown (*t*).

If the covenantor has purchased lands and afterwards resold or mortgaged them, this will afford some evidence that he did not intend the purchase to be in satisfaction of the covenant (*u*); but where the covenantor purchased lands subject to an existing mortgage in his favour and subsequently assigned the mortgage, it was held that this was not a valid objection to the purchase being a part performance of the covenant, for as Lord Hardwicke observed, "it was only continuing, in effect, the same mortgage upon the estate, because he wanted to take up money to complete the purchase" (*x*).

But where the covenant points to a *future* purchase of lands, it cannot be presumed that lands, of which the covenantor was seised at the time of the covenant, were intended to be taken in performance of it (*y*).

Nor can it be presumed that property of a different nature from that covenanted to be purchased by the covenantor, was intended as a performance. Thus, leaseholds for lives or terms of years, although with a covenant to purchase the fee, or estates in reversion expectant upon lives, unless, perhaps, the lives fall in during the life of the covenantor, will not be taken in performance of a covenant to purchase fee simple lands in possession (*z*).

So, where a person covenanted to purchase and settle lands of inheritance on his wife for life, without *impeachment of waste*, with remainder to the issue of the marriage, and he afterwards

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(*s*) *Powdrell* v. *Jones*, 2 Sm. & Gif. 335.
(*t*) *Deacon* v. *Smith*, 3 Atk. 323.
(*u*) *Ibid.*, p. 327.
(*x*) *Ibid.*, p. 328.
(*y*) Cas. t. Talbot, 80. And see *Davys* v. *Howard*, 5 Bro. P. C. 552.
(*z*) *Lechmere* v. *Earl of Carlisle*, 3 P. W. 227; *Lechmere* v. *L.*, Cas. t. Talbot, 80, *ante*, p. 355; *Deacon* v. *Smith*, 3 Atk. 323; *Whorwood* v. *University College, Oxford*, 1 Ves. Sen. 540; *Lewis* v. *Hill*, 1 Ves. Sen. 274.

purchased the moiety of a house, Lord Hardwicke was clearly of opinion that the *moiety of the house was not* applicable in part satisfaction of the covenant, because it was not the kind of estate intended by the articles (*a*).

And under a covenant to purchase lands of inheritance, it has been held that copyhold estate was not applicable where the estates were to be settled for life, *without impeachment of waste*, because lands of that tenure could not be so settled (*b*); *secus*, if the settlement is not to be without impeachment for waste (*c*).

As a covenant is construed most strongly against the covenantor, a covenant by him to secure a jointure "out of estates he should thereafter acquire," will be a charge upon an estate which he had at that time already *contracted* to purchase (*d*).

A covenant to purchase lands is a mere specialty debt, and will not create a specific lien upon lands afterwards purchased, although the presumption may arise that they were purchased by the covenantor, intending them to go in performance of the covenant in his marriage articles, and will not affect a purchaser or mortgagee without notice (*e*). And other specialty creditors cannot complain that the presumption arises, that lands were purchased in performance of a covenant; for it is in the power of an owner of an estate to prefer one specialty creditor to another, for none of them have any specific lien on it (*f*).

Where a person who has purchased lands in satisfaction of the covenant has mortgaged them to a mortgagee who had no notice of the covenant, the equity of redemption will be liable to the covenant (*g*). From the judgment in this case it may be inferred that the mortgagee's title depended upon his being a purchaser *pro tanto* without notice.

Where the presumption arises that lands were bought with the intention of performing a covenant, in the absence of fraud, the price paid for them will be considered their value (*h*). And where

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(*a*) *Pinnell* v. *Hallett*, Amb. 106. (*b*) *Ibid.*

(*c*) *Wilkes* v. *W.*, 5 Vin. Abr. 293, fol. 39; but see *Whorwood* v. *University College, Oxford*, 1 Ves. Sen. 540.

(*d*) *Warde* v. *W.*, 16 B. 103.

(*e*) *Deacon* v. *Smith*, 3 Atk. 327; see *Countess of Mornington* v. *Keane*, 2 De G. & J. 292; 27 L. J. Ch. 7.

(*f*) *Deacon* v. *Smith*, 3 Atk. 327.

(*g*) *Ex p. Poole*, 11 Jur. 1005; De G. 581.

(*h*) See *Tyrconnel* v. *Duke of Ancaster*, Amb. 239, and note; *Pinnell* v. *Hallett*, Amb. 106; *Wace* v. *Bickerton*, 3 De G. & Sm. 751; *Horlock* v. *Smith*, 17 B. 572.

trustees, under an obligation to lay out money in land, have trust funds in their hands, any purchase by them will, more readily than in ordinary cases, be taken to have been made in fulfilment of their obligation (*i*).

In *Lewis* v. *Madocks* (*k*) a husband, upon his marriage, executed a bond by which he bound himself to assure all personal estate that he should during the joint lives of himself and his intended wife become possessed of, for the use of himself and his wife "and the survivor of them for ever," subject to a sum of £300 being paid to children of the marriage. Subsequently, the husband purchased real estate, partly with money borrowed, and he later paid off part of the money so borrowed. He died intestate, leaving his wife surviving, and leaving his brother his heir-at-law. It was held that the land was charged in favour of the wife, with the money of the deceased which he had employed towards the purchase of the land and with the sums he had paid off in respect of the money borrowed, and also with the money he had spent in lasting improvements.

By a promise made in consideration of marriage and evidenced by letter, the defendant in *Synge* v. *S.* (*l*) promised to leave by will to the plaintiff (his intended wife) a certain house and land for her life, and the marriage took place on the faith of such promise. After the marriage the defendant conveyed the property to third persons, who were treated by the Court as having taken without notice of the promise and for value. It was held by the Court of Appeal that the defendant having put it out of his power to perform his contract, the plaintiff had an immediate right of action for damages. It was further stated by Kay, L.J., delivering the judgment of the Court of Appeal: "A definite proposal in writing to leave property by will, made to induce a marriage, and accepted, and the marriage made on the faith of it, will be enforced in equity. Then, what is the remedy where the proposal relates to a defined piece of real property? We have no doubt of the power of the Court to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers" (*m*).

(*i*) *Mathias* v. *M.*, 3 Sm. & Gif. 552; 3 Jur. (N.S.) 429.
(*k*) 8 V. 150; 17 V. 48; *Denton* v. *Davies*, 18 V. 499.
(*l*) [1894] 1 Q. B. 466.
(*m*) *Ibid.*, pp. 470—471; and see *Central Trust, etc., Safe Co.* v. *Snider*, [1916] 1 A. C. 272.

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In *Central Trust and Safe Deposit Co.* v. *Snider* (*n*), the defendant, Mabel Carleton, and her uncle (the testator) being entitled in undivided shares to certain property in Toronto, the defendant conveyed her moiety to the testator, who undertook to pay to her half the rents during her life, and that after her death half the property should be conveyed to her heirs. The testator by his will bequeathed to his niece a legacy of 20,000 dollars. She claimed this legacy, and that the testator was a trustee for her of an undivided moiety of the Toronto property. It was held that the testator was not a trustee for the defendant; and Lord Parker, delivering the judgment of the Privy Council, observed (*o*) : " If, therefore, Mabel Carleton has any interests in the property, it can only be because an action would lie for specific performance of the testator's contract to settle the property in her favour. Their lordships will assume that the contract is one in its nature capable of specific performance as against volunteers under the testator's will—as indeed would appear from the case of *Synge* v. *S.* (*p*)—and that the defendant is seeking to have it performed." There being evidence, however, that the legacy was bequeathed to the defendant upon the footing that she would relinquish, or had relinquished, any claim to the Toronto property, the Court held that she could not claim specific performance of the agreement as well as the legacy, and a period of three months was fixed within which she was to make her election.

In connection with the above cases, it must be borne in mind that by the Land Charges Act, 1925, s. 10, it is provided that the classes of " charges on, or obligations affecting, land " therein specified may be registered as land charges. Class C (iii) includes " any other equitable charge which is not secured by a deposit of documents relating to the legal estate affected, and does not arise or affect an interest arising under a trust for sale or a settlement and is not included in any other class of land charge " (called in the Act a " general equitable charge "). Class C (iv) includes " any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him, to convey or create a legal estate " (in the Act referred to as an " estate contract "). Section 13, sub-section 2, provides (*inter alia*) that a land charge of Class C arising after the commencement of the

(*n*) [1916] 1 A. C. 266.
(*o*) [1916] 1 A. C. p. 272.
(*p*) [1894] 1 Q. B. 466.

Act is to be void as against a purchaser unless the charge is registered before completion of the purchase. But as regards an estate contract entered into after the commencement of the Act, this provision only applies in favour of a purchaser of a legal estate for money or money's worth.

3. Covenant to Leave a Sum of Money.

Upon a principle analogous to that upon which the former class of cases proceeds, it has long since been settled, upon the authority of *Blandy* v. *Widmore*, that if a person covenants to *leave*, or that his executor shall *pay*, to another a sum of money, or part of his personal estate, if *he dies intestate*, and such person becomes entitled under such intestacy to a portion of his personal property, of equal or greater amount, such distributive share will be a performance of the covenant (*q*).

If the distributive share, as for instance, in the case of a widow, be less than the sum which the husband covenants to leave, it will be taken to be a part performance (*r*); and the Court will not look upon the slight difference between *leaving* and *paying*; or whether payment is to be within three months or six months after the covenantor's death, as the year allowed to executors and administrators to retain property in their hands is for convenience merely, and does not prevent vesting; and if a case were produced in which it was quite clear that there were no debts, the Court would give the fund to the party; notwithstanding there had not been a lapse of twelve months (*s*).

The same principle has been held applicable where the covenant of a husband is to assure or bequeath a sum to trustees for his wife, or that his executors should pay her such sum, for the distributive share of the wife will be taken in performance of the covenant (*t*).

Exceptions.—There are three classes of cases which ought to be distinguished from those last considered :—

(1) Where the covenantor makes a will; for it seems that a gift *by will* on the part of the covenantor, either of a sum of money or

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(*q*) *Lee* v. *D'Aranda*, 1 Ves. Sen. 1; see also *Thacker* v. *Key*, 8 Eq. 408.

(*r*) *Garthshore* v. *Chalie*, 10 V. 14, 16.

(*s*) *Garthshore* v. *Chalie*, *supra*; *Lang* v. *L.*, 8 Si. 465. Cf. *Re Rattenberry*, [1906] 1 Ch. 667.

(*t*) *Lee* v. *D'Aranda*, 3 Atk. 419; *S. C.*, 1 Ves. Sen. 1; *Garthshore* v. *Chalie*, *supra*.

a residue, or part of a residue, will not, *per se*, be considered a performance of a covenant to leave a widow a certain sum; for a gift by will *prima facie* imports bounty, and admits a presumption of an intention in the testator to augment the provision under the covenant, and not to satisfy or perform it (*u*).

Where, however, although a testator makes a will it becomes inoperative, so that his widow takes a distributive share as on an intestacy, the principle of the decisions in cases of intestacy will be applicable (*x*).

(2) Where the covenant is not to pay a capital sum, but the interest of a sum of money for life, or a mere annuity, the distributive share upon an intestacy being a capital sum. Thus, in *Couch* v. *Stratton* (*y*), a covenant by a husband to pay the interest of a sum of money to his widow, for life, was held not to be satisfied by her distributive share under his intestacy (*z*). But since the alteration made by the Administration of Estates Act, 1925, s. 46, under which the widow, on her husband's intestacy, is entitled to a life interest in a half or the whole (according to whether there are or are not issue) of the residuary estate, her share and interest under the intestacy might be considered to satisfy a covenant to leave her the interest of a sum of money or a life annuity.

(3) Where the husband covenants to pay a sum in his *lifetime*, and there is a breach of covenant before his death, and a *debt* is due to his wife. She will not take her distributive share either wholly or partially in performance of the covenant. In *Oliver* v. *Brickland*, or *Oliver* v. *Brighouse* (*a*), the husband covenanted to pay a sum within two years after marriage, and if he died, his executors should pay it. He lived after the two years and died intestate, leaving a larger sum than what he covenanted to pay to devolve upon his widow, as her distributive share; but Jekyll, M.R., held that it was not to be taken in performance of the covenant (*b*).

And where a covenant is entire, although the provision for the wife be such that, if part of it, standing alone, might be considered

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(*u*) See *Haynes* v. *Mico*, 1 Bro. Ch. 129; *Devese* v. *Pontet*, 1 Cox, 188.

(*x*) *Goldsmid* v. *G.*, 1 Swans. 211.

(*y*) 4 V. 391; see *Salisbury* v. *S.*, *infra*.

(*z*) See also *Young* v. *Y.*, 5 Ir. R. Eq. 615; *Salisbury* v. *S.*, 6 Ha. 526; *Wood* v. *W.*, 7 B. 183.

(*a*) Cited 1 Ves. Sen. 1; 3 Atk. 420, 422.

(*b*) See *Garthshore* v. *Chalie*, 10 V. 12; cf. *Salisbury* v. *S.*, 6 Ha. p. 529; *Lang* v. *L.*, 8 Si. 451; *Corsbie* v. *Free*, Cr. & Ph. 64.

as performed by the distributive share of the husband's personalty devolving upon her on his intestacy, if another part of it could not be considered as so performed, the Court will not, since the covenant is entire, divide it by holding one part performed, and the other part not performed (*c*).

Policy of Assurance.—Where, by a marriage settlement, a settlor covenanted with trustees for the payment to them in his lifetime or within six months after his decease of a sum of £2,000 to be held in trust for the wife for life, and after her death for the settlor for life, and after the decease of the survivor for the children of the marriage and of a former marriage as the husband and wife shall jointly appoint, and in default of appointment for the children of both marriages, sons at twenty-one, and daughters at twenty-one or marriage, and the covenant remained unperformed in the settlor's lifetime, it was held not to be satisfied by the fact that the settlor took out two policies for £1,000 each under the provisions of section 10 of the Married Women's Property Act, 1870, expressed to be "for the benefit of his wife and children," the provisions of the settlement differing materially from the statutory provisions which under the Act affected the policy moneys (*d*).

(*c*) *Couch* v. *Stratton*, 4 V. 391.
(*d*) *Cartwright* v. *C.*, [1903] 2 Ch. 306.

SPECIFIC PERFORMANCE.

CUDDEE *v.* RUTTER.

1720. 5 Vin. Abr. 538, pl. 21 (*a*).

Specific Performance of Agreements relating to Personal Property.

A bill in equity will not lie for specific performance of an agreement to transfer South-Sea Stock.

Bill for a specific performance of an agreement to transfer stock.—Case was, the defendant agreed with the plaintiff to transfer to him £1,000 South-Sea Stock, upon November 20 then next following, at the rate of £140 per cent., and gave him a promissory note under his hand for so doing, and received two guineas of the plaintiff in part of the consideration-money; but the defendant, in drawing the note, had put in the usual words "or pay the difference," which the plaintiff struck out, and would not agree to, and then the defendant signed the note.

After the bargain was made, and before the time of delivering the stock, the South-Sea Stock rose considerably in value, and the defendant did not deliver the stock at the day, but a few days afterwards offered to pay the difference, and submits so to do by his answer; but the plaintiff insists to have the stock actually transferred to him, and refuses to take the difference, etc.

Sir Robert Raymond and Mr. Vernon, for the defendant, insisted that a contract for the sale of stock differs from other contracts for sale of a house, lands, etc., for in such things there may be a particular conveniency or benefit to the buyer in the

(*a*) *S. C. nom. Cud* v. *Rutter*, 1 P. W. 570; 2 Eq. Ca. Abr. 18, pl. 8; Pr. Ch. 534, cited, *nom. Scould* v. *Butter*; Reg. Lib. A. 1719, fol. 35; Reg. Lib. B. 1719, fol. 411.

individual house, etc.: but it is not so in stock, for one £1,000 is as good as another £1,000 stock, and is to be purchased daily in Exchange Alley: that the plaintiff has his remedy at law for the damages; *viz.*, the difference.

Sir Joseph Jekyll, M.R., said, that this is a fair and reasonable agreement, and he saw no reason why the Court should not in this case, as well as others, decree a specific performance of the contract, especially since it was insisted upon by the plaintiff, at the making of the agreement, that he should not be obliged to take the difference, but would have the stock actually delivered to him; and it is more for the advantage of the buyer to have the stock than the difference, and saves him the trouble of buying it of another, and paying brokerage: and decreed that the defendant do transfer the stock, and pay the dividends since November 20, plaintiff to pay interest of the money to that time, and ordered costs to the plaintiff.

On an appeal from this decree, Parker, C. (*b*), upon opening the cause, asked if the plaintiff was at the South-Sea House upon the day appointed for transferring the stock, to demand it and tender the money, and seemed strongly against the plaintiff; and urged the law in case of a bargain for corn to be delivered upon a day certain at such a market, at such a price, and the corn is not delivered according to the contract, the buyer shall not by a bill in equity compel the seller to a specific performance of this agreement, but the buyer is left to his remedy at law, for breach of the agreement, to recover damages, *id est*, the difference between the price agreed on by the parties, and the price of corn upon the market-day.

It was said (*c*), that it was the common justice of this Court to compel the party to a specific performance of his agreement, if the same was just and reasonable, and fairly obtained: that this was a just, reasonable, and fair agreement in all the circumstances; it was the current price of the stock at that time, and no imposition upon the defendant; that the subsequent rise

(*b*) Afterwards Earl of Macclesfield.
(*c*) In argument for the plaintiff.

could not alter the case, for it was an equal hazard that it might fall, and the parties in such contracts executory must take their chance. They compared it to the case of a contract for so many bales of silk, or any other merchandise, to be delivered at a future day, at a certain price: if the value of the silk, or other goods, doth rise before the day, that is no excuse for non-performance of the contract. So, in the case of a contract for lands, if lands rise in value, yet the party ought to execute his agreement.

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It was said, for the defendant, that the rule laid down was too general for compelling the execution of agreements between the parties: that this Court would not compel the party to perform a hard agreement, though it was fair at the time it was made, but leave the other party to his remedy at law * * * that the plaintiff knew that the defendant had no stock when he made the bargain with him, and therefore could not expect to have the stock delivered to him, but to have the difference if the stock should happen to rise before the time, and he had no more intention to take the stock than the other had to deliver it, and this appears by his non-attendance at the South-Sea House upon the day to accept and pay for the stock. They cited the case of *The Marquess of Normanby* v. *Lord Berkly*, temp. Lord Somers, C., who said, in that case, that the Court would not carry agreements into execution unless the contract was reasonable and fair in every particular, because they cannot mitigate damages upon the circumstances of the case, as a jury may do, but must decree the whole contract to be performed.

It was replied that the plaintiff, some days before the stock was to be delivered, told the defendant that he expected to have the stock delivered to him, but the defendant said that he had not the stock, and therefore could not deliver it; and afterwards the defendant kept out of the way for some days, and the plaintiff could not find him, and that was the reason he did not attend at the South-Sea House to accept the stock; that, this being occasioned by the defendant's own unfair dealing, the plaintiff ought not to suffer by it; and upon that account the

plaintiff ought to be relieved in equity, because he is remediless at law for want of a legal demand and tender upon the day.

Parker, C.—There is no reason to bring this bill for a specific performance of this agreement, because there is no difference between this £1,000 South-Sea Stock and another £1,000 stock, which the plaintiff might have bought of any other person upon the very day; and the plaintiff does not suffer at all by the non-performance of the agreement specifically, if the defendant pays him the difference.

These sorts of contracts are commonly understood to mean no more than to transfer the stock or pay the difference, and this fully answers the intention of the parties; and the party has thereby the entire benefit of his contract as fully as if the stock were actually delivered, for he may buy of any other person, and be no more money out of pocket than if the stock were delivered to him according to the agreement. This differs very much from the case of a contract for lands, some lands being more valuable than others, at least, more convenient than others, to the purchaser; but there is no difference in stock, one man's stock is of equal benefit and conveniency as another's.

Secondly, it appears that the defendant had not the stock when the contract was made, and this Court will not decree a specific performance of a contract when the party has not the thing to deliver. Suppose a contract for the sale of land, and the party has not the land at the time he contracted for the sale of it, this Court would not decree a specific performance of the agreement. If there be a contract for the sale of malt, or any other commodity, and the seller has not the malt or other things agreed to be delivered, this Court would not compel the party to perform his agreement, but leave the buyer to recover his damages at law for non-performance of the agreement.

Thirdly, in contracts for stock, being subject to sudden rise and fall, the day is the most material part of the contract, and therefore not proper for a Court of equity to carry into execution. The decree might be beneficial to the plaintiff one day, and to his prejudice the next. I shall always discourage bills of this

kind; but since the defendant did shuffle with the plaintiff, and not offer to pay him the difference till two months after the day, I will not dismiss the bill, but let the Master inquire what the difference was at the day, and the defendant pay it to the plaintiff, with interest, but no costs.

(Decree reversed *per* Parker, C. MS. Rep. Trin. 6 Geo. 1: *Cuddee* v. *Rutter*.)

NOTES.

1. Generally.
2. Contracts relating to real property, p. 373.
3. Contracts relating to personal property, p. 375.
4. Contracts relating to personal acts, p. 386.
5. Specific performance compelled by injunction, p. 396.
6. Specific performance and damages under Lord Cairns' Act and the Judicature Act, 1925, p. 399.

1. Generally.

The question of what contracts the Court will decree specific performance may be considered conveniently under the following heads :—(1) When the contract relates to property, whether real or personal; (2) When the contract relates to personal acts; (3) Specific performance when compelled by injunction; and (4) The extension of the jurisdiction of equity in matters of specific performance by the Legislature conferring power to award damages.

The original and sole foundation of the jurisdiction to decree specific performance of contracts is that an award of damages will not give a party the compensation to which he is entitled (*d*). The remedy is discretionary, but of the circumstances calling for the exercise of this discretion the Court judges by settled rules; hence the discretion is said not to be arbitrary or capricious, but judicial (*e*). "If the defendant can show any circumstances *dehors*, independent of the writing, making it inequitable to interpose for the purpose of specific performance, a Court of equity, having satisfactory information on that subject, will not interpose" (*f*).

(*d*) *Harnett* v. *Yielding*, 2 Sch. & L. 552.
(*e*) Fry, Spec. Perf. (6th ed.), p. 19.
(*f*) *Per* Plumer, V.-C., *Clowes* v. *Higginson*, 1 V. & B. 527.

Thus, in the case of a contract for the sale of land under which there were minerals, the purchase price to consist of shares in a syndicate to be formed for the purpose of "developing" the property, the Court refused to make an order for specific performance (*g*).

As the remedy of specific performance is enforceable *in personam*, it cannot be invoked against a person over whom the tribunals of this country have no jurisdiction, *e.g.*, against a foreign government (*h*). But the Court will make the decree against a defendant within the jurisdiction though the subject-matter with which the contract deals is not within the jurisdiction of the Court, even though the foreign law might give no such remedy (*i*).

A Court of equity will not decree specific performance of a contract, even under seal, unless it be founded upon valuable consideration (*k*), and unless, as a general rule, the contract be mutual, *i.e.*, capable of being enforced at the suit of either party (*l*).

2. Contracts relating to Real Property.

Where a contract in writing respecting *real property*, and conforming to the statutory requirements (*m*), is entered into between competent parties, and is, moreover, in its nature and circumstances, unobjectionable, it is as much of course to decree a specific performance as it is to give damages for the breach of such a contract (*n*).

Even when an agreement for a lease is extremely short, it will be specifically enforced (*o*), but a decree which would be inoperative will not be granted; *e.g.*, where the defendant could at once

(*g*) *Douglas* v. *Baynes*, [1908] A. C. 477; cf. *Macphail* v. *Torrance*, 25 T. L. R. 810.

(*h*) *Smith* v. *Weguelin*, 8 Eq. 198.

(*i*) *Penn* v. *Baltimore*, vol. 1; *Foubert* v. *Turst*, 1 Bro. P. C. 129; *Toller* v. *Carteret*, 2 Vern. 494; *Hart* v. *Herwig*, L. R. 8 Ch. 860; and cf. *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *Deschamps* v. *Miller*, [1908] 1 Ch. 856.

(*k*) *Groves* v. *G.*, 3 Y. & J. 163; *Jefferys* v. *J.*, Cr. & Ph. 138; *Houghton* v. *Lees*, 1 Jur. (N.S.) 862; *Cheale* v. *Kenward*, 3 De G. & J. 27; *Re Ellenborough*, [1903] 1 Ch. 697, and see note to *Ellison* v. *E.*, *post*.

(*l*) Fry (6th ed.), pp. 219 and 223; and see *Douglas* v. *Baines*, [1908] A. C., pp. 485—6.

(*m*) Section 40 of the L. P. Act, 1925, taking the place of section 4 of the Statute of Frauds.

(*n*) *Hall* v. *Warren*, 9 V. 608.

(*o*) *Lever* v. *Koffler*, [1901] 1 Ch. 543. But see *Enderby* v. *Clark*, 34 T. L. R. 351; *Deverell* v. *Milne*, 34 T. L. R. 576.

put an end to the lease he agreed to grant because of breach of covenant (*p*), or the intended term has expired before the hearing (*q*). The ordinary rescission clause in a contract of sale which enables the vendor to rescind on the purchaser making any objection or requisition which the vendor is unwilling or unable to comply with, does not enable him to rescind when he has no title at all, and consequently the Court may still decree specific performance against him (*r*).

Quasi-contracts.—A Court of equity will entertain suits for specific performance in certain cases of quasi-contracts, *viz.*, after notice to treat has been given by railway or other companies in the exercise of their compulsory powers under the Lands Clauses Consolidation Act, 1845, and the price of the land has been fixed, no matter in what way. In such cases a railway company is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a Court of equity to complete the purchase (*s*).

But a mere notice to treat is not sufficient to give the Court jurisdiction to interfere by way of decreeing specific performance (*t*), nor a mere notice of intention to apply for the appointment of a surveyor after notice to treat (*u*). Then if the company refuse to proceed, the landowner's remedy is to apply for a mandamus to compel the company to put in force its powers under the Act of 1845 (*x*).

Where a railway company has given notice to treat for leaseholds, has paid the purchase-money, and has, with the consent of the lessee, been admitted into possession, it will, at the suit of the lessee within a reasonable time, be compelled to accept an assignment containing the usual covenants (*y*).

(*p*) *Rankin* v. *Lay*, 2 De G. F. & J. 65.

(*q*) See *Moore* v. *Marrable*, L. R. 1 Ch. 217; *Turnor* v. *Clowes*, 17 W. R. 274; *Lavery* v. *Pursell*, 39 Ch. D. 508.

(*r*) *Re Deighton & Harris*, [1898] 1 Ch. 458.

(*s*) *Inge* v. *Birmingham, etc., Ry. Co.*, 1 Sm. & Gif. 347; *Haynes* v. *H.*, 1 Dr. & Sm. p. 457; *Harding* v. *Met. Ry.*, L. R. 7 Ch. p. 158; *Watts* v. *W.*, 17 Eq. p. 221; *Mercer* v. *Liverpool Ry. Co.*, [1903] 1 K. B. 652; *Re Cary Elwes' Contract*, [1906] 2 Ch. 143; Fry, Spec. Perf. (6th ed.), p. 63.

(*t*) *Haynes* v. *H.*, 1 Dr. & Sm. 426; but see *Marson* v. *L. C. & D. Ry. Co.*, 7 Eq. 546.

(*u*) *Grierson* v. *Cheshire Lines Committee*, 19 Eq. 83.

(*x*) *Adams* v. *London & Blackwall Ry. Co.*, 2 Mac. & G. 118; *Lind* v. *Isle of Wight Ferry Co.*, 7 L. T. 416; *R.* v. *Birmingham, etc., Ry. Co.*, 15 Q. B. 634; *Tiverton & N. Devon Ry. Co.* v. *Loosemore*, 9 A. C. 491.

(*y*) *Ibid.* See also *Harding* v. *Met. Ry. Co.*, L. R. 7 Ch. 154.

Cuddee v. Rutter.

When a railway company has given notice to treat for a *portion* of a piece of land to the owner, who, thereupon, has given notice to the company to take *the whole*, and sues for a declaration in accordance with his notice, if such declaration is made (and upon enquiry the title is found to be good), the Court has made an order compelling the company to take the necessary steps for ascertaining the value of the whole, for payment of the value so ascertained, and for the execution of a conveyance to the company (*z*).

3. Contracts relating to Personal Property.

As a general rule, specific performance of agreements relating to personalty will not be decreed, the reason being that in such cases damages will be an adequate compensation. The Lord Chancellor, in the principal case, observed that a contract relating to personal estate differed much from " a contract for lands, some lands being more valuable than others—at least, more convenient than others —to the purchaser; but there is no difference in stock—one man's stock is of equal benefit and conveniency as another's " (*a*).

The question, therefore, in cases where specific performance of an agreement relating to personalty is claimed, is, will damages be an adequate compensation for breach of the agreement? If it will not, specific performance of the agreement (even independently of the express power given by the Sale of Goods Act, 1893, s. 52), will be enforced.

Specific performance of a contract to deliver coals, not of a specific kind, would not be decreed, and where the case is not one entitling the plaintiff to specific performance, the Court will not grant an injunction (*b*), unless the contract contains an express or implied negative stipulation (*c*).

In *Taylor* v. *Neville* (*d*), specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years, and by instalments; and the reason

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(*z*) *Marson* v. *L. C. & D. Ry. Co.*, 7 Eq. 546 (the question of jurisdiction was not argued); see the remarks thereon in *Grierson* v. *Cheshire Lines Committee*, 19 Eq. 89.

(*a*) See *Adderley* v. *Dixon*, 1 S. & S. p. 610; *Buxton* v. *Lister*, 3 Atk. 384.

(*b*) *Fothergill* v. *Rowland*, 17 Eq. 132, 137; *Re Wait*, [1927] 1 Ch. 606, 620; Kerr on Injunctions (6th ed.), p. 462.

(*c*) *Donnell* v. *Bennett*, 22 Ch. D. 835. Cf. *Davis* v. *Foreman*, [1894] 3 Ch. 654; *Kirchner* v. *Gruban*, [1909] 1 Ch. 413; *Mortimer* v. *Beckett*, [1920] 1 Ch. 571.

(*d*) 3 Atk. 384, cited; and see *Jones* v. *Earl Tankerville*, [1909] 2 Ch. 440.

given by Lord Hardwicke is, "that such sort of contracts differ from those that are immediately to be executed"; and they do differ in this respect, that the profit upon the contract being to depend upon future events, cannot be correctly estimated in damages, where the calculation must proceed on conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract is to compel him to sell the actual profit which may arise from it at a conjectural price. This case was doubted, however, in *Pollard* v. *Clayton* (*e*).

In *Ball* v. *Coggs* (*f*), specific performance was decreed, in the House of Lords, of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundredweight of brass wire manufactured by him during his life as manager of defendants' works.

Lord Hardwicke, in *Buxton* v. *Lister* (*g*), put the case of a ship-carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity, and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land; and assumes that, as in both those cases damages would not, by reason of the special circumstances, be a complete remedy, specific performance would be decreed (*h*).

Again in the case of *Thorn* v. *The Commissioners of Public Works* (*i*), specific performance of a contract to purchase the arch stone, spandrill stone, and the Bramley Fall stone contained in the old Westminster Bridge was decreed. And for the same reason, a contract for the purchase of articles of unusual beauty, rarity, and distinction, such as objects of virtu, will be enforced (*k*).

The jurisdiction of the Court to decree specific performance of contracts relating to chattels does not rest upon a very satisfactory foundation. The question ought not to be whether a chattel contracted to be sold is of an extraordinary character or not, but solely whether the subject-matter of the contract is a specific chattel; if it be, it is submitted that the purchaser ought to have

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(*e*) 1 K. & J. p. 474; see also *Nives* v. *N.*, 15 Ch. D. 649; *Dominion Coal Co.* v. *Dominion Steel & Iron Co.*, [1909] A. C. 293.

(*f*) 1 Bro. P. C. 140.

(*g*) 3 Atk. 385.

(*h*) And see *Adderley* v. *Dixon*, 1 S. & S. 610, 611; *Jones* v. *Earl Tankerville*, [1909] 2 Ch. 440.

(*i*) 32 B. 490; Fry (6th ed.), p. 37.

(*k*) *Per* Kindersley, V.-C., in *Falcke* v. *Gray*, 4 Drew. 658; Fry, p. 36. See also *Pusey* v. *P.*, *post*; and *Duke of Somerset* v. *Cookson*, *post*.

the right to decide whether he will have the chattel, or damages in lieu thereof. As Lord Westbury said, "A contract for the sale of goods, as, for example, of 500 chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell 500 chests of tea which are now in my warehouse in Gloucester is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person" (*l*).

The Court, moreover, has enforced specific performance by a purchaser of a contract to purchase debts (*m*). So, likewise, the specific performance of a contract to sell or purchase an annuity will be enforced (*n*).

And the Court will, at the suit of a vendor, enforce specific performance of a contract to purchase a life annuity, by compelling payment of the purchase-money, even after the death of the annuitant: at any rate, where there are arrears of the annuity due. The Court "entertains a suit for specific performance by a purchaser, in order to give him the very subject of his contract. And, although the demand of a vendor be merely for a sum of money, it will entertain a similar suit for him on the principle that remedies should be mutual" (*o*).

The Court will specifically enforce a contract for the sale of a patent in a suit by a purchaser against the vendor, and, upon the principle of mutuality, the vendor also may come into equity for the purchase-money (*p*).

In contracts relating to commodities, the market price of which fluctuates from day to day, the Court expects persons to be unusually vigilant and active in asserting their right to specific performance, which it is inequitable to grant after a delay on the part of the plaintiff, when the parties may be no longer in the same position (*q*).

(*l*) *Holroyd* v. *Marshall*, 10 H. L. Cas. pp. 209, 210; but see *Re Wait*, [1927] 1 Ch. 606, 634, 648; *Hoare* v. *Dresser*, 7 H. L. Cas. 317, 318.

(*m*) *Adderley* v. *Dixon*, 1 S. & S. 607; *Wright* v. *Bell*, 5 Price, 325; Dan. Ex. Rep. 95.

(*n*) *Withy* v. *Cottle*, 1 S. & S. 174; and see *Clifford* v. *Turrell*, 1 Y. & C. Ch. 138.

(*o*) *Per* Leach, V.-C., in *Kenney* v. *Wexham*, 6 Mad. 355, 357.

(*p*) *Cogent* v. *Gibson*, 33 B. 557.

(*q*) *Pollard* v. *Clayton*, 1 K. & J. 462.

Cuddee v. Rutter.

It has been decided that a Court of equity will neither decree specific performance of a contract to lend (*r*), nor of a contract to borrow (*s*), or to pay (*t*) money, or to leave property by will entered into by a donee of a mere testamentary power of appointment (*u*). But the covenant of the donee of a testamentary power not to exercise the power in such a way that one of the persons entitled in default of appointment will receive less than a certain sum is effectual and will be enforced (*x*). And the Court will always decree specific performance of an agreement to execute a mortgage in consideration of money advanced at or before the time of the contract (*y*), or a parol agreement to execute a bill of sale of chattels to secure the plaintiff against certain liabilities (*z*). And under the Companies (Consolidation) Act, 1908, a contract with a company to take and pay for any debentures of the company may be enforced by an order for specific performance (*a*).

Stocks and Shares.—The principal case shows that ordinarily specific performance of a contract for the delivery of Government stock will not be decreed. In that case the Earl of Macclesfield refused to decree specific performance of a contract for the transfer of South-Sea Stock—his reasons being, first, that one man's stock did not differ from another man's stock; secondly, that the defendant had not the stock when the contract was made; and thirdly, that stock being subject to sudden rise and fall, the day was of the essence of the contract. It will be observed that, although Lord Macclesfield refused specific performance, he ordered the defendant to pay the difference between the price agreed upon and the value of the stock on the day fixed upon for its delivery. Except in a somewhat doubtful case of Lord Hardwicke, alluded to by Lord Eldon (*b*), the Courts have since, as a general rule, declined to enforce specific performance of an agreement for the purchase of

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(*r*) *Thorpe* v. *Hosford*, 20 W. R. 922; *Larios* v. *Gurety*, L. R. 5 P. C. 346; *Western Wagon Co.* v. *West*, [1892] 1 Ch. 271; and see *Firth* v. *Slingsby*, 58 L. T. 481.

(*s*) *Rogers* v. *Challis*, 27 B. 175.

(*t*) *Crampton* v. *The Varna Ry. Co.*, L. R. 7 Ch. 562; and see *Larios* v. *Gurety*, *supra*; *Brough* v. *Oddy*, 1 R. & M. 55.

(*u*) *Re Parkin*, [1892] 3 Ch. 510; and see *Macphail* v. *Torrance*, 25 T. L. R. 810.

(*x*) *Re Evered*, [1910] 2 Ch. 147; *Re Cooke*, [1922] 1 Ch. 292.

(*y*) *Ashton* v. *Corrigan*, 13 Eq. 76; *Hermann* v. *Hodges*, 16 Eq. 18.

(*z*) *Taylor* v. *Eckersley*, 2 Ch. D. 302.

(*a*) Section 105, a statutory reversal of *South African, etc., Ltd.* v. *Wallington*, [1898] A. C. 309.

(*b*) 10 V. p. 161; Fry (6th ed.), p. 34

Government stock; but they did not follow Lord Macclesfield in ordering the payment of the difference (*c*).

It has been held, however, that a bill would lie for the specific performance of a contract for the purchase of Neapolitan stock, where it prays, not for the transfer of stock, but for the *delivery of the certificates*, which give the legal title to the stock (*d*). And a purchaser of a life annuity payable out of dividends of stock was held entitled to specific performance (*e*), though it has been refused (partly on the ground of misrepresentation) in the case of a contract to sell a life interest in the public funds (*f*).

Contracts for the purchase of shares in companies, as distinguished from the public funds, will as a general rule be enforced. Thus in *Duncuft* v. *Albrecht* (*g*), specific performance of a parol agreement for the sale of railway shares was decreed. "There is not any sort of analogy," said Shadwell, V.-C., "between a quantity of £3 per cents. or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market) and a certain number of railway shares of a particular description, . . . which are not always to be had in the market" (*h*). On principle, however, so far as concerns the question of granting or refusing specific performance, there would seem to be no reason for treating a contract for the sale of stock or shares in a public company, where the same are dealt with freely on the market, differently from a contract for the sale of stock in Government funds (*i*).

Specific performance of a contract to purchase shares, at the instance of the vendor, is effected by ordering the purchaser to execute and register a proper deed of transfer (*k*), and to indemnify the vendor against future calls (*l*). A company can, in a similar

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(*c*) See *Cappur* v. *Harris*, Bunb. 135; *Buxton* v. *Lister*, 3 Atk. 384; *Nutbrown* v. *Thornton*, 10 V. 161, but see now the Judicature Act, 1925, s. 43, replacing section 24, sub-section 7 of the Act of 1873.

(*d*) *Doloret* v. *Rothschild*, 1 S. & S. 590, 598.

(*e*) *Withy* v. *Cottle*, 1 S. & S. 174.

(*f*) *Brealey* v. *Collins*, You. 317, 330.

(*g*) 12 Si. 189; affirmed on July 23, 1841, by the Lord Chancellor.

(*h*) 12 Si., p. 199; and see *Jackson* v. *Cocker*, 4 B. 59; *Shaw* v. *Fisher*, 2 De G. & Sm. 11; 5 De G. M. & G. 596; *Wilson* v. *Keating*, 7 W. R. 484; *Cheale* v. *Kenward*, 3 De G. & J. 27, 30.

(*i*) See the judgment of Parker, J., in *Re Schwabacher*, 98 L. T., at p. 128; see also Fry (6th ed.), p. 35.

(*k*) *Shaw* v. *Fisher*, 5 De G. M. & G. 596.

(*l*) *Wynne* v. *Price*, 3 De G. & Sm. 310. The right to indemnity exists at law as well as in equity: *Walker* v. *Bartlett*, 18 C. B. 845.

manner, secure specific performance of a contract by an individual to take shares allotted to him (*m*); but the company must act promptly (*n*). In one case specific performance was refused on the ground that the company could at once put an end to the membership (*o*).

A purchaser of shares is also entitled to take all proceedings against the vendor which are necessary to procure himself to be registered as holder of those shares (*p*). Until registration of a proper transfer, the vendor holds the shares for the purchaser as an absolute *cestui que trust* (*q*).

The obligations of the parties to a contract to purchase shares vary according to whether the contract was made on the Stock Exchange or elsewhere.

(1) Stock Exchange. At law, the distinction between a jobber and a broker does not exist (*r*).

The vendor is bound, upon receiving the consideration money, to execute a proper transfer of the shares to the purchaser or his nominee, and hand the transfer and his certificate to the transferee (*s*). He thereupon, until registration, is in the position of a trustee for the transferee and is entitled to be indemnified by him from all liability in respect of the shares (*t*).

Unless he expressly contracts to do so, he does not undertake to procure the registration of the transferee. That duty lies on the transferee himself. Consequently, if the company, in the exercise of its powers, refuses to register the transfer the purchaser or transferee has no remedy against the vendor (*u*), who can himself obtain specific performance. But the transferor must not do anything to obstruct the registration of the transferee as owner (*x*).

The purchaser contracts either to take the shares himself, or on

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(*m*) *New Brunswick, etc. Co.* v. *Muggeridge*, 4 Drew. 686.

(*n*) *Oriental, etc. Steam Co.* v. *Briggs*, 2 John. & H. 625; *Odessa Tram Co.* v. *Mendel*, 8 Ch. D. 235.

(*o*) *Sheffield Gas, etc. Co.* v. *Harrison*, 17 B. 294; but see *New Brunswick, etc. Co.* v. *Muggeridge*, 4 Dr. 686, 701.

(*p*) *Re London, Hamburg, etc. Bank*, L. R. 2 Ch. 431.

(*q*) *Loring* v. *Davis*, 32 Ch. D. 625; cf. *Hardoon* v. *Belilios*, [1901] A. C. 118.

(*r*) *Maxted* v. *Paine*, L. R. 6 Ex., at p. 170.

(*s*) *Stray* v. *Russell*, 1 E. & E. 888.

(*t*) *Paine* v. *Hutchinson*, 3 Eq. 257; *Castellan* v. *Hobson*, 10 Eq. 47; *Spencer* v. *Ashworth, Partington & Co.*, [1925] 1 K. B. 589.

(*u*) *Stray* v. *Russell*, 1 E. & E. 888; *Remfry* v. *Butler*, E. B. & E. 887; *Skinner* v. *City of London, etc. Co.*, 14 Q. B. D. 882; *London Founders, etc. Co.* v. *Clarke*, 20 Q. B. D. 576; *Hooper* v. *Herts*, [1906] 1 Ch. 549, 558.

(*x*) *Hooper* v. *Herts*, *supra*.

a day fixed (called the name day), to give the name of one or more persons to whom the shares are to be transferred. When the vendor executes a transfer to the nominee he recognises him as purchaser of the shares, and accordingly a new contract arises and the original purchaser is released (*y*).

The nominee must be a person who has capacity to contract (*z*), (for example, not an infant or lunatic so found) who has authorised the giving of his name to the vendor (*a*); and to whom no reasonable objection can be made (*b*). He need not be a sub-purchaser, and, if no objection is taken within the proper time, he may be a mere man of straw (*c*). The Rules of the Stock Exchange determine the time during which objection can be made to any nominee (*d*).

If the nominee by his conduct induces the vendor to believe that he has adopted the contract he can be compelled to perform the contract (*e*).

There has been a certain amount of judicial controversy as to the time when the original purchaser is released. One view is that the new contract only arises when the nominee has accepted the transfer and the consideration money has been paid (*f*). The other view is that the new contract arises on the vendor notifying that he accepts the nominee (*g*). But, as in practice the only mode of notifying such acceptance is the delivery of the executed transfer and certificate against the money, the point is of very little importance (*h*).

Where, however, the sale of shares is with registration guaranteed, the liability of the original purchaser remains until actual registration of the transferee as holder (*i*).

(2) Not on the Stock Exchange. The respective obligations of a vendor and purchaser are governed by the general law and any

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(*y*) *Coles* v. *Bristowe*, L. R. 4 Ch. 3; *Grissell* v. *Bristowe*, L. R. 4 C. P. 36; *Merry* v. *Nickalls*, L. R. 7 H. L. 530; Fry (6th ed.), p. 79.

(*z*) *Merry* v. *Nickalls*, L. R. 7 H. L. 530.

(*a*) *Maxted* v. *Paine*, L. R. 4 Ex. 81.

(*b*) *Allen* v. *Graves*, L. R. 5 Q. B. 478.

(*c*) *Maxted* v. *Paine*, L. R. 6 Ex. 132.

(*d*) See Fry (6th ed.), p. 685.

(*e*) *Shepherd* v. *Gillespie*, 5 Eq. 293; *Shaw* v. *Fisher*, 5 De G. M. & G. 596; *Re Towns' Drainage, etc. Co., Morton's Case*, 16 Eq. 104; Fry, p. 688.

(*f*) See *per* Cockburn, C.J., in *Grissell* v. *Bristowe*, L. R. 4 C. P., p. 51, and *per* James, L.J., in *Merry* v. *Nickalls*, L. R. 7 Ch., p. 751.

(*g*) *Davis* v. *Haycock*, L. R. 4 Ex., p. 384; *Bowring* v. *Shepherd*, L. R. 6 Q. B., p. 328.

(*h*) See also *Torrington* v. *Lowe*, L. R. 4 C. P. 26; *Castellan* v. *Hobson*, 10 Eq. 47.

(*i*) *Cruse* v. *Paine*, L. R. 4 Ch. 441; *Grissell* v. *Bristowe*, L. R. 4 C. P. 36; *Davis* v. *Haycock*, L. R. 4 Ex. 373; Fry (6th ed.), pp. 687-8.

special terms the parties may have agreed upon. The vendor must deliver a duly executed instrument of transfer with the certificate against the price. It is doubtful whether he is bound to take any steps to procure registration of the transferee as holder. If the contract is made with reference to the company's articles of association, which require the vendor of shares to procure the registration of the transferee, and the company, acting under its powers, refuses such registration, then the purchaser has a good defence to an action for specific performance, and if he has paid the consideration money in ignorance of the refusal he can recover it (*k*).

Where, however, the articles do not cast on the vendor the duty of registration, the better opinion appears to be that the vendor is under no duty to procure registration, and, consequently, the refusal to register is no defence to an action by the vendor for specific performance (*l*).

The fact that the vendor is only equitably entitled to shares registered in the name of a third person is no defence to an action for specific performance (*m*), nor, it seems, is the fact that a call has been made on shares which are not fully paid (*n*).

But it would seem that where a petition for the winding up of the company has been presented before the contract for sale has been made, specific performance will not be decreed, if an order for winding up is made (*o*). But the fact of a petition being presented after the making of the contract does not affect the rights of the parties (*p*).

As the discretion of the directors of a company to forfeit shares for non-payment of calls is a trust to be exercised for the benefit of all the shareholders, an agreement with a shareholder to relieve him from all liability on his consenting to absolute forfeiture will not be

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(*k*) *Wilkinson* v. *Lloyd*, 7 Q. B. 27; cf. *Stray* v. *Russell*, 1 E. & E., p. 900; *Poole* v. *Middleton*, 29 B. 646.

(*l*) See *Bermingham* v. *Sheridan*, 33 B. 660; *Robinson* v. *Chartered Bank*, 1 Eq. 32; *Re Gresham Life, etc. Co.*, L. R. 8 Ch. 446; *Hawkins* v. *Maltby*, L. R. 3 Ch., p. 194; *Skinner* v. *City of London, etc. Co.*, 14 Q. B. D. 882; *Re Coalport, etc. Co.*, [1895] 2 Ch. 404; *Casey* v. *Bentley* (1902), 1 Ir. R. 376; *Sheppard* v. *Murphy*, 2 Ir. R. Eq. 544.

(*m*) *Paine* v. *Hutchinson*, L. R. 3 Ch. 388; *Loring* v. *Davis*, 32 Ch. D. 625.

(*n*) *Hawkins* v. *Maltby*, L. R. 3 Ch. 188; L. R. 4 Ch. 200; Fry (6th ed.), p. 689; cf. *Kuala, etc. Estate* v. *Mowbray*, 111 L. T. 1072.

(*o*) *Emmerson's Case*, L. R. 1 Ch. 433.

(*p*) *Cruse* v. *Paine*, 6 Eq. 641; *Chapman* v. *Shepherd*, L. R. 2 C. P. 228; *Hodgkinson* v. *Kelly*, 6 Eq. 496; *Evans* v. *Wood*, 5 Eq. 9; *Holmes* v. *Symons*, 13 Eq. 66.

specifically enforced, if it be shown that the discretion was not properly exercised (*q*).

All contracts, for the sale of shares in joint stock banking companies, made after July 1, 1867, are void, unless the distinguishing numbers of such shares are set out in the contracts (*r*); but an error as to such numbers in the transfer of such shares is immaterial, as it can be rectified afterwards (*s*).

The Court has power to rectify the register of shareholders of a company, on motion or summons, and in doing so may order the company to pay any damage which may have been sustained by the register being inaccurate (*t*). The Court may order rectification whether the question arises between the company and members or alleged members, or between persons who claim to be members.

The Court's jurisdiction to act on motion or summons is discretionary, and will not be exercised in a case of difficulty or complication; in such a case the parties will be left to bring an action for that purpose (*u*). When the only question between persons who claim to be members is one of conflicting equities, and the company itself is not in default, it is doubtful whether the Court has jurisdiction under the section (*x*).

The Court cannot interfere when the articles of association have not been complied with (*y*); nor will the Court overrule the discretion of the directors, where the articles have given them a discretion (*z*). But if the facts establish a clear legal right in one of the parties then the Court will exercise its jurisdiction (*a*).

Ships.—All British ships and shares in them must be British owned, and the owners must be registered (*b*). The transfer, transmission, and mortgage of such ships or shares can only be effected

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(*q*) *Harris* v. *N. Devon Ry. Co.*, 20 B. 384.

(*r*) 30 & 31 Vict. c. 29, s. 1.

(*s*) *Re International Contract Co., Ind's Case*, L. R. 7 Ch. 485; *Perry* v. *Barnett*, 14 Q. B. D. 467.

(*t*) Companies (Consolidation) Act, 1908, s. 32; replacing section 35 of the Companies Act, 1862.

(*u*) *Stewart's Case*, L. R. 1 Ch., pp. 585, 586; *Ex p. Watkins*, 14 L. T. 696; *Re London, Hamburg, etc. Bank, Ward and Henry's Case*, L. R. 2 Ch. 431; *Bellerby* v. *Rowland*, [1902] 2 Ch. 14; Fry (6th ed.), p. 532.

(*x*) *Stewart's Case, supra; Musgrave and Hart's Case*, 5 Eq. 193; cf. *Ward and Henry's Case, supra; Ex p. Sargent*, 17 Eq., p. 276; and see Buckley (10th ed.), pp. 84—6.

(*y*) *Musgrave and Hart's Case, supra; Marino's Case*, L. R. 2 Ch. 596; *Re Taurine, etc. Co.*, 25 Ch. D. 118.

(*z*) *Walker's Case*, 2 Eq. 554; *Marshall* v. *Glamorgan, etc. Co.*, 7 Eq. 129.

(*a*) *Ex p. Shaw*, 2 Q. B. D. 463; Fry (6th ed.), p. 532.

(*b*) Merchant Shipping Act, 1894, ss. 1—23, 48—55; 1906, ss. 51—53.

in the manner and according to the forms prescribed by the Act (*c*). No notice of any trust is to be received or entered in the register (*d*). The title of the person registered is absolute, but the Court has power to prohibit a transfer (*e*).

Under the old Ship Registry Acts, and under the Merchant Shipping Act, 1854, it was held that the policy of the law required that the prescribed formalities must be fulfilled to confer any rights at all, and consequently no rights arising from unregistered documents could be enforced even in equity (*f*). But the Court could enforce equitable rights over foreign ships, since they were not included in the Acts (*g*); and it had jurisdiction when the ship was built in England in order to be sold abroad, and to be delivered at a foreign port (*h*).

There are many *dicta* that the Court would interfere in the case of fraud, but there appears to be no reported decision upon the question. But where a person who had no title procured himself to be registered, the Court, it seems, would, even under the old law, have compelled him to retransfer the ship to the real owner and account for the earnings (*i*).

The policy of the old Acts did not extend to the proceeds of the sale of ships. Thus, where a ship was registered in the name of the purchaser's son, who, after the purchaser's death, acknowledged the executors' title and agreed to sell it, it was held, after he had sold, that the executors could recover the proceeds of sale (*k*).

The Merchant Shipping Act, 1862 (*l*), amended the law so as to enable equitable rights to be enforced. The Act is now repealed and replaced by section 57 of the Act of 1894, which provides :

" The expression ' beneficial interest,' where used in this Part of this Act (*m*), includes interests arising under contract and other equitable interests; and the intention of this Act is, that (without prejudice to the provisions of this Act for preventing notice of trusts

(*c*) Sections 24—30 (Transfer); 31—38 (Mortgage); 39—46 (Certificates). See *Burgis* v. *Constantine*, [1908] 2 K. B. 484; *Manchester Ship Canal Co.*v. *Horlock*, [1914] 1 Ch. 453.

(*d*) Section 56; but see section 57, *infra*.

(*e*) Section 30; see *Re La Blanca*, 77 L. J. P. 91.

(*f*) See *Battersby* v. *Smyth*, 3 Madd. 110; *Hughes* v. *Morris*, 2 De G. M. & G. 349, 357; *Liverpool Borough Bank* v. *Turner*, 2 De G. F. & J. 502.

(*g*) *Hart* v. *Herwig*, L. R. 8 Ch. 860.

(*h*) *Union Bank of London* v. *Lenanton*, 3 C. P. D. 243.

(*i*) *Holderness* v. *Lamport*, 29 B. 129.

(*k*) *Armstrong* v. *A.*, 21 B. 78.

(*l*) Section 3.

(*m*) See sections 5, 9, 58, 71.

being entered in the register book or received by the registrar (*n*), and without prejudice to the powers of disposition, and of giving receipts conferred by this Act on registered owners and mortgagees (*o*), and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships (*p*)) interests arising under contracts and other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property " (*q*).

It has been held that an owner who has executed a bill of sale absolute can show that it was intended only as a mortgage, and the Court will, for such a purpose, go behind the register and ascertain the real transaction (*r*). And an owner may show that the transferee of a mortgage had agreed to postpone the date of repayment (*s*). An agreement to transfer will accordingly be enforced (*t*).

Where the registered owner was, in fact, a trustee, and he executed a mortgage in blank for an unauthorised person, it was held that, as the mortgage was not in accordance with the statute, the title of the *cestui que trust* was not postponed (*u*).

The net result of the statutes and cases is, that if the contract is one proper for specific performance to be decreed, the mere fact that the contract relates to a ship will not disentitle the Court to make a decree.

Chattels.—As above stated (*x*), specific performance of contracts relating to chattels will be enforced in proper cases, and may be resisted upon the same grounds as the specific performance of other contracts. Thus, where the plaintiff had, without actual fraud, contracted for the purchase of two valuable jars, the parties not being upon an equal footing, since the plaintiff well knew, and the vendor (who was an elderly lady) was ignorant of their value, and sold them at an inadequate price, specific performance was refused (*y*).

(*n*) Section 56.
(*o*) Sections 31, 40, 56.
(*p*) Section 1.
(*q*) *The Venture*, [1908] P. 218, resulting trust; and see *Stapleton* v. *Haymen*, 2 H. & C. 918; for the liability of a beneficial owner, see section 58.
(*r*) *Ward* v. *Beck*, 13 C. B. (N.S.) 668; *The Innisfallen*, L. R. 1 Ad. & E. 72.
(*s*) *The Cathcart*, L. R. 1 Ad. & E. 314.
(*t*) *Batthyany* v. *Bouch*, 44 L. T. 177.
(*u*) *Burgis* v. *Constantine*, [1908] 2 K. B. 484.
(*x*) *Ante*, pp. 375-9; and see *Pusey* v. *P.*, *post*.
(*y*) *Falcke* v. *Gray*, 4 Drew. 651.

Cuddee v. Rutter.

In the principal case, the Lord Chancellor lays it down as a general rule, "That the Court will not decree a specific performance of a contract when the party has not the thing to deliver." Thus, where a bill was filed against the provisional committee of a projected railway company for specific performance of an agreement to deliver to the plaintiff a certain number of scrip certificates, Lord Cottenham, C., allowed a demurrer (*z*), because not only was there no allegation in the bill that the defendants had in their possession any scrip to deliver, but that the bill contained statements from which the contrary might rather be inferred.

Now section 52 of the Sale of Goods Act, 1893, enacts: "In any action for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree, direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages." The judgment may be either unconditional or upon such terms as to the payment of damages, or the price, or otherwise, as the Court may think fit.

4. Contracts relating to Personal Acts.

Notwithstanding some early decisions to the contrary, it is now settled that, with some few exceptions, the Court will not decree specific performance of contracts to do certain works, such as to build or repair (*a*), to make a railway (*b*), to work quarries (*c*), coal mines (*d*), to make good a gravel pit (*e*).

The principal reason is the inconvenience and even practical impossibility of the Court taking upon itself to superintend, as between builders, contractors, railway companies and others, the erection and construction of a large number of buildings and works (*f*).

The Court, moreover, will not specifically compel the performance

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(*z*) *Columbine* v. *Chichester*, 2 Ph. 27. As to cases in which plaintiff has made specific performance impossible, see *Hipgrave* v. *Case*, 28 Ch. D. 356; *Nicholson* v. *Brown*, [1897] W. N. 52.

(*a*) *Errington* v. *Aynesley*, 2 Bro. Ch., p. 343; *Lucas* v. *Comerford*, 3 Bro. Ch. 166; *Paxton* v. *Newton*, 2 Sm. & Gif. 437; *Kay* v. *Johnson*, 2 Hem. & M. 118.

(*b*) *South Wales Ry. Co.* v. *Wythes*, 1 K. & J. 186; 5 De G. M. & G. 880; *Greenhill* v. *Isle of Wight Ry. Co.*, 19 W. R. 345.

(*c*) *Booth* v. *Pollard*, 4 Y. & C. Ex. 61.

(*d*) *Pollard* v. *Clayton*, 1 K. & J. 462; *Wheatley* v. *Westminster, etc. Coal Co.*, 9 Eq. 538; and see *Lord Abinger* v. *Clayton*, 17 Eq. 358, 369.

(*e*) *Flint* v. *Brandon*, 8 V. 159.

(*f*) *South Wales Ry. Co.* v. *Wythes*, 1 K. & J. 200; Fry (6th ed.), p. 46.

of continuous duties, especially if they would spread over a long period of time, as the Court could not undertake to see to such performance (*g*).

It may be here mentioned that when an agreement is entire, the Court will not compel the defendant to fulfil his part unless the plaintiff can (*h*) and does fulfil his part also (*i*). *Secus* when the agreement is divisible (*k*).

In a case decided before the passing of Lord Cairns' Act (*l*), A, the plaintiff, agreed to grant a lease to B, the defendant, as soon as B should have built a house with the necessary outbuildings on the land of the value of £1,400 at the least, "according to a plan to be submitted to and approved by A." B agreed to build and take the lease. As no plan had been approved of specific performance was not decreed (*m*).

The Courts have not acted consistently with regard to building contracts. At first they were specifically enforced, and then not at all, but now they will, it seems, be enforced if the work is so definite that the Court can enforce obedience to its orders, and damages would not be an adequate compensation (*n*).

Lord Rosslyn, C., was of opinion that if an agreement for building were in its nature defined, there would be no great difficulty in decreeing specific performance (*o*). And it seems that in Scotland the Courts have solved the difficulty which has prevented the English Courts from compelling the specific performance of contracts to build, by appointing a proper person to superintend the performance of the work (*p*).

Where the defendant under the contract with the plaintiff has obtained possession of land, it is clear that the Court has juris-

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(*g*) *Blackett* v. *Bates*, L. R. 1 Ch. 117; *Powell, etc. Coal Co.* v. *Taff Vale Ry. Co.*, L. R. 9 Ch. 331; *Ryan* v. *Mutual Tontine, etc. Association*, [1893] 1 Ch. 116; *Phipps* v. *Jackson*, 56 L. J. Ch. 550.

(*h*) *Hipgrave* v. *Case*, 28 Ch. D. 356; *Nicholson* v. *Brown*, [1897] W. N. 52.

(*i*) *Blackett* v. *Bates*, L. R. 1 Ch. 117; *Gervais* v. *Edwards*, 2 Dr. & War. 80; *Dietrichsen* v. *Cabburn*, 2 Ph. 52; *Hills* v. *Croll*, 2 Ph. 60; *Firth* v. *Ridley*, 33 B. 516.

(*k*) *Wilkinson* v. *Clements*, L. R. 8 Ch. 96; *Odessa Tramways Co.* v. *Mendel*, 8 Ch. D. 235.

(*l*) 21 & 22 Vict. c. 27, repealed by St. L. Rev. Act, 1883, but jurisdiction kept alive: see *post*, p. 401.

(*m*) *Brace* v. *Wehnert*, 25 B. 348; see also *Norris* v. *Jackson*, 1 J. & H. 319.

(*n*) *Wolverhampton Corporation* v. *Emmons*, [1901] 1 K. B. 515, 524; *Molyneux* v. *Richard*, [1906] 1 Ch. 34.

(*o*) *Mosely* v. *Virgin*, 3 V. 185; see Stor. Eq. Jur. s. 728; and *Cubitt* v. *Smith*, 10 Jur. (N.S.) 1123.

(*p*) *Clark* v. *Glasgow Assurance Co.*, 1 M'Queen, H. L. Cas. 670.

diction to enforce specific performance of another part of such contract by the defendant to do *defined* work *upon such land*, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages (*q*). Orders of this kind have frequently been made where railway companies have contracted to do works on lands acquired from the plaintiff (*r*).

The rule is that the Court will not enforce specific performance of a contract to build unless (1) the building work is defined by the contract in such a way that the Court can see the exact nature of the work (*s*); (2) the plaintiff has an interest in having the contract performed which cannot be adequately compensated by damages for breach of the contract; and (3) the defendant has, by the contract, obtained possession of the land on which the work is to be done (*t*).

One ground upon which a Court of equity decrees specific performance of a contract to do certain works, is that the plaintiff, by reason of his having parted with his land to the defendant, has no opportunity of erecting the buildings at his own cost, and so ascertaining the amount of damages sustained by reason of the non-performance of the contract (*u*); thus, in one case, a contract to erect a market-place would have been specifically enforced if the defendants had not fulfilled their contract pending the hearing (*x*); and in another case specific performance of a contract to make a railway siding was decreed (*y*).

Again, acts amounting to a part performance of the contract may so define the way in which the contract is to be fulfilled that the Court can compel specific performance, which otherwise it could

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(*q*) *Storer* v. *G. W. Ry. Co.*, 2 Y. & C. Ch. 48; *Franklyn* v. *Tuton*, 5 Madd. 469; Fry (6th ed.), p. 48.

(*r*) See *Sanderson* v. *Cockermouth, etc. Ry.*, 11 B. 497; *Lytton* v. *G. N. Ry. Co.*, 2 K. & J. 394; *Darnley* v. *L. C. & D. Ry. Co.*, L. R. 2 H. L. 43; *Cooke* v. *Chilcott*, 3 Ch. D. 694; *Fortescue* v. *Lostwithiel, etc. Ry. Co.*, [1894] 3 Ch. 621; and cf. *Lane* v. *Newdigate*, 10 V. 192; *Hood* v. *N. E. Ry. Co.*, L. R. 5 Ch. 525; *Wilson* v. *Northampton, etc. Ry. Co.*, L. R. 9 Ch. 279; *Kennard* v. *Cory Bros.*, [1922] 2 Ch. 1.

(*s*) See *Rushbrooke* v. *O'Sullivan*, [1908] 1 Ir. R. 232.

(*t*) *Wolverhampton Corporation* v. *Emmons*, [1901] 1 K. B. 515, 525; *Molyneux* v. *Richard*, [1906] 1 Ch. 34.

(*u*) *South Wales Ry. Co.* v. *Wythes*, 1 K. & J. 200.

(*x*) *Price* v. *Penzance Corporation*, 4 Ha. 506.

(*y*) *Greene* v. *West Cheshire Ry. Co.*, 13 Eq. 44. See also *Storer* v. *G. W. Ry. Co.*, 2 Y. & C. Ch. 48; *Soames* v. *Edge*, Johns. 669; *Wilson* v. *Furness Ry. Co.*, 9 Eq. 28.

not do (*z*), but acts of part performance will not be sufficient if the work is not thereby defined (*a*).

The tendency of the modern decisions where companies have contracted to perform certain works, and have got the whole benefit of the agreement, is to find a mode of compelling specific performance (*b*); hence it has been held to be no defence to an action by a private individual against a railway company that the public would be subjected to inconvenience if the company were compelled specifically to perform their contract (*c*).

In *Wilson* v. *Furness Ry. Co.* (*d*), a railway company which had agreed to make a carriage road between certain points, on land conveyed to them by the plaintiffs, and to make and maintain a wharf for loading and discharging vessels at a specified place, was not allowed to set up the defence that the contract was *ultra vires*, on the ground that the company was incorporated for making a railway, and not a public road, or where they had only partially fulfilled the agreement, to set up the Statute of Limitations, or, lastly, to insist that the Attorney-General was a necessary party, because it is the person with whom the agreement was made, it is he, and not the Attorney-General, on behalf of the public, who has a right to call for its performance, although the work to be done is for the benefit of the public.

Where, however, more perfect and complete justice can be done by an award of damages, the Court will not decree specific performance of such contracts. In *Wilson* v. *Northampton, etc., Ry. Co.* (*e*), a railway company had agreed, for valuable consideration, with a landowner, to erect, construct, and fit up, a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company refused to erect a station in the specified place, and substituted one at a distance of two miles; it was held that justice could be better done by an

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(*z*) *Price* v. *Penzance Corporation*, 4 Ha. 506, 509; see also *Pembroke* v. *Thorpe*, 3 Swans. 437 (n.); *Sanderson* v. *Cockermouth, etc. Ry. Co.*, 11 B. 497; *Oxford* v. *Provand*, L. R. 2 P. C. 135; *Crook* v. *Seaford Corporation*, 10 Eq. 678.

(*a*) *Kirk* v. *Bromley Union*, 2 Ph. 640, 648; *Crampton* v. *Varna Ry. Co.*, L. R. 7 Ch. 562. And see *South Wales Ry. Co.* v. *Wythes*, 5 De G. M. & G. 880.

(*b*) *Wilson* v. *Furness Ry. Co.*, 9 Eq. 33; *Fortescue* v. *Lostwithiel, etc. Ry. Co.*, [1894] 3 Ch. 621. See *Kennard* v. *Cory Bros.*, [1922] 2 Ch. 1.

(*c*) *Raphael* v. *Thames Valley Ry. Co.*, L. R. 2 Ch. 147. See also *Att.-Gen.* v. *Mid-Kent, etc. Co.*, L. R. 3 Ch. 100.

(*d*) 9 Eq. 28, 33.

(*e*) L. R. 9 Ch. 279.

inquiry in chambers as to damages, than by a decree for specific performance (*e*).

Contracts for Partnership.—As a general rule Courts of equity will not decree a specific performance of an agreement to enter into and carry on a partnership (*f*).

There are, however, some very limited exceptions to the rule, such for instance as the Court going the length of decreeing the execution of a formal deed recording the terms of the partnership which have been already agreed upon (*g*).

Where there has been a *part performance* of the contract to enter into partnership for a fixed and definite term, the Court will decree specific performance thereof, and order the execution of a proper deed, and restrain, if necessary, the defendant from carrying on a partnership with another person, or from publishing notices of dissolution (*h*); but it will not do so when the amount of capital and the mode by which it is to be provided is undefined (*i*); nor will it do so when no term has been fixed for the duration of the partnership, for such a decree would be useless when either of the parties might dissolve the partnership immediately afterwards (*k*).

In a case where a partner has a right to introduce a partner, and has exercised it, and the nominee has been accepted by the other partners, the Court will give the nominee all the relief usually given to a partner subject to his fulfilling the conditions contained in the partnership deed (*l*).

It is clear, moreover, that the Court will not interfere on behalf of parties claiming under contracts of partnership which are illegal as being in contravention of the laws regulating trade or otherwise (*m*), or tainted with fraud, hardship, or improper conduct (*n*).

Nor will the Court interfere where the contract of partnership has reference to the manufacture and sale of a medicine the recipe

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(*e*) L. R. 9 Ch. 279.

(*f*) *Scott* v. *Rayment*, 7 Eq. 112; and see *Sichel* v. *Mosenthal*, 30 B. 371.

(*g*) *Scott* v. *Rayment*, 7 Eq., p. 115.

(*h*) *Anon.*, 2 Ves. Sen. 630; *England* v. *Curling*, 8 B. 129; *Hibbert* v. *H.*; cited in Collyer on Partnership, p. 133; Fry (6th ed.), p. 699.

(*i*) *Downs* v. *Collins*, 6 Ha. 418, 437.

(*k*) *Hercy* v. *Birch*, 9 V. 357; and see *Sheffield Gas Consumers' Co.* v. *Harrison*, 17 B. 294; *New Brunswick Co.* v. *Muggeridge*, 4 Drew. 698.

(*l*) *Byrne* v. *Reid*, [1902] 2 Ch. 735.

(*m*) *Knowles* v. *Haughton*, 11 V. 168; *Hughes* v. *Statham*, 4 B. & C. 187; *Re Padstow, etc. Association*, 20 Ch. D. 137; *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496; cp. *Jeffrey* v. *Bamford*, [1921] 2 K. B. 351.

(*n*) *Vivers* v. *Tuck*, 1 Moo. P. C. 516; *Maxwell* v. *Port Tennant, etc. Coal Co.*, 24 B. 495.

of which is secret, for in such case the Court would have no means of enforcing its own orders (*o*).

Goodwill.—The Court will not decree specific performance of a contract for the sale of the goodwill of a business unconnected with the premises where the business is carried on (*p*); but where the goodwill is altogether or principally annexed to the premises, a contract for the sale of the goodwill and premises may be enforced in equity (*q*). Goodwill is nothing more than the probability that the old customers will resort to the same place (*r*), in other words, although the vendor of goodwill may set up a rival business, he will be restrained from soliciting any former customer to deal with him or to cease to deal with the purchaser of the business (*s*).

In *Boorne* v. *Wicker* (*t*), it was held by Tomlin, J. that the rule in *Trego* v. *Hunt* (*u*), that the vendor of the goodwill of a business may not solicit its customers extends to a vendor's executor carrying out a contract for sale contained in partnership articles.

And although at one time it was doubtful whether a contract for the sale of the business of an attorney was legal (*x*), there is now no doubt that it is valid both at law (*y*), and in equity (*z*).

It has been doubted whether there can be a decree for specific performance of a contract to sell a medical practice (*a*); but (it is thought) an injunction might be obtained if the vendor solicited patients who had been such before the practice was sold.

Contracts of Hiring and Service.—Again, as contracts of hiring and service are of a confidential character, and cannot therefore be enforced against an unwilling party with any hope of ultimate success, the Courts refuse to decree specific performance of them (*b*),

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(*o*) *Newbery* v. *James*, 2 Mer. 446.

(*p*) *Baxter* v. *Conolly*, 1 J. & W. 576; *Bozon* v. *Farlow*, 1 Mer. 459, 474; *Coslake* v. *Till*, 1 Russ. 376.

(*q*) *Cruttwell* v. *Lye*, 17 V. 335; *Shackle* v. *Baker*, 14 V. 468; *Chissum* v. *Dewes*, 5 Russ. 29; *Darbey* v. *Whitaker*, 4 Drew., pp. 139, 140.

(*r*) *Trego* v. *Hunt*, [1896] A. C. 7; *Cruttwell* v. *Lye*, 17 V. 346.

(*s*) *Trego* v. *Hunt*, *supra; Jennings* v. *J.*, [1898] 1 Ch. 378; *Gillingham* v. *Beddow*, [1900] 2 Ch. 242; *Curl* v. *Webster*, [1904] 1 Ch. 685.

(*t*) [1927] 1 Ch. 667. But see *Farey* v. *Cooper*, [1927] 2 K. B. 384.

(*u*) [1896] A. C. 7.

(*x*) See *Candler* v. *C.*, Jac., p. 231; *Bozon* v. *Farlow*, 1 Mer. 459.

(*y*) *Bunn* v. *Guy*, 4 East, 190.

(*z*) *Whittaker* v. *Howe*, 3 B. 383; *Aubin* v. *Holt*, 2 K. & J. 66; Fry, (6th ed.), pp. 43—4.

(*a*) *May* v. *Thompson*, 20 Ch. D. 705, 715.

(*b*) *Johnson* v. *Shrewsbury, etc. Ry. Co.*, 3 De G. M. & G. 914; *Horne* v. *L. & N. W. Ry. Co.*, 10 W. R. 170; *Pickering* v. *Bishop of Ely*, 2 Y. & C. Ch. 249; *Stocker* v. *Brocklebank*, 3 Mac. & G. 250; *Brett* v. *East India, etc. Co.*, 2 Hem. & M. 404; *Frith* v. *F.*, [1906] A. C. 254; *Mair* v. *Himalaya Tea Co.*,

more especially as in such cases no Court can interfere so long as there is no property, the right to which is taken away from the person complaining (*c*).

The Court likewise has refused specific performance of a contract of apprenticeship against an infant (*d*), although the infant was bound by the contract (*e*).

For cases where the contract will be indirectly enforced by the Court granting an injunction, see *post*, pp. 396 *et seq.*

Contracts of Agency.—The specific performance of a *contract of agency* will not be enforced in equity, *e.g.*, to employ an auctioneer (*f*), or a shipping broker (*g*).

Husband and Wife.—A contract providing for the *future* separation of husband and wife, being against *public policy*, will not be enforced by the Court, even if it be contained in an instrument providing for an immediate separation, but looking forward to the event of the parties living together again, and to a future separation (*h*). But where husband and wife are already living apart, an agreement entered into with a view to their resuming cohabitation is not rendered invalid because it contains terms contemplating, in certain events, a renewed separation (*i*).

The Court will, however, compel specific performance of agreements for the *present* separation between husband and wife, by decreeing the execution of proper deeds of separation, provided there be a *good consideration* to support the contract (*k*).

Since the Married Women's Property Act, 1882 (*l*), a woman can contract, without the intervention of trustees (as was formerly necessary), to live apart from her husband, and such a contract, if not in other respects against public policy, is one which will be enforced (*m*).

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1 Eq. 411; *Bainbridge* v. *Smith*, 41 Ch. D. 462; *Sutton* v. *English*, *etc. Produce Co.*, [1902] 2 Ch. 502; *British Murac Syndicate* v. *Alperton*, *etc.*, *Ltd.*, [1915] 2 Ch. 186, 196; *Plantations*, *etc.*, *Ltd.* v. *Bila*, *etc.*, *Ltd.*, 85 L. J. Ch. 801; Fry (6th ed.), p. 50.

(*c*) *Rigby* v. *Connol*, 14 Ch. D. 482; *Chamberlain's Wharf* v. *Smith*, [1900] 2 Ch. 605. See also *Gillis* v. *M'Ghee*, 13 Ir. Ch. R. 48, 57; *White* v. *Boby*, 37 L. T. 652.

(*d*) *De Francesco* v. *Barnum*, 45 Ch. D. 430.

(*e*) *Ibid.*; and see *Roberts* v. *Gray*, [1913] 1 K. B. 520.

(*f*) *Chinnock* v. *Sainsbury*, 30 L. J. Ch. 409.

(*g*) *Brett* v. *East India*, *etc. Co.*, *supra*.

(*h*) *Westmeath* v. *Salisbury*, 5 Bli. (N.S.), pp. 366, 367; *Westmeath* v. *Countess of W.*, Jac. 142. See *ante*, vol. I, notes to *Wilson* v. *W.*

(*i*) *Harrison* v. *H.*, [1910] 1 K. B. 35.

(*k*) *Wilson* v. *W.*, 1 H. L. Cas. 538; vol. I, notes.

(*l*) 45 & 46 Vict. c. 75, s. 1, sub-s. 2.

(*m*) *Besant* v. *Wood*, 12 Ch. D. 622; *McGregor v. M.*, 21 Q. B. D. 424; *Sweet*

Cuddee v. Rutter.

A covenant by trustees to indemnify the husband against the wife's debts (*n*), though it be conditional on an annuity which was agreed to be paid being secured (*o*), or even a covenant by a third person to pay the husband's debts (*p*), the staying by the wife of a suit for nullity of marriage on the ground of her husband's impotency (*q*), or her acceptance of maintenance from her husband instead of proceeding against him for a divorce *a mensa a thoro* (*r*), have all been held a good consideration for a separation agreement. So an agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, was decreed to be specifically performed (*s*). And the Court would also compel the husband by injunction, pursuant to his covenant not personally to molest his wife (*t*).

Where a couple, living in concubinage, agree to separate, the Court will give effect to a covenant by the man to pay the woman an annuity even if they afterwards come together again (*u*). In *Ex p. Naden* (*x*), a man had gone through the form of marriage with his deceased wife's sister (prior to the alteration in the law which made such a marriage legal), and they subsequently separated. The separation deed contained (*inter alia*) a covenant by the man to pay an annuity during the joint lives, and there was a general proviso that if the parties "should live together again," the deed should become null and void. The man was subsequently adjudged bankrupt, and it was held that the value of the future payments of the annuity was provable in the bankruptcy, and the same were not rendered uncertain by the proviso to the deed, which was in fact void.

Contracts of Indemnity.—Specific performance of an agreement or covenant to indemnify will be decreed if the defendant has agreed to do some lawful act. Thus, if an assignor of a lease has paid rents

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v. *S.*, [1895] 1 Q. B. 12; *Hulse* v. *H.*, 103 L. T. 804; and Married Women's Property Act, 1893.

(*n*) *Stephens* v. *Olive*, 2 Bro. Ch. 90; *Earl of Westmeath* v. *Countess of W.*, Jac. 126, 141.

(*o*) *Wellesley* v. *W.*, 10 Si. 256.

(*p*) *Wilson* v. *W.*, 1 H. L. Cas. 538; 5 H. L. Cas. 40.

(*q*) *Wilson* v. *W.*, 1 H. L. Cas. 538.

(*r*) *Hobbs* v. *Hull*, 1 Cox. (Eq.) 445.

(*s*) *Gibbs* v. *Harding*, L. R. 5 Ch. 336; and see *Brailey* v. *B.*, [1922] P. 15.

(*t*) *Sanders* v. *Rodway*, 22 L. J. Ch. 230.

(*u*) *Re Abdy*, [1895] 1 Ch. 455.

(*x*) L. R. 9 Ch. 670.

and laid out moneys which the assignee had covenanted to indemnify him against, the Court will direct payment to be made to the assignor on account of such breaches of covenant with costs (*y*). But the Court will not, it seems, make a general declaration of the assignor's rights to indemnity, or give liberty to apply from time to time in case of a future breach (*z*).

Arbitration.—Before the Arbitration Act, 1889, the Court would not decree the specific performance of a covenant (*a*), or execution of a bond (*b*), to refer disputes to arbitration. An inequitable refusal, however, of a plaintiff to submit to arbitration according to contract disentitled him to equitable relief, for he who seeks equity must do equity (*c*).

The Arbitration Act, 1889 (*d*), enacts, in substance (section 1), that a submission, unless a contrary intention is expressed therein, is to be irrevocable except by leave of a Court or Judge, and is to have the same effect as if made an order of Court. By section 4 (which is similar to section 11 of the Common Law Procedure Act, 1854, which is repealed) if any party to a submission, or a person claiming under him, commences proceedings against any other party to the submission, or a person claiming under him in respect of any matter agreed to be referred, any party to the proceedings may, after appearance and before delivering pleadings or taking any other steps in the proceedings (*e*), apply to that Court to stay the proceedings, and the Court or Judge, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. And by section 12, an award on a submission may, by leave of the Court

(*y*) *Lloyd* v. *Dimmack*, 7 Ch. D. 398; and see *Pember* v. *Mathers*, 1 Bro. Ch. 53; *L. & S. W. Ry. Co.* v. *Humphrey*, 6 W. R. 784; *Bank of England* v. *Cutler*, 25 T. L. R. 509; *Ascherson* v. *Tredegar Dry Dock Co.*, [1925] 1 Ch. 132.

(*z*) *Lloyd* v. *Dimmack*, *supra*; and see *Anglo-Australian, etc. Co.* v. *British Provident Society*, 4 De G. F. & J. 341; *Hughes Hallett* v. *Indian, etc. Mines*, 22 Ch. D. 561; *Re Mitchell*, [1913] 1 Ch. 201; *Bradford* v. *Gammon*, [1925] 1 Ch. 132.

(*a*) *Price* v. *Williams*, 1 V. 365; *Street* v. *Rigby*, 6 V. 815; *Wilks* v. *Davis*, 3 Mer. 507; *Gervais* v. *Edwards*, 2 Dr. & W. 80.

(*b*) *South Wales Ry. Co.* v. *Wythes*, 5 De G. M. & G. 880.

(*c*) *Cheslyn* v. *Dalby*, 2 Y. & C. Ex. 170.

(*d*) 52 & 53 Vict. c. 49; Annual Practice.

(*e*) As to what amounts to taking a "step" in the proceedings, see *County Theatres and Hotels, Ltd.* v. *Knowles*, [1902] 1 K. B. 480; *Ochs* v. *Ochs Bros.*, [1909] 2 Ch. 121.

or a Judge, be enforced in the same manner as a judgment or order to the same effect. By section 2, a " submission " means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

By staying the action under section 4, the plaintiff is indirectly compelled to specifically perform the contract to refer (*f*). The Court has a discretion hereunder (*g*), and is bound to exercise it (*h*). " If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act (Common Law Procedure Act, 1854) was passed a *prima facie* duty is cast upon the Court to act upon such agreement " (*i*). The Courts formerly showed a disposition to object to have their jurisdiction ousted by a reference to arbitration, but this no longer prevails (*k*). Where the action embraces several questions, all within the arbitration clause, as to some of which the arbitrator may be, and as to others of which he is not, disqualified from acting, it seems that the Court may stay the action as to the former, and allow it to proceed as to the latter, questions (*l*).

The Court will not grant specific performance of an agreement to refer, or of a part of such an agreement, for example, the appointment of an arbitrator. In *Smith and Nelson's Arbitration* (*m*), an agreement to refer to arbitration provided for the appointment of three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed. One of the parties refused to appoint an arbitrator, and the Court of Appeal held there was no power either under or apart from the Act to order him to do so. If the reference had provided for a reference to two arbitrators and an umpire, sections 4, 5, and 6 of the Act would have met the case.

Sale at a Price to be fixed.—Where there is a contract for a sale

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(*f*) *Willesford* v. *Watson*, L. R. 8 Ch. 473; *Plews* v. *Baker*, 16 Eq. 564; *Gillett* v. *Thornton*, 19 Eq. 599.

(*g*) *Re Carlisle*, 44 Ch. D. 200; *Workman* v. *Belfast Harbour Commissioners*, [1899] 2 Ir. R. 234; *Printing Machinery Co.* v. *Linotype and Machinery, Ltd.*, [1912] 1 Ch. 566.

(*h*) *Lyon* v. *Johnson*, 40 Ch. D. 579; *Met. Tunnel and Pub. Works, Ltd.* v. *L. Electric Ry. Co.*, [1926] Ch. 371.

(*i*) *Per* Lord Selborne, C., in *Willesford* v. *Watson*, L. R. 8 Ch., p. 480; cf. *Freeman* v. *Chester R. D. C.*, [1911] 1 K. B. 783; *Bristol Corp.* v. *Aird*, [1913] A. C. 241.

(*k*) See *Met. Tunnel and Pub. Works, Ltd.* v. *L. Electric Ry. Co.*, *supra*.

(*l*) *Bristol Corp.* v. *Aird*, [1913] A. C. 241, 261—2.

Works, Ltd. v. *L. Electric Ry. Co.*, *supra*.

(*m*) 25 Q. B. D. 545.

at a price to be determined upon by *certain* persons as valuers, the Court will not ordinarily decree specific performance thereof unless the price be fixed in the manner determined upon so as to be made part of the agreement (*n*), except in those cases where the fixing of the price is a subsidiary point, and not of the essence of the contract (*o*), in which case the Court will appoint a valuer to ascertain the price.

On the same principle, where a contract provides that the price shall be fixed by named persons and they fail for some reason to fix the price, the Court will not (unless in special cases, where the valuation relates to a subsidiary term of the contract (*p*)) specifically enforce the contract or appoint valuers to fix the price (*q*); but if the contract is divisible, and the price fixed as to part, it will specifically enforce the contract as to that part (*r*). So, where the vendor refuses to allow a valuer to enter into his house for the purpose of making a valuation, the Court will compel the vendor to allow the valuation to proceed (*s*).

5. Specific Performance compelled by Injunction.

When a person has covenanted that certain things shall not be done, the only way in which he can be made to fulfil his obligation is by injunction restraining him from breaking it. In such cases the Court acts on the same principles as in specific performance. It will not grant an injunction where it would not decree specific performance (*t*)—for example, where the granting of an injunction would necessarily involve continuous employment of signalmen for an indefinite period (*u*).

The substance of the contract is the material point, not its form. Thus, a contract negative in form but not in substance comes within the principles governing specific performance; while a covenant

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(*n*) *Milnes* v. *Gery*, 14 V. 400; *Firth* v. *M. Ry. Co.*, 20 Eq. 100; *Vickers* v. *V.*, 4 Eq. 529.

(*o*) *Dinham* v. *Bradford*, L. R. 5 Ch. 519; *Hordern* v. *H.*, [1910] A. C. 465; *Jackson* v. *J.*, 1 Sm. & G. 184; Sale of Goods Act, 1893, s. 9; Fry (6th ed.), p. 170.

(*p*) See *Dinham* v. *Bradford*, *supra*.

(*q*) See *e.g.*, *Milnes* v. *Gery*, *supra*.

(*r*) *Richardson* v. *Smith*, L. R. 5 Ch. 648.

(*s*) *Smith* v. *Peters*, 20 Eq. 511, 513. See also *Morse* v. *Merest*, 6 Madd. (Madd. & G.) 26.

(*t*) *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. 683; *Peperno* v. *Hermiston*, 31 Sol. Jo. 154; *Wheatley* v. *Westminster Co.*, 9 Eq. 538; Kerr on Injunctions (6th ed.), p. 411.

(*u*) *Powell Duffryn, etc. Co.* v. *Taff Vale Ry. Co.*, L. R. 9 Ch. 331.

framed affirmatively but in substance negative will in a proper case be enforced by an injunction (*x*). Thus, a covenant that the employer will not, save in certain specified events, require his employee to leave his service is not a negative covenant (*y*). It is for the Judge to determine whether the contract is negative or not (*z*).

The Court has restrained : a defendant from permitting the sale of specified goods at a particular place, in contravention of an agreement that the plaintiff should have the exclusive right of selling that class of goods there (*a*); a landowner from building in breach of a covenant not to build (*b*); a tenant from breaking a covenant not to carry on a dangerous trade (*c*); a telephone company from cutting off communication during the subsistence of a contract to maintain telephone wires and apparatus (*d*), and even, in a proper case, a company from applying to Parliament for a private Act (*e*). In a recent case, where the defendant had sold timber growing on his land to the plaintiff, and the contract gave the plaintiff rights of entry into the land, and of erecting saw mills upon the land, the Court restrained the defendant from preventing the execution of the contract (*f*).

A covenant " to act exclusively for " a company (*g*), or " to give his whole time " to the employment (*h*), is not negative. Nor is a covenant, on the assignment of a lease, to observe and perform negative covenants in the lease, for the true effect of such a covenant

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(*x*) *Catt* v. *Tourle*, L. R. 4 Ch. 654; and see *Kennard* v. *Cory Bros.*, [1922] 1 Ch. 265; [1922] 2 Ch. 1.

(*y*) *Davis* v. *Foreman*, [1894] 3 Ch. 654; *Kirchner* v. *Gruban*, [1909] 1 Ch. 413; and see *Wolverhampton Ry. Co.* v. *L. & N. W. Ry.*, 16 Eq., p. 440.

(*z*) *Dowden* v. *Pook*, [1904] 1 K. B. 45; cf. *Maxim-Nordenfelt* v. *Maxim*, [1894] A. C. 535.

(*a*) *Altman* v. *Royal Aquarium Co.*, 3 Ch. D. 228; and see *Donnell* v. *Bennett*, 22 Ch. D. 835; *County Hotel, etc. Co.* v. *L. & N. W. Ry. Co.*, [1919] 2 K. B. 29; [1921] 1 A. C. 85; Kerr on Injunctions (6th ed.), p. 458.

(*b*) *Rankin* v. *Huskisson*, 4 Si. 13; *Bowes* v. *Law*, 9 Eq. 636; *Manners* (*Lord*) v. *Johnson*, 1 Ch. D. 673.

(*c*) *Chapman* v. *Mason*, 103 L. T. 390.

(*d*) *Keith* v. *Nat. Telephone Co.*, [1894] 2 Ch. 147; cf. *Cochrane* v. *Exchange T. Co.*, 65 L. J. Ch. 334.

(*e*) *Ware* v. *Grand Junction Canal Co.*, 2 Russ. & M., p. 483; *Heathcote* v. *N. Staffs. Ry. Co.*, 2 Mac. & G. 100; *Lancaster, etc. Ry. Co.* v. *L. & N. W. Ry. Co.*, 2 K. & J. 293; Kerr (6th ed.), p. 454.

(*f*) *Jones* v. *Tankerville* (*Earl of*), [1909] 2 Ch. 440; see Sale of Goods Act, 1893, s. 52; *Re Wait*, [1926] Ch. 962; [1927] 1 Ch. 606.

(*g*) *Mutual Reserve, etc. Association* v. *New York Life, etc. Co.*, 75 L. T. 528.

(*h*) *Whitwood, etc. Co.* v. *Hardman*, [1891] 2 Ch. 416; *Kirchner* v. *Gruban*, [1909] 1 Ch. 413; *Mortimer* v. *Beckett*, [1920] 1 Ch. 571; *Rely-a-Bell, etc. Co.* v. *Eisler*, [1926] Ch. 609.

is merely to give an indemnity to the assignor (*i*). In the *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (*k*), a covenant to give "the first refusal" of lands was enforced by injunction.

A plaintiff cannot restrain the defendant from breach if he has himself broken his own covenants (*l*), or has become incapable of fulfilling them (*m*).

Where an affirmative covenant, of a kind that the Court will not specifically enforce, has a negative provision added to it, difficult questions arise. In *Lumley* v. *Wagner*, (*n*), the defendant contracted to sing at the plaintiff's theatre and not to sing elsewhere. She afterwards entered into an engagement to sing at another theatre, and the Court granted an injunction to restrain her from breaking her express negative promise. This decision has been much criticised (*o*), for the covenant was really only ancillary to the main part of the contract (*p*). The decision governs all cases of a like nature; but it is an anomaly, and will not be extended (*q*). The decision will not be applied to an agreement, incapable of specific performance, which, though negative in form, is affirmative in substance (*r*).

Apart from the particular cases governed by *Lumley* v. *Wagner*, it would seem clear that a negative covenant, joined to a positive covenant, will not (where the positive covenant is not such as will be specifically enforced) be enforced by injunction, if it is merely ancillary to the positive covenant and not of itself a substantial part of the contract (*s*).

(*i*) *Harris* v. *Boots Cash Chemists*, [1904] 2 Ch. 376; and see *Reckitt* v. *Cody*, [1920] 2 Ch. 452.

(*k*) [1901] 2 Ch. 37; Kerr on Injunctions (6th ed.), p. 457; cf. *Ryan* v. *Thomas*, 55 Sol. Jo. 364.

(*l*) *Telegraph Despatch, etc. Co.* v. *M'Lean*, L. R. 8 Ch. 658; *General Bill-posting Co.* v. *Atkinson*, [1909] A. C. 118.

(*m*) *Measures Bros.* v. *Measures*, [1910] 2 Ch. 248.

(*n*) 1 De G. M. & G. 604. See also *De Mattos* v. *Gibson*, 4 De G. & J. 416; *Grimston* v. *Cuningham*, [1894] 1 Q. B. 125.

(*o*) *Per* Lord Selborne, in *Wolverhampton and Walsall, etc. Co.* v. *L. & N. W. Ry. Co.*, 16 Eq. 433, at p. 440; *Donnell* v. *Bennett*, 22 Ch. D. 835; and see *Fothergill* v. *Rowland*, 17 Eq. 132.

(*p*) *Merchants' Trading Co.* v. *Banner*, 12 Eq. 18.

(*q*) *Per* Lindley, L.J., in *Whitwood, etc. Co.* v. *Hardman*, [1891] 2 Ch., pp. 426, 427; and see Fry (6th ed.), pp. 401—3; Kerr (6th ed.), p. 466.

(*r*) *Davis* v. *Foreman*, [1894] 3 Ch. 654; *Kirchner* v. *Gruban*, [1909] 1 Ch. 413; *Mortimer* v. *Beckett*, [1920] 1 Ch. 571; and see *Rely-a-Bell, etc. Co.* v. *Eisler*, [1926] Ch. 609.

(*s*) See also *Phipps* v. *Jackson*, 56 L. J. Ch. 550; *Bucknall* v. *Tatem*, 83 L. T. 121; Kerr (6th ed.), p. 409.

Cuddee v. Rutter.

6. Specific Performance and Damages under Lord Cairns' Act, and the Judicature Act, 1925.

Although the Court of Chancery had in former times given damages estimated by an issue *quantum damnificatus*, where it refused to decree specific performance (*t*), it afterwards disclaimed such jurisdiction; although it would give compensation, no doubt somewhat similar to damages (*u*), in many cases where it could decree specific performance (*x*).

The jurisdiction of the Court of Chancery with regard to damages, in addition to, *or* substitution for an injunction and specific performance, was much enlarged by the Chancery Amendment Act, 1858 (*y*). It enacted that in all cases in which the Court of Chancery had jurisdiction to entertain an application for an *injunction against a breach* of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the *specific performance* of any covenant, contract or agreement, it should be lawful for the same Court, if it should think fit, to *award damages* to the party injured, *either in addition to* or *in substitution for* such injunction or specific performance, and such damages might be assessed in such manner as the Court should direct (section 2). Subsequent sections provided the machinery for the assessment of damages and the trial of questions of fact either by a jury before the Court itself, or by the Court alone (sections 3, 4, 5), or for the assessment of damages by a jury before any Judge of one of the superior Courts of common law, at Nisi Prius, or before the sheriff of any county or city (section 6).

This Act, which is discretionary (*z*), did not extend the jurisdiction of the Court to cases where there was a plain common law remedy, and where the Court would not have interfered either by way of injunction or specific performance before the passing of the Act (*a*).

The Court, therefore, could not under the Act award damages save in cases where it had jurisdiction to decree specific performance. Hence, as a Court of Equity had no jurisdiction to compel specific

(*t*) *City of London* v. *Nash*, 3 Atk. 512; and see *Cleaton* v. *Gower*, Rep. t. Finch, 164.
(*u*) *Phelps* v. *Prothero*, 7 De G. M. & G., p. 734.
(*x*) *Seton* v. *Slade*, *post*.
(*y*) 21 & 22 Vict. c. 27 (Lord Cairns' Act).
(*z*) *Durell* v. *Pritchard*, L. R. 1 Ch. 244.
(*a*) *Rogers* v. *Challis*, 27 B. 175.

performance of an agreement to borrow money, it could not award compensation or damages against a person who had refused to accept a loan for which he had contracted (*a*). And, in the same way, it could not grant damages for the breach of a contract of agency (*b*).

So where a plaintiff sued for specific performance of a contract by a company to allot shares to him, and, in the alternative, if all the shares had been allotted to other persons, for damages, and it appeared that all the shares had been allotted before action commenced, it was held that as specific performance was not possible when the bill was filed, no damages could be granted (*c*). And a plaintiff will not be entitled to damages if he has done any act which would disentitle him to specific performance (*d*).

Where the Court, however, had jurisdiction to grant specific performance, it could grant specific performance of part of the contract, and award damages for non-performance of a part of the contract in respect of which it could not have compelled specific performance. In *Soames* v. *Edge* (*e*), the plaintiff agreed to grant a lease to the defendant as soon as he, the defendant, should have built a new house on the land; and the defendant agreed to accept such lease when required, and to pull down an old house, and build a new one on the site. The defendant caused the old house to be pulled down, but did not proceed to build a new house upon the old site. It was held that the plaintiff was entitled to damages for the non-building of the house and to specific performance of the contract to accept the lease (*f*).

In certain cases, although the Court has jurisdiction to compel specific performance, it can best do justice by awarding damages in substitution (*g*). Where the plaintiff, when he commenced his suit, was entitled to damages for delay in performance, and before the hearing the defendants performed the contract, it was held that the plaintiff was nevertheless right in bringing his suit to a hearing (*h*).

(*a*) *Rogers* v. *Challis*, 27 B. 175.

(*b*) *Chinnock* v. *Sainsbury*, 30 L. J. Ch. 409.

(*c*) *Ferguson* v. *Wilson*, L. R. 2 Ch. 77. See also *Howe* v. *Hunt*, 31 B. 420; *Franklinski* v. *Ball*, 33 B. 560; *Hilton* v. *Tipper*, 16 W. R. 888; *Lewers* v. *Shaftesbury* (*Earl*), 2 Eq. 270.

(*d*) *Hipgrave* v. *Case*, 28 Ch. D. 356; *Collins* v. *Stuteley*, 7 W. R. 710; *Scott* v. *Rayment*, 7 Eq. 112; Fry (6th ed.), p. 605.

(*e*) Johns. 669.

(*f*) See also *Mayor of London* v. *Southgate*, 38 L. J. Ch. 141; *Samuda* v. *Lawford*, 4 Gif. 42; *Norris* v. *Jackson*, 1 John. & H. 319; Fry, p. 606.

(*g*) *Wilson* v. *Northampton, etc. Ry. Co.*, L. R. 9 Ch. 279.

(*h*) *Cory* v. *Thames Ironworks, etc. Co.*, L. R. 3 Q. B. 181.

Cuddee v. Rutter.

Damages will be given in addition to specific performance of an agreement for a lease, in respect of the delay which was caused by the defendant's wilful refusal to perform his contract, and the consequent loss of profit to the plaintiff (*i*).

And it seems that after a decree for specific performance against a purchaser unable to complete, the plaintiff cannot at the same time obtain an order to rescind the agreement, and claim damages against the defendant for the breach thereof (*j*).

Lord Cairns' Act has been repealed by the Statute Law Revision Act, 1883 (*k*), but section 5 of that Act enacts that any jurisdiction established by any enactment repealed by the Act is not to be affected by such repeal (*l*).

The jurisdiction conferred by Lord Cairns' Act upon the Court of Chancery, and also the powers of granting damages formerly exercisable by the Courts of Common Law, are by the Supreme Court of Judicature (Consolidation) Act, 1925, which takes the place of the Judicature Act, 1873, vested in the High Court of Justice, and by section 43, the High Court of Justice, and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by the Act in every cause or matter pending before the Court, " shall grant, either absolutely or on such terms and conditions as the Court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided " (*m*).

The Chancery Division, unlike the former Court of Chancery, now has power to award damages in any case, whether the facts give jurisdiction to decree specific performance or not (*n*).

" Under Lord Cairns' Act the plaintiff had first to make out that he was entitled to specific performance before he could get damages at all; now he may come into Court and say, ' If you think I am not

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(*i*) *Jaques* v. *Millar*, 6 Ch. D. 153 (overruled on another point by *Marshall* v. *Berridge*, 19 Ch. D. 233); and see *Wesley* v. *Walker*, 26 W. R. 368; *Royal Bristol, etc. Socy.* v. *Bomash*, 35 Ch. D. 390; *Jones* v. *Gardiner*, [1902] 1 Ch. 191.

(*j*) *Henty* v. *Schroder*, 12 Ch. D. 666; *Jeffery* v. *Stewart*, 80 L. T. 17; but see *Baker* v. *Williams*, 62 L. J. Ch. 315; Fry (6th ed.), p. 548.

(*k*) 46 & 47 Vict. c. 49.

(*l*) See *Sayers* v. *Collyer*, 28 Ch. D. 103.

(*m*) See *Serrao* v. *Noel*, 15 Q. B. D., p. 559; *Chapman* v. *Auckland Guardians*, 23 Q. B. D., p. 299.

(*n*) See *per* Kay, J., *Elmore* v. *Pirrie*, 57 L. T. 333.

entitled to specific performance of the whole or any part of the agreement, then give me damages ' " (*o*).

In *Nicholson* v. *Brown* (*p*), an action for specific performance of an agreement by the defendant to take a lease, the plaintiff claimed damages in the alternative. After issue of the writ the plaintiff offered the defendant the lease, and stated that if the offer were declined he should let the premises and confine his claim to damages. The defendant did not accept the lease, and the plaintiff let the premises. At the trial the plaintiff said he should confine his claim to damages only, but he did not ask for leave to amend. At the close of plaintiff's case, defendant objected that the claim for specific performance having failed through plaintiff's own act, and no leave to amend having been asked for, the alternative claim for damages also failed (*q*). Stirling, J., gave leave to amend on the terms that the defendant was to be at liberty to raise any defence that he might have raised in a common law action for damages.

The result of the cases seems to be that damages may be given although the plaintiff at the time of the issue of the writ had no case for specific performance (*r*); that a plaintiff may be entitled, in certain circumstances, to damages although by his own act, after action commenced, he has made specific performance impossible (*s*), and that the Court will endeavour to do complete justice by enforcing the contract, or by giving damages for the breach, or by enforcing one part of the contract and giving damages for the remainder (*t*), as the justice of the case may seem to require.

The Court will endeavour, also, to assess the damages at the trial (*u*), or it may order an enquiry (*x*), or refer the matter to an official referee (*y*), or may direct an issue (*z*).

(*o*) *Per* Kay, J., *Elmore* v. *Pirrie*, 57 L. T. 333; and see *Ryan* v. *Mutual Tontine, etc. Association*, [1893] 1 Ch. 117; *Bowman* v. *Hyland*, 8 Ch. D. 588; *Re Deighton and Harris*, [1898] 1 Ch. 458; *Dominion Coal Co.* v. *Dominion Iron and Steel Co.*, [1909] A. C. 293, 311.

(*p*) [1897] W. N. 52.

(*q*) *Hipgrave* v. *Case*, 28 Ch. D. 356.

(*r*) *Ryan* v. *Mutual Tontine, etc.*, [1893] 1 Ch. 116; *Tamplin* v. *James*, 15 Ch. D. 215; *Dominion Coal Co.* v. *Dominion Iron and Steel Co.*, [1909] A. C. 293.

(*s*) *Nicholson* v. *Brown*, [1897] W. N. 52.

(*t*) *Mayor, etc., London* v. *Southgate*, 38 L. J. Ch. 141.

(*u*) *Jaques* v. *Millar*, 6 Ch. D. 153; *Wesley* v. *Walker*, 26 W. R. 368; *Serrao* v. *Noel*, 15 Q. B. D., p. 560; *Ryan* v. *Mutual Tontine, etc.*, [1893] 1 Ch. 116; *Jones* v. *Gardiner*, [1902] 1 Ch. 191.

(*x*) Seton (7th ed.), p. 2159; *Maxim-Nordenfelt, etc. Co.* v. *Nordenfelt*, [1893] 3 Ch. 122.

(*y*) Arbitration Act, 1889, s. 13. *Marsh* v. *Jones*, 40 Ch. D. 563; Order XXXVI, rule 57 (n.).

(*z*) *Cory* v. *Thames, etc. Co.*, L. R. 3 Q. B. 181; R. S. C. (1883), Order XXXIII, rule 1.

Cuddee v. Rutter.

In *Bayley* v. *Birch* (*a*), an action was brought for specific performance of an agreement to compromise, or for damages. An action for trespass to land had been withdrawn on the terms that plaintiff should purchase the land in question at a price to be fixed by arbitration, the defendant to give a good title, etc. Each party to pay his own costs, and the costs of the arbitration. The price was fixed, the plaintiff was ready to pay it, but the defendant could make no title. The plaintiff claimed, as the consideration for the compromise had failed, that he was entitled to be refunded the costs of the settled action (*b*). The Court limited the enquiry as to damages to the costs incurred by the plaintiff in the arbitration, and in the investigation of title.

(*a*) [1894] 8 R. 647.

(*b*) See *Bain* v. *Fothergill*, L. R. 7 H. L. 158; and see *Keen* v. *Mear*, [1920] 2 Ch. 574.

PUSEY *v.* PUSEY.

1684. 1 Vern. 273.

Specific Delivery up of Chattels.

Land held by the tenure of a horn. Bill brought by the heir for the horn (*a*).

Bill was, that a horn, which, time out of mind, had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold their land by, might be delivered to him; upon which horn was this inscription, viz., *pecote this horn to hold huy thy land* [*sic*] (*b*).

The defendant answered as to part, and demurred as to the other part; and the demurrer was, that the plaintiff did not by his bill pretend to be entitled to this *horn* either as executor or devisee; nor had he in his bill charged it to be an *heir-loome*.

The demurrer was overruled, because the defendant had not fully answered all the particular charges in the bill, and was ordered to pay costs. And the Lord Keeper Guildford was of opinion, that if the land was held by the tenure of a *horn* or *cornage*, the heir would be well entitled to the horn at law (*c*).

(*a*) Reg. Lib. 1684, B., fol. 310.

(*b*) Camden, speaking of the manor of Pusey, says, "the family of Pusey still hold it by a horn, anciently given to their ancestors by Canute, the Danish king" (Camd. Brit., Berks, p. 203 (ed. 1607)). Dr. Hicks gives the inscription as follows: see Thes. Præf., p. xxv:

"I Kynd Knowd geve Wyllyam Pecote
Thys horne to hold by thy lond."

The name "Pecote," however, seems to be a mistake, and should be written "Pewse." The real inscription runs thus:

"Kyng Knowd geve Wyllyam Pewse
This horne to hold by thy lond."

—Archæologia, vol. iii, pp. 13, 14.

(*c*) *Vide* 1 Inst. 107 a.

DUKE OF SOMERSET *v.* COOKSON.

1735. 3 P. W. 390 (*a*).

Specific Delivery up of Chattels.

A bill lies to compel the delivery of an altar-piece, or other curiosity in specie.

The Duke of Somerset, as lord of the manor of Corbridge, in Northumberland (part of the estate of the Piercys, late Earls of Northumberland), was entitled to an old altar-piece made of silver, remarkable for a Greek inscription, and dedication to Hercules. His Grace became entitled to it as treasure-trove within his said manor. This altar-piece had been sold by one who had got the possession of it, to the defendant, a goldsmith at Newcastle, but who had notice of the Duke's claim thereto. The Duke brought in a bill of equity, to compel the delivery of this altar-piece *in specie, undefaced.*

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law, by an action of trover or detinue, and ought not to bring his bill in equity; that it was true for writings savouring of the realty a bill would lie, but not for anything merely personal (*b*) any more than it would lie for a horse or a cow. So a bill might lie for an heirloom, as in the case of *Pusey* v. *P.* (*c*). And though in trover the plaintiff could have only damages, yet in detinue, the thing itself, if it can be found, is to be recovered; and if such bills as the present were to be allowed, half the actions of trover would be turned into bills in Chancery.

On the other side, it was urged that the thing here sued for was matter of curiosity and antiquity; and though at law only

(*a*) 2 Eq. Ca. Abr. 164, pl. 28.
(*b*) *Cud* v. *Rutter*, 1 P. W. 570; *ante*, p. 368, *nom. Cuddee* v. *Rutter; Colt* v. *Nettervill*, 2 P. W. 304.
(*c*) 1 Vern. 273.

the intrinsic value is to be recovered, yet it would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it: which is like a trespasser's forcing the right owner to part with a curiosity or matter of antiquity, or ornament, *nolens volens*. Besides, the bill is to prevent the defendant from defacing the altar-piece, which is one way of depreciating it and the defacing may be with an intention that it may not be known, by taking out or erasing some of the marks and figures of it; and though the answer had denied the defacing of the altar-piece, yet such answer could not help the demurrer: that in itself, nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again *in specie*; and the law being defective in this particular, such defect is properly supplied in equity.

Wherefore it was prayed that the demurrer might be overruled, and it was overruled accordingly [by Lord Chancellor Talbot].

NOTES.

1. Generally.
2. Fiduciary relation, p. 407.
3. Deeds, p. 408.

1. Generally.

Since the decision in the case of *Pusey* v. *P.*, and *The Duke of Somerset* v. *Cookson*, it has always been admitted as undoubtedly within the power of a Court having equitable jurisdiction to compel the delivery up of heirlooms, or chattels of *peculiar value* to the owner, although the heirlooms or chattels, if they could be found, might be recovered in an action of detinue, or their value in an action of trover. The ground of the jurisdiction is the same as that upon which the specific performance of an agreement is enforced—viz., that the specific thing is the object, and damages will not afford an adequate compensation.

"The Pusey horn, the patera of the Duke of Somerset, were things of that sort of value that a jury might not give twopence beyond the weight. It was not to be cast to the estimation of

people who have not those feelings. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy. It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it" (*d*). The reason for the interposition of the Court is still stronger when the chattel in question is an heirloom (*e*).

But the Court will not decree the specific delivery up of a chattel where adequate damages can be ascertained and awarded in an action at law. Thus, where by the terms of an agreement and the frame of the pleadings the plaintiff, an artist seeking restitution of a picture, had in effect put a fixed price upon it, it was held that damages would be an adequate remedy, and that there was no jurisdiction in a Court of equity to interfere (*f*).

The jurisdiction has been exercised in the case of a tobacco-box of a club (*g*), of Masonic dresses and ornaments (*h*), of a box of jewels (*i*), of a cherrystone finely engraved (*k*), of an extraordinary wrought piece of plate and a valuable picture (*l*).

By the Sale of Goods Act, 1893, s. 52, the Court has jurisdiction, in any action for breach of contract to deliver specific or ascertained goods, to direct that the contract shall be performed specifically without giving the defendant the option to retain the goods on payment of damages (*m*).

2. Fiduciary Relation.

The interposition, however, of Courts of equity was not confined to those cases in which the articles sought were of some peculiar or intrinsic value if there subsisted any fiduciary relation between the parties. In *Wood* v. *Rowcliffe* (*n*), where a bill had been filed against an agent for the delivery up of furniture and household

(*d*) *Per* Lord Loughborough, C., in *Fells* v. *Read*, 3 V. 71.
(*e*) *Earl of Macclesfield* v. *Davis*, 3 V. & B. 16.
(*f*) *Dowling* v. *Betjemann*, 2 John. & H. 544.
(*g*) *Fells* v. *Read*, *supra*.
(*h*) *Lloyd* v. *Loaring*, 6 V. 773.
(*i*) *Saville* v. *Tancred*, 1 Ves. Sen. 101; Belt's Supp. 70.
(*k*) *Pearne* v. *Lisle*, Amb. 77 (*dicta* of Lord Hardwicke, C.).
(*l*) *Lowther* v. *Lord L.*, 13 V. 95; and see *Nutbrown* v. *Thornton*, 10 V. 163; *Arundell* v. *Phipps*, 10 V. 139; *Buxton* v. *Lister*, 3 Atk. 383; *Falcke* v. *Gray*, 4 Drew. 651; *Claringbould* v. *Curtis*, 21 L. J. Ch. 541; *Holroyd* v. *Marshall*, 10 H. L. Cas., p. 210.
(*m*) See also R. S. C., Ord. XLVIII.
(*n*) 2 Ph. 382.

effects, deposited by the plaintiff with him, and to restrain him from parting with them, as he threatened to do, it was argued for the defendant, who demurred for want of equity, that household furniture and effects were not chattels of such a peculiar or valuable nature as to be within the rule. Lord Cottenham, C., said " that where a fiduciary relation subsists between the parties, whether it be the case of an agent, or a trustee, or a broker, or whether the subject-matter be stock or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale, either by the party intrusted with the goods, or by a person claiming under him, through an alleged abuse of power " (*o*).

3. Deeds.

A Court of equity proceeding upon the same principle as in cases of chattels of peculiar value, entertains jurisdiction to decree a specific delivery-up of deeds or writings to the persons legally entitled to them (*p*).

In *Jackson* v. *Butler* (*q*), where mortgage deeds, delivered to a person for the purpose of receiving the principal and interest due on the mortgage, and pawned by him, were decreed to be delivered up by the pawnee, Lord Hardwicke observed, that the plaintiff might have had an action of trover, but then he could only have damages for the detaining, but not the deeds themselves, and therefore he was right in bringing a bill in equity for the recovery of his deeds.

In such an action it was not necessary, as in trover, to prove conversion, or resistance to deliver them up when sought to be recovered. But if the defendant would have delivered them up without an action, the plaintiff would be liable to pay the costs unnecessarily incurred (*r*).

By the Law of Property Act, 1925, s. 64 (taking the place of section 9 of the Conveyancing Act, 1881), a person who retains deeds and gives to another person interested in them an acknow-

(*o*) And see *Lingen* v. *Simpson*, 1 S. & S. 600; *Pooley* v. *Budd*, 14 B. 34; *Edwards* v. *Clay*, 28 B. 145.

(*p*) *Brown* v. *B.*, Dick. 62; *Armitage* v. *Wadsworth*, 1 Madd., p. 192; *Reeves* v. *R.*, 9 Mod. 128; *Tanner* v. *Wise*, 3 P. W. 296; *Ford* v. *Perring*, 1 V. 72; *Papillon* v. *Voice*, 2 P. W., p. 478; *Duncombe* v. *Mayer*, 8 V. 320; *Knye* v. *Moore*, 1 S. & S. 61; *Freeman* v. *Fairlie*, 3 Mer., p. 30; *Gray* v. *Cockeril*, 2 Atk. 114; *The Duchess of Newcastle* v. *Pelham*, 3 Bro. P. C. 460; *Reece* v. *Trye*, 1 De G. & Sm. 273; *Lady Beresford* v. *Driver*, 14 B. 387; 16 B. 134; Tudor's L. C. Real Prop., notes to *Lewis Bowles's Case*.

(*q*) 2 Atk. 306.

(*r*) *Turner* v. *Letts*, 20 B., pp. 191-2.

ledgment of his right to production of the same and to delivery of copies thereof, may be ordered by the Court, upon application, to produce or produce and deliver such deeds; and if an undertaking for safe custody has been given, and the documents are lost, destroyed or injured, the person giving the undertaking may be ordered to pay damages therefor upon a similar application (*s*).

The Court may enforce its order for delivery up of chattels by attachment, or it may order that execution shall issue under R. S. C. Ord. XLVIII. But if such process is not applicable to the exigencies of the case, it may order a writ of assistance to issue. Thus, in *Wyman* v. *Knight* (*t*), the defendants, who were trustees, had been ordered to deliver up to the receiver in the action certain documents of title. One of them was out of the jurisdiction, the other had absconded. An injunction restraining the defendants from dealing with the documents was granted, and a writ of assistance ordered to issue.

(*s*) See Wolst. and Cherry, vol. 1, p. 235 *et seq.*
(*t*) 39 Ch. D. 165.

LESTER [or LYSTER] *v.* FOXCROFT AND OTHERS (*a*).

1701. Colles's P. C. 108.

Part Performance of a Parol Contract respecting Land.

Specific performance of a parol agreement to grant a lease decreed, notwithstanding the Statute of Frauds, after acts of part performance on the part of the lessee by pulling down an old house, and building new houses according to the terms of the agreement.

The appellant stated that Isaac Foxcroft was seised in fee of a part of an ancient messuage called Wildhouse, in the parish of St. Giles's-in-the-Fields, in the county of Middlesex, and possessed of other part thereof for a long term of years, and agreed with several builders to pull down parts thereof, and build new houses thereon; and about March 25, 1695, proposed to make such agreement for part of the said house with appellant, and promised to assist him with money without interest, in case he should want it to finish the building; and it was *particularly agreed between them, that appellant should at his own cost pull down a certain part of the messuage, and build thereon fourteen or more good messuages; and that Foxcroft should, in consideration thereof, lease the said part to appellant*, from Michaelmas, 1695, for ninety-nine years, at a pepper-corn for the first year, and £150 yearly rent for the last ninety-eight years.

At the time of making such agreement, *there was no memorandum or note thereof in writing; but in performance of the agreement* appellant entered into that part of the messuage, and, at his own cost, pulled down the same, and built several new houses thereon (the whole fourteen being almost finished), and therein disbursed several thousand pounds—about £2,000 his own money, and several sums borrowed from Foxcroft upon his

(*a*) *S. C.*, cited 2 Vern. 456, *nom. Foxcroft* v. *Lister*; Gilb. Rep. 4, 11; Pr. Ch. 519, 526, *nom. Leicester* v. *Foxcroft*.

own securities, yet unsatisfied—and was all along in possession, and acted as sole proprietor and owner, and was acknowledged as such by Foxcroft, who frequently declared that he had only a ground rent, and that appellant was the landlord; and as any of the new houses were finished, appellant demised the same in his own name, received the rents, and Foxcroft never received nor claimed any part thereof.

About August, 1698, Foxcroft (being then ill of the sickness whereof he died) made his will, and his daughter, Elizabeth Foxcroft, sole executrix; and devised to his second son, Isaac Foxcroft, his heirs and executors, all his estate in the said ancient messuage called Wildhouse; and if he died under twenty-one, to his eldest son Henry Foxcroft, his daughter Elizabeth, and Benjamin Whichcott, and appointed Francis Nicholson guardian of his son Isaac, with power to let and set for such time during his minority. And immediately after making the said will, he delivered it to appellant's wife, to let the appellant see there was nothing therein inconsistent with his said agreement; and ordered her to get a lease prepared speedily according to the agreement; and delivered to her two building leases executed by him, in pursuance of like agreements with others, as precedents to have appellant's lease drawn by; and appellant accordingly caused the leases to be prepared, bearing date about the time of the said agreement, and brought two parts thereof to Foxcroft to be executed, who caused both of them to be read to him, and approved of the same; but observed that there was a mistake in one part thereof in his name, John being put for Isaac, and disliked that the sealing and delivery was not endorsed on the back thereof; and thereupon ordered appellant to get the mistake amended, and the endorsement made by the same hand that engrossed the deeds, and then to bring them again, and he would execute them; and often expressed his dissatisfaction that they were not brought back for execution as soon as he expected, and was under great uneasiness of mind lest he should die before it was done.

And appellant, a few days before the death of Foxcroft, brought the deeds, so amended, to his house, to have them so executed as he had directed, but respondent refused to let

appellant see or speak with Foxcroft, and used several indirect and unfair methods to prevent him from executing the said leases, by means whereof he died without executing them; and since his death respondents refused to execute leases, according to the agreement, whereon appellant, in Hilary Term, 1698, exhibited his bill in Chancery for a specific execution of the agreement, and the cause being heard, March 6, 1700, the Lord Keeper (*b*) declared that there was no sufficient proof of the said agreement, and ordered appellant's bill to stand dismissed without any relief; *which decree appellant insisted ought to be reversed, for that the agreement was sufficiently proved; and though not originally reduced into writing, occasioned by the entire confidence the parties had in each other, yet the same having been, at appellant's great expense, so far executed on his part, there ought to be a reciprocal performance of it on the other part*; and the rather so, as the terms of the agreement were reduced to a certainty, by the lease prepared by direction of the lessor, and the execution thereof prevented by the unfair practices of the respondents or some of them (*c*).

The respondents, in affirmance of the decree, alleged, that Isaac Foxcroft made his will, dated August 30, 1698, of the import stated by appellant, and died September 15 following; and, in Hilary Term then next, appellant filed his bill against respondents for a specific execution of a parol agreement expended and that respondents had answered, that they knew not that appellant was any ways concerned in pulling down and rebuilding the premises, otherwise than as agent or servant for the testator, at whose proper charge and expense they insisted the work was done; and denied that any such agreement for a lease was ever made by the testator to the appellant; and showed that the appellant was greatly indebted to the testator before any building began, and that the testator had no other way to obtain his debt but by employing him in work; and that the testator, though of perfect understanding, had not taken any notice of such supposed agreement in his will; and that the appellant had not required a performance thereof, for near three years and a

(*b*) Sir Nathan Wright.
(*c*) J. Jekyll, Hen. Poley, counsel for the appellant.

Lester v. Foxcroft.

half after, nor until so near an approach of the testator's death; and showed, further, that three of the appellant's witnesses were considerable legatees in the testator's will, and that their evidence tended to enlarge the personal estate for their own benefit; and finally, insisted that nothing of such pretended agreement being in writing, and signed by either of the parties, the Statute made for preventing frauds and perjuries (*d*) was a full bar to the appellant's pretences.

Die Lunæ, 7. Aprilis, 1701. Upon hearing counsel on this appeal, it was ordered and adjudged by the Lords, that the decretal order of dismission complained of should be reversed, and that the respondent, Isaac Foxcroft, or such other of the respondents to whom the estate in question would come, by virtue of his father's will, should, when he or they should be of age, execute to the appellant Lyster, his executors, etc., such a lease of the premises in question as was prepared and approved of by the said Isaac Foxcroft, the father, before his death, and that the appellant and his assigns should, in the meantime, hold and enjoy the same under the covenants and agreements in the said intended lease contained, discharged of all incumbrances done by said Isaac Foxcroft, or any claiming under him.—Lords' Journ. vol. xvi, p. 644.

NOTES.

1. Generally.
2. What acts amount to part performance, p. 415.
3. Evidence, pleading, etc., p. 421.

1. Generally.

"The Statute of Frauds," observes Lord Redesdale, "says that no action or suit shall be maintained on an agreement relating to lands, which is not in writing, signed by the party to be charged with it; and yet the Court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed, as a bar to his relief. The first case (apparently) of this

(*d*) 29 Car. 2, c. 3.

kind was *Foxcroft* v. *Lyster* (*e*), which was decided on a principle acted upon in Courts of law, but not applicable to the particular case. It was against conscience to suffer the party who had entered and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out." And after referring to this and subsequent cases, he continues: "It appears, from these cases, that Courts of Equity have decided on equitable grounds, in contradiction to the positive enactment of the Statute of Frauds, though their proceedings are in words included in it" (*f*).

The principle upon which the equitable doctrine of part performance rests, was stated by Lord Selborne, L.C., in *Maddison* v. *Alderson* (*g*), as follows: "In a suit founded on part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute) upon the contract itself. . . . The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just), and completing what has been left undone."

The words "or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them" in section 4 of the Statute of Frauds have been repealed by the Law of Property Act, 1925; but the enactment is substantially repeated by section 40, sub-section 1 of such last-mentioned Act, and sub-section 2 expressly recognises part performance as taking a case outside the provisions of sub-section 1.

"40.—(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or some other person thereunto by him lawfully authorised.

"(2) This section applies to contracts whether made before or after the commencement of this Act and *does not*

(*e*) See note (*a*), p. 410, *supra*.

(*f*) *Bond* v. *Hopkins*, 1 Sch. & L., p. 433. See also *Clinan* v. *Cooke*, 1 Sch. & L., p. 41; *Dillwyn* v. *Llewellyn*, 10 W. R. 742; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch., p. 206.

(*g*) 8 A. C., pp. 475—6

affect the law relating to part performance, or sales by the Court."

The extent of the application of the doctrine of part performance is not precisely defined. Probably it applies to all cases in which the Court would entertain a suit for specific performance, if the contract had been in writing (*h*); it is not confined to contracts for the acquisition of that which is an interest in land within section 4 (*i*).

To be an answer to the statute it is necessary—

1. That the acts of part performance are unequivocally referable to the alleged agreement. " Part performance, to take a case out of the Statute of Frauds, always supposes a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement, and by force of the agreement " (*k*). And, therefore, part performance of an engagement which is purely a matter of honour, and not a legal obligation, will not give the Court jurisdiction (*l*).

2. The acts must be done by the plaintiff and be such that it would amount to fraud in the defendant to take advantage of the contract not being in writing (*m*); hence the acts must be acquiesced in or done with the knowledge of the other party (*n*).

3. The parol agreement must be of such a character that the Court would be able to decree specific performance thereof if it were in writing (*o*).

4. The parol evidence must prove the agreement.

2. What Acts amount to Part Performance.

Ancillary and introductory acts.—Acts merely introductory to and done *previous* to an agreement, cannot be presumed to be done

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(*h*) *McManus* v. *Cooke*, 35 Ch. D. 681, at p. 697, Kay, J.

(*i*) *Ibid.* and see *Maddison* v. *Alderson*, 8 A. C. pp. 474, 479; but see *Britain* v. *Rossiter*, 11 Q. B. D. 123.

(*k*) *Per* Lord Brougham in *Lady Thynne* v. *Earl of Glengall*, 2 H. L. Cas., p. 158; *Re Ryan*, 3 Ir. R. Eq. 238; *Frame* v. *Dawson*, 14 V. 386. Cf. *Laird* v. *Birkenhead Ry. Co.*, John. 500.

(*l*) See *Walpole* v. *Orford*, 3 V. 402.

(*m*) *Caton* v. *C.*, L. R. 1 Ch., p. 148 (affirmed L. R. 2 H. L. 127); *Whitbread* v. *Brockhurst*, 1 Bro. Ch., p. 416; *Dickinson* v. *Barrow*, [1904] 2 Ch. 339; *Rawlinson* v. *Ames*, [1925] 1 Ch. 96, 109, 115.

(*n*) Fry (6th ed.), p. 281.

(*o*) *Kirk* v. *Guardians of Bromley*, 2 Ph. 640; *Crampton* v. *Varna Ry. Co.*, L. R. 7 Ch. 562.

in pursuance of it, and cannot therefore be considered as acts of part performance (*p*).

Acts, moreover, which though *subsequent*, are merely ancillary to an agreement, although attended with expense, are not considered acts of part performance. Thus, the delivery of abstracts of title (*q*), giving orders for conveyances to be drawn and engrossed (*r*), giving instructions for a lease (*s*), going to view an estate (*t*), putting a deed into a solicitor's hands to prepare a conveyance (*u*), measuring the estate (*x*), employing surveyors to value timber thereon, or fixing upon persons as appraisers to value stock (*y*), appointing a person to make a valuation of the land (*z*), altering a draft (*a*), registering deeds (*b*), obtaining the release of a right from a third party for a valuable consideration by the plaintiff in pursuance of a condition of the contract (*c*), and similar acts of an equivocal nature, are not sufficient acts of part performance to take a parol agreement out of the statute.

Payment of part (*d*), or even of *all* the purchase-money will not be considered an act of part performance to take a parol contract out of the Statute of Frauds (*e*). Nor will payment of the auction duty (*f*).

Possession.—But an admission into possession which has unequivocal reference to the contract has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has, therefore, constantly been received as

(*p*) *Whitbread* v. *Brockhurst*, 1 Bro. Ch., p. 412; *Parker* v. *Smith*, 1 Coll. 608, 623; Fry (6th ed.), p. 295.

(*q*) *Whaley* v. *Bagnel*, 1 Bro. P. C. 345; 6 Bro. P. C. 45.

(*r*) *Phillips* v. *Edwards*, 33 B. 444; *Clerk* v. *Wright*, 1 Atk. 12; *Whitchurch* v. *Bevis*, 2 Bro. Ch. 559; *Cooke* v. *Tombs*, 2 Anst. 420.

(*s*) *Phillips* v. *Edwards*, 33 B. 444; *Cole* v. *White*, cited in 1 Bro. Ch. p. 409.

(*t*) *Clerk* v. *Wright*, 1 Atk. 12.

(*u*) *Whitchurch* v. *Bevis*, 2 Bro. Ch. 559; *Redding* v. *Wilkes*, 3 Bro. Ch. 400.

(*x*) *Pembroke* v. *Thorpe*, 3 Swans. 437 (n).

(*y*) *Whitchurch* v. *Wainewright*, 1 Bro. Ch. 404.

(*z*) *Cooke* v. *Jackson*, 6 V., pp. 17, 41.

(*a*) *Hawkins* v. *Holmes*, 1 P. W. 770.

(*b*) *Whitbread* v. *Brockhurst*, 1 Bro. Ch. 409.

(*c*) *O'Reilly* v. *Thompson*, 2 Cox, 271; *Re Cooke*, 5 L. R. Ir. 99; see also *Stokes* v. *Moore*, 1 Cox, 219; *Frame* v. *Dawson*, 14 V. 386; *East India Co.* v. *Nuthambadoo*, 7 Moo. P. C. 482, 497; *Borrett* v. *Gomeserra*, Bunb. 94.

(*d*) *Clinan* v. *Cooke*, 1 Sch. & L. 22; *Seagood* v. *Meale*, Pr. Ch. 560; *O'Herlihy* v. *Hedges*, 1 Sch. & L. 123.

(*e*) *Hughes* v. *Morris*, 2 De G. M. & G., p. 356; *Watt* v. *Evans*, 4 Y. & C. Ex. 579. At one time payment was held to be a part performance. See *Lacon* v. *Mertins*, 3 Atk. 1.

(*f*) *Buckmaster* v. *Harrop*, 7 V. 346.

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evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure (*g*), *a fortiori* where, as in *Lester* v. *Foxcroft*, after entering into possession money has been laid out in building or in improvements (*h*).

As between landlord and tenant, however, the mere continuance in possession by the tenant is not part performance of an oral contract for sale or a new lease (*i*), but if he pays an increased rent which is clearly referable to that contract it is part performance (*k*). Where, however, other tenants of the same landlord also paid an increased rent, from the same time as the plaintiff, and the improvements were of small value and such that a prudent yearly tenant might do, the Court declined to assist the tenant (*l*).

It is essential that possession should be delivered according to the contract; if obtained otherwise it will not be treated as an act of part performance (*m*).

Where possession has been taken without consent, if subsequently the owner allows a stranger to remain in possession, it may be treated as an act of part performance (*n*), and so may possession taken before, but continued after a parol contract if referable to the contract (*o*).

In *Millard* v. *Harvey* (*p*), the plaintiff's wife, without his knowledge, paid £150 to the defendant with the desire of purchasing a field for the plaintiff. The defendant refused to sell, but kept the

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(*g*) *Morphett* v. *Jones*, 1 Swans. 181; *Earl of Aylesford's Case*, 2 Stra. 783; *Lacon* v. *Mertins*, 3 Atk. 1; *Bowers* v. *Cator*, 4 V. 91; *Kine* v. *Balfe*, 2 Ball & B. 343; *Shillibeer* v. *Jarvis*, 8 De G. M. & G. 79; *Wilson* v. *West Hartlepool Ry. Co.*, 2 De G. J. & S. 475.

(*h*) See *Floyd* v. *Buckland*, 2 Freem. 268; *Mortimer* v. *Orchard*, 2 V. 243; *Toole* v. *Medlicott*, 1 Ball & B. 393; *Wheeler* v. *D'Esterre*, 2 Dow (H. L.), 359; *Norris* v. *Jackson*, 10 W. R. 228; *Cook* v. *Corporation of Seaford*, L. R. 6 Ch. 551.

(*i*) *Wills* v. *Stradling*, 3 V., p. 381, but see *Savage* v. *Carroll*, 1 Ball & B. 265; *Morphett* v. *Jones*, 1 Swans. 181.

(*k*) *Nunn* v. *Fabian*, L. R. 1 Ch. 35; *Humphreys* v. *Green*, 10 Q. B. D. 148; *Miller* v. *Sharp*, [1899] 1 Ch. 612; and see *Wills* v. *Stradling*, 3 V. 378; cf. *Charlewood* v. *Bedford (Duke)*, 1 Atk. 497; *Clarke* v. *Reilly*, 2 Ir. R. C. L. 422; *Archbold* v. *Lord Howth*, 1 Ir. R. C. L. 608; *Williams* v. *Evans*, 19 Eq. 547; Lyne, 347; *Connor* v. *Fitzgerald*, 11 L. R. Ir. 106.

(*l*) *Howe* v. *Hall*, 4 Ir. R. Eq. 242.

(*m*) *Cole* v. *White*, cited 1 Bro. Ch. 409; *White* v. *Whitewood*, 13 T. L. R. 409. See *Brough* v. *Nettleton*, [1921] 2 Ch. 25.

(*n*) *Pain* v. *Coombs*, 1 De G. & J. 34; see also *Miller* v. *Finlay*, 5 L. T. 510; *Gregory* v. *Mighell*, 18 V. 331.

(*o*) *Hodson* v. *Heuland*, [1896] 2 Ch. 428; and see *Brough* v. *Nettleton*, [1921] 2 Ch. 25.

(*p*) 34 B. 237.

money and paid no interest. A few days afterwards he let the plaintiff into possession, telling him he might have the field to put his horse in. The plaintiff occupied it for ten years, after which defendant threatened ejectment. Plaintiff, being informed of what his wife had done, refused to go out. It was held that, there being a contract with the wife as agent for her husband, subsequently adopted by him, and accompanied by possession for ten years, the Court ought to decree specific performance.

Possession is considered an act of part performance of a parol contract, not only in the case of sales or leases, but also of other contracts whereby the possession may be explained (*q*); especially in the case of family arrangements (*r*).

Acquiescence moreover in possession for a long lapse of time will be a circumstance taken into consideration by the Court against allowing the Statute of Frauds to be set up (*s*).

The laying out of money.—If the laying out of money, by a stranger who enters into possession, be such as would probably take place under the alleged agreement, and is done with the privity of the other party, it will, as decided in the principal case, be an act of part performance, for example, where an intended lessee has entered and built upon the premises (*t*).

The laying out of money by the *tenant* continuing in possession, if it was part of the agreement that money should be laid out, and it is one of the considerations for granting the lease (the laying out of which must be then with the privity of the landlord), is very strong to take it out of the Statute (*u*). In *Mundy* v. *Jolliffe* (*x*), a tenant from year to year of a farm having at his own expense drained the lands upon the farm, and laid down into pasture the only piece of arable land which the farm contained, and repaired the buildings, pursuant to a parol agreement for a lease, Cottenham, C., upon proof of the agreement, decreed specific performance, saying there was no doubt of the part performance.

(*q*) *Lincoln* v. *Wright*, 4 De G. & J. 16; *Coles* v. *Pilkington*, 19 Eq. 174; Fry (6th ed.), pp. 273-4.

(*r*) *Stockley* v. *S.*, 1 V. & B. 23; *Williams* v. *W.*, L. R. 2 Ch. 294, 304, 305; *Neale* v. *N.*, 1 Keen, 672; *Cood* v. *C.*, 33 B. 314.

(*s*) *Blachford* v. *Kirkpatrick*, 6 B. 232; *Crook* v. *Corporation of Seaford*, L. R. 6 Ch. 551; and see *Stockley* v. *S.*, *supra*.

(*t*) *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Sutherland* v. *Briggs*, 1 Ha. 26; *Reddin* v. *Jarman*, 16 L. T. 449; *Plimmer* v. *Mayor, etc., of Wellington*, 9 A. C 699.

(*u*) *Per* Lord Loughborough, C., in *Wills* v. *Stradling*, 3 V. 382.

(*x*) 5 My. & C. 167.

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And the result is the same where the outlay in part performance of an agreement with the tenant is made by his sub-lessee with the assent and approval of the landlord (*y*).

But such laying out of money, to be an act of part performance, must not be of an equivocal character. Thus, if a tenant should set up an agreement for a purchase, and get a witness to swear to it, and then offer as evidence of part performance his possession and cultivation of the land, that could not be deemed an act of part performance, for it would have taken place precisely in the same shape, whether there was any agreement for a purchase or not (*z*).

In *Brough* v. *Nettleton* (*a*), a verbal agreement was come to between the plaintiff and the defendant that the plaintiff should take a house of the defendant for two and a half years at a rent of £27 10s. with an option of purchase at any time during the term for £500. The plaintiff signed a memorandum containing these terms but no document was signed by the defendant. The plaintiff entered into possession and paid rent, and before the term expired gave notice of exercise of the option of purchase, but the defendant denied the plaintiff's right. It was held by Lawrence, J., that the possession taken by the plaintiff was an act of part performance which enabled him to give evidence of all the terms of agreement, and that the plaintiff was entitled to specific performance of the agreement including the option to purchase.

The surrender of a lease by the lessee to the lessor, on the faith of a parol agreement by him to grant a new lease to a third party, has been held in Ireland to be an act of part performance, and specific performance was decreed (*b*).

Upon the same principle, in *Parker* v. *Smith* (*c*), the landlord of a coal set, having four tenants in partnership together holding under a lease, several years of which were unexpired, entered into a parol agreement with all four upon the surrender of the old lease to grant a new one to two of the partners—the plaintiffs—upon the terms that the partnership should be dissolved, and that the plaintiffs should release the two retiring partners from all liability. The dissolution and release so agreed upon took place, by which the plaintiffs took upon themselves the liability which had before been

(*y*) *Williams* v. *Evans*, 19 Eq. 547; *Shillibeer* v. *Jarvis*, 8 De G. M. & G. 79, 87; cf. *Dickinson* v. *Barrow*, [1904] 2 Ch. 339.

(*z*) *Frame* v. *Dawson*, 14 V. 388; and see *Howe* v. *Hall*, 4 Ir. R. Eq. 242.

(*a*) [1921] 2 Ch. 25.

(*b*) *Re Cooke*, 5 L. R. Ir. 99.

(*c*) 1 Coll. 608.

shared by the four. Specific performance was decreed. "It is part of the entire agreement that the dissolution and release shall take place. They do take place. It is impossible to treat these acts otherwise than as acts of part performance, taking the case out of the Statute of Frauds."

Companies and corporations are bound equally with individuals by acts of part performance; the doctrine extending to contracts which are invalid for want of the corporate seal (*d*).

Sales of land at an ordinary auction are within the statute (*e*).

If a purchaser at an auction takes possession of a lot knocked down to him, and cuts down crops, it will be held to be a part performance of the verbal contract entered into in the auction room and specific performance will be decreed; but if a person has purchased two or more lots sold separately at a sale by auction, acts of part performance with regard to one lot will not supply the want of a written contract with regard to the other lots (*f*).

Marriage.—Although where a parol contract is made in consideration of marriage, the subsequent marriage will not be an act of part performance so as to take the case out of the Statute of Frauds, inasmuch as the statute expressly provides that a contract in consideration of marriage shall not be binding unless it be in writing (*g*), nevertheless a parol contract may be taken out of the statute by acts of part performance independently of the marriage. Thus, in *Surcome* v. *Pinniger* (*h*), a father previous to the marriage of his daughter told her intended husband that he meant to give certain leasehold property to them on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title deeds. The husband also expended money upon the property. It was held by the Lords Justices, that there had been sufficient part performance to take the case out of the Statute of Frauds (*i*).

(*d*) *Wilson* v. *West Hartlepool Ry. Co.*, 2 De G. & J. & S. 475; *Steven's Hospital* v. *Dyas*, 15 Ir. Ch. R. 405; *Hunt* v. *Wimbledon, etc.*, 4 C. P. D., pp. 52, 60, 61, 62; *Melbourne Banking Corporation* v. *Brougham*, 4 A. C. 156; Fry (6th ed.), pp. 280, 306.

(*e*) *Blagden* v. *Bradbear*, 12 V. 472. (*f*) *Buckmaster* v. *Harrop*, 13 V. 474.

(*g*) *Lassence* v. *Tierney*, 1 Mac. & G. 551; *Warden* v. *Jones*, 2 De G. & J. 76; *Cooper* v. *Wormald*, 27 B. 266; *Caton* v. *C.*, L. R. 1 Ch. 137 (affirmed L. R. 2 H. L. 127); *Re Eyre*, 72 L. T. 585; *M'Askie* v. *M'Cay*, 2 Ir. R. Eq. 447; and see *Trowell* v. *Shenton*, 8 Ch. D. 318, 326 (on Lord Tenterden's Act 9 Geo 4, c. 14). (*h*) 3 De G. M. & G. 571.

(*i*) See also *Taylor* v. *Beech*, 1 Ves. Sen. 297; *Barkworth* v. *Young*, 4 Drew. 1; *Ungley* v. *U.*, 5 Ch. D. 887; Fry (6th ed.), 294.

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Although marriage is not, a return to cohabitation may be, a sufficient act of part performance. Thus, where a husband in a separation deed covenanted with a trustee to pay an annuity for life to his wife, and she shortly before his death returned to him upon the faith of a verbal agreement made with her and her trustee, that if she would do so, he would continue to pay the annuity, and would charge it upon his real estate, and the husband having died without having done so, it was held that the verbal agreement, having been in part performed by the wife returning to her husband, could be enforced against his devisees (*k*).

In a recent case decided in Northern Ireland, where A conveyed land to his brother B, on the faith of a promise by his mother that she would (if this were done) leave certain property to A by her will, it was held, after the mother's death, that there had been part performance by A and he could enforce the verbal contract against his mother's executors (*l*). The mere fact that an incomplete agreement has been signed will not preclude the proof of additional terms by parol in a case where there have been acts of part performance (*m*).

3. Evidence, Pleading, &c.

The plaintiff must first prove that the agreement he alleges was in fact entered into. Where the defendant admits the contract as alleged no difficulty arises, but where the defendant proves a different contract to that alleged by the plaintiff, the Court will refuse to interfere, as the burden of proof is on the plaintiff (*n*); but may give leave to bring a fresh action (*o*). But variations between the agreement alleged and that proved, if immaterial, or of the plaintiff's admission of some term against himself or omission of some term in his favour (*p*), will not prevent the Court decreeing specific performance. If the alleged contract is denied by admitting a different one, it is probable that the Court would admit parol evidence of the plaintiff to modify the contract admitted by the defendant.

(*k*) *Webster* v. *W.*, 4 De G. M. & G. 437. See and consider *Maddison* v. *Alderson*, 8 A. C. 467; and cf. *Harrison* v. *H.*, [1910] 1 K. B. 35.

(*l*) *Lowry* v. *Reid*, [1927] N. Ir., p. 142.

(*m*) *Sutherland* v. *Briggs*, 1 Ha. 26, 35; Fry (6th ed.), p. 302.

(*n*) *Lindsay* v. *Lynch*, 2 Sch. & L. 1; *Price* v. *Salusbury*, 32 B. 446; *Reynolds* v. *Waring*, You. 346; *Mortimer* v. *Orchard*, 2 V., p. 243.

(*o*) *Hawkins* v. *Maltby*, L. R. 3 Ch. 188.

(*p*) *Clifford* v. *Turrell*, 9 Jur. (N.S.) 633; *Lanyon* v. *Martin*, 13 L. R. Ir. 297; *Re Holland*, [1902] 2 Ch., p. 379.

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A parol agreement alone, without any acts of part performance, was, under the old practice, held to be taken out of the Statute of Frauds by the admission thereof by a defendant in his answer to a bill of complaint, unless he insisted upon the statute by way of defence, for it was considered that the admission took the agreement entirely out of the mischief which the statute was designed to obviate (*q*); and in the event of his death, the admission would equally bind his representatives (*r*).

Where the defendant *admitted* a parol agreement as alleged, no further proof thereof by the plaintiff was requisite, even if the defendant claimed the benefit of the Statute of Frauds, if there were acts of part performance, for they take the case out of the statute (*s*).

Under the present system of pleading the contract is admitted unless it is actually denied, except in the case of an infant, lunatic, or person of unsound mind (*t*).

In many cases, especially where possession has been taken and there have been other acts of part performance, there has been a strong inclination *quacunque via* to make out the agreement notwithstanding the conflict of evidence. "Courts of Equity exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been a part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money, or otherwise acted, in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and with that object, it has, at the hearing, and when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect, if it can, what the terms of the agreement really were" (*u*). But if, after considering

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(*q*) *Att.-Gen.* v. *Day*, 1 Ves. Sen., p. 221; *Lacon* v. *Mertins*, 3 Atk., p. 3; *Gunter* v. *Halsey*, Amb. 586; *Limondson* v. *Sweed*, Gilb. 35, *sed vide Eyre* v. *Popham*, Lofft's Rep. 808, 809.

(*r*) *Ibid.*; Fry (6th ed.), p. 271.

(*s*) *Cooth* v. *Jackson*, 6 V., pp. 37, 38.

(*t*) R. S. C., 1883, Ord. XIX., rr. 13, 15; see also Fry, S. P., (1903), p. 250.

(*u*) *Per* Lord Cottenham, C., in *Mundy* v. *Jolliffe*, 5 My. & C., p. 177. See also *Mortimer* v. *Orchard*, 2 V. 243; *Laird* v. *Birkenhead Ry. Co.*, John. 500; *Wilson* v. *West Hartlepool Ry. Co.*, 2 De G. J. & S. 475; *Oxford* v. *Provand*, L. R. 2 P. C. 135, 148; *Baumann* v. *James*, L. R. 3 Ch. 508; cf. *Rochefoucauld* v. *Boustead*, [1897] 2 Ch., p. 206.

all the evidence, any material terms of the contract are doubtful, the Court can make no decree (*x*).

Where the defendant denies the agreement alleged, but admits another, and the acts of part performance are equally consistent with both agreements, it seems that parol evidence of the agreement alleged is not admissible. Thus, in *Lindsay* v. *Lynch* (*y*), the plaintiff alleged an agreement for a lease for three lives, the answer admitted an agreement for *one* life only, and the acts of part performance, viz., the building of a wall under a former covenant and the payment of rent, not being inconsistent with the agreement admitted by the defendant, evidence in support of the agreement set up by the bill was refused (*z*). It seems that if the plaintiff had amended his bill abandoning the agreement alleged, he might have had a decree for the agreement admitted (*a*), but as he had amended his bill, continuing to insist on the agreement alleged, and praying in the alternative to have specific performance of the agreement admitted by the defendant, the bill was dismissed, but without prejudice to his filing a new bill (*b*).

In *Berners* v. *Fleming* (*c*), the plaintiff (the vendor) claimed specific performance of a written contract for sale. The plaintiff insisted that upon the construction of the contract the defendant was entitled to a more limited right of way than that claimed by the defendant. The Court of Appeal held that the plaintiff's construction was erroneous, but nevertheless, subject to the plaintiff paying the costs of the action up to and including the trial, an order for specific performance was made pursuant to the true construction, in accordance with which the defendant in his pleading had expressed his willingness to complete.

Pleading the Statute. — The statute must be specifically pleaded (*d*), and the point thus raised may, by consent or order,

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(*x*) *Clinan* v. *Cooke*, 1 Sch. & L. 22; *Lord Ormond* v. *Anderson*, 2 Ball & B. 363; *Wheeler* v. *D'Esterre*, 2 Dow (H. L.), 359; *Blore* v. *Sutton*, 3 Mer. 237; *Reynolds* v. *Waring*, You. 346; *Monro* v. *Taylor*, 3 Mac. & G. 719; *Tatham* v. *Platt*, 9 Ha. 660; *Stuart* v. *L. & N. W. Ry. Co.*, 1 De G. M. & G. 721; *Taylor* v. *Portington*, 7 De G. M. & G. 328.

(*y*) 2 Sch. & L. 1. *Sed quære*; see Fry (6th ed.), p. 302.

(*z*) *Sed vide Sutherland* v. *Briggs*, 1 Ha. 26; *Tomkinson* v. *Staight*, 17 C. B. 697.

(*a*) Anon., cited in 2 S. & L. 9.

(*b*) *Lindsay* v. *Lynch*, 2 Sch. & L. 1.

(*c*) [1925] Ch. 264.

(*d*) R. S. C., 1883, Ord. XIX, r. 15, Ord. XXV, rr. 1, 2; *Dawkins* v.

be set down for hearing before the trial (*e*). It was held that no particular section of the statute of Frauds need be pleaded, but that where a particular section is pleaded, the defendant may be held to it and leave to amend refused (*f*). It may be doubted, however, whether, now, it would be sufficient to plead the Law of Property Act, 1925, without specifying the section—*i.e.*, section 40 —which takes the place of the portion of section 4 of the Statute of Frauds referred to in the above notes.

Penrhyn, 4 A. C. 58; *Catling* v. *King*, 5 Ch. D. 660; *Brunning* v. *Odhams*, 75 L. T. 602.

(*e*) R. S. C., 1883, Ord. XXV., r. 2; *Stokell* v. *Niven*, 61 L. T. 18.

(*f*) *James* v. *Smith*, [1891] 1 Ch. 384.

SETON *v.* SLADE.
HUNTER *v.* SETON.

1802. 7 V. 265; 6 R. R. 124.

Specific Performance with Compensation.

Specific performance decreed: the abstract, though delivered very late, and under a notice that the vendee would insist on his deposit, with interest, if the title should not be made out and possession delivered by the time of payment, having been received and kept without objection: and the vendee, upon the construction and the circumstances, not being entitled to insist on the time, as the essence of the contract.

An agreement signed by one party only, good to charge him within the Statute of Frauds.

The plaintiff in the first of these causes being entitled to an estate called Kilorough, in the county of Glamorgan, under a contract entered into in 1799, by the trustees of the Marquis de Choiseul, to convey to him and his heirs, in consideration of £8,500, employed Josiah Phipps to sell the estate by auction or private contract; and the following memorandum, in writing, dated April 12, 1800, was signed by the defendant Robert Slade, but not by the plaintiff, or anyone on his behalf:—"I, Robert Slade, of Doctors' Commons, in the City of London, Esquire, have this day purchased of Josiah Phipps, the estate described in the within particular, at and for the sum of £10,000, including the timber and underwood growing thereon, have paid a deposit of £1,000, do hereby undertake and agree to pay the remainder of the purchase-money, and complete my purchase, within two months from the date hereof, the proprietor making a good title thereto at his own expense, and executing a proper conveyance, to be prepared at my expense. And I do further agree to pay for the fixtures, household furniture, at a fair valuation, and for the growing crops, seeds, fallows, etc., in the same way, according to

the custom of the country; and possession to be given upon the completion of the contract, to which time all outgoings are to be cleared up, and I am entitled to the rents and profits. Upon failure of my complying with the terms and conditions before mentioned, the deposit money shall be forfeited, the proprietor shall be at full liberty to re-sell the estate, and the deficiency, if any there shall be by such second sale, together with all charges attending the same, shall be made good at my expense."

The bill in the first cause prayed a specific performance of this agreement; which was resisted under the following circumstances, appearing by the answer and the evidence.

The defendant, the day after he signed the agreement (April 13), wrote to Phipps from Brighthelmstone, stating objections to the title, and that, if the title should not be made out, and possession delivered to him by June 12 then next, he should insist upon having the deposit money returned to him with interest. Phipps' letter in answer, dated April 19, stated the plaintiff's answer, as given verbally by his solicitor, thus:— "Mr. Seton desired I would inform you that he accedes to your request respecting the interest as a matter of course." The defendant, about the beginning of May, informed Phipps he had sold out stock for the purpose of being ready with his purchase-money, and expressed his surprise that no abstract had been delivered. He afterwards pressed Phipps for the abstract, and proposed that Phipps should copy and send in his name to the plaintiff a note written by the defendant, expressing, that, finding no progress made in the delivery of the title, he called to remind Phipps, that, in the eevnt of its not being completed at the expiration of the two months, he expects, in compliance with the promise the plaintiff made, in answer to his letter from Brighthelmstone, to have his deposit-money returned with interest, and requesting authority to fulfil the engagement on the plaintiff's part. Phipps declined writing that letter. On Saturday, June 7, the abstract was left at the defendant's solicitors, with a note stating that the plaintiff had only a title under an agreement, but all necessary parties were ready to convey, and making a proposal for that purpose. On Monday, the 9th, the plaintiff's

solicitor called there to say that he would not vouch for the authenticity of the abstract, as it was not prepared by him, but by the solicitors for the trustees of the Marquis de Choiseul. Nothing further passed till June 13, on which day the defendant wrote to Phipps, demanding his deposit with interest, and stating his reasons, that the two months within which the plaintiff agreed to complete the contract were expired, and the defendant's solicitors had not received an abstract till within these few days; and so far from showing a right in the plaintiff to convey, it states merely a contract for purchase by him, without noticing a suit in Chancery against the trustees of the Marquis and Marchioness de Choiseul, previous to the contract for purchase by the plaintiff, which renders it impossible for the plaintiff to carry into effect his agreement with the defendant within the time limited.

The defendant afterwards recovered his deposit with interest, in an action. Several objections were taken to the abstract, the principal of which (mentioned in the defendant's letter of April 13) were the suit instituted by the Marquis de Choiseul and his creditors to remove his trustees, and for an account of their conduct; and a prior contract with a person named Darby, who gave notice of his claim. He was made a defendant, and put in an answer, amounting, on the whole, to a disclaimer. Afterwards, being examined as a witness, by his depositions he renewed his claim. The Lord Chancellor held, that he could not get rid of the disclaimer upon the record without a strong case upon affidavit; and, therefore, he was a good witness; but the defendant, reading his depositions, must admit that he has no interest. The defendant then declined reading his evidence.

The second cause was instituted upon a bill by the trustees of the Marquis de Choiseul, praying a specific performance of their contract with Seton.

Mr. Romilly and Mr. Bell, for the plaintiff Seton.—The question is, whether the vendor was bound to make out his title by a certain day; and farther, whether, if he could make a title at a subsequent time, that would not be sufficient in this Court.

Seton v. Slade.

In all the decisions upon this point, time has been considered a circumstance merely not of the essence of the agreement. It is true, in modern cases parties have been discharged, where in former times they would have been bound, the late decisions having restrained the unlimited extent of the older cases. But they have never gone the length, that if the agreement is not performed at the particular day, it shall be at an end. . . . The result is that the non-performance at the day is a circumstance to show abandonment, but only a circumstance. . . .

[They cited *Gregson* v. *Riddle* (*a*).]

Mr. Richards and Mr. Leach, for the defendant Slade. . . .

[The Lord Chancellor (*b*).—There have been several very hard cases under the description of the specific performance of agreements, upon the principle of compensation; that, for instance, where a person contracted for an estate in Essex, with the object of becoming a freeholder of that county, and it turned out to be in Kent; yet he was held to it (*c*). So, in a case before Sir T. Sewell, upon an agreement for a leasehold house with a wharf, the object of the purchaser being to be a wharfinger, he was compelled to take the house without the wharf. So, where the object was to purchase an estate tithe-free, and he was compelled to take it subject to tithe (*d*). The value of the tithe is not a compensation. I incline much to think, notwithstanding what was said in *Gregson* v. *Riddle*, that time may be made the essence of the contract: but I do not recollect a case where an abstract was delivered for the purpose of preparing a conveyance; at the delivery no objection made that it was delivered too late; and between the delivery and the time for the execution of the conveyance, no objection stated, either to the time of the delivery or the nature of the title. The abstract certainly was delivered very late; but it is upon the party to say it was too late. If he receives the abstract without objection, does he not authorise the

(*a*) In Chancery, before the Lords Commissioners, 12th June, 1783; before Lord Thurlow, 12th June, 1784. Cited by Mr. Romilly, from his own note.
(*b*) Lord Eldon.
(*c*) *Shirley* v. *Davis*, in the Court of Exchequer, cited 6 V. 678.
(*d*) *Lord Howland* v. *Norris*, 1 Cox, 59.

other to suppose he is, during the currency of the rest of the time, preparing his conveyance, and the thing is to go on?]

Mr. Richards and Mr. Leach.—The delivery of the abstract was a mere mockery. It could not possibly be imagined that it could be looked through in time. It was incumbent upon the vendor to have some communication with the vendee, to do away the effect of his letter. It would be a new decision, that the delivery of the abstract to the solicitor, the vendee having declared absolutely that he would not let it go beyond the time, shall amount to a new contract. No diligence could have enabled the vendor to perfect his title by June 12, on account of the claim of Darby, and the suit in this Court.

Mr. Romilly in reply.—* * * There is no such principle, that time is essential here as well as at law, and that it is always dispensed with upon the conduct of the party. That would exclude Courts of equity from a great part of their jurisdiction. * * * There are no words in this agreement shewing the parties meant this time strictly. It was inserted merely because it is usual to fix a time. * * *

The Lord Chancellor.—If it were necessary, for the decision of this case, to express myself with great accuracy upon the principle of the Court as to suits for specific performance, as far as objections are to be founded upon what the Court has done, and has forborne to do, in a great variety of cases, in which the objection has been taken, that the agreement was not carried into execution within the time stipulated upon the face of it, I should think it my duty to look through a great number of cases. But in the view I have of this case, I incur no hazard of making a decree in its principle inconsistent with any authority that can be stated.

To say time is regarded in this Court as at law is quite impossible. The case mentioned, of a mortgage, is very strong: an express contract under hand and seal. At law, the mortgagee is under no obligation to reconvey at [*quære* after] that particular

day and yet this Court says, that, though the money is not paid at the time stipulated, if paid with interest at the time a reconveyance is demanded, there shall be a reconveyance, upon this ground, that the contract is, in this Court, considered a mere loan of money, secured by a pledge of the estate. But that is a doctrine upon which this Court acts against what is the *prima facie* import of the terms of the agreement itself, which does not import, at law, that once a mortgage always a mortgage. But equity says that; and the doctrine of this Court as to redemption does give countenance to that strong declaration of Lord Thurlow, that the agreement of the parties will not alter it; for I take it to be so, in the case of a mortgage, that you shall not, by special terms, alter what this Court says are the special terms of that contract. Whether that is to be applied to the case of a purchase is a different consideration. I only say, time is not regarded here as at law. * * *

But I need not address myself to the consideration of what is the precise principle with much industry; for no authority would support me in saying, that, under the particular circumstances of this case, the defendant can resist a decree, if a good title can be made. This agreement is signed by the defendant Slade only; but that makes him within the statute (*e*) a party to be charged. I do not say whether terms might or might not be introduced, that would make time expressly of the essence of the contract (*f*). It is enough to say, that, if this agreement has that effect, there never was an agreement that would not; for, upon that point, the agreement is as loose as possible. There is no passage in it *eo intuitu;* not that sort of passage in *Gregson* v. *Riddle.* The clause as to liberty to resell, etc., is not considered of much importance in this Court; but in this instance it is a clause against the vendee, having no corresponding clause against the vendor. That clause expresses little more than would be the legal effect if that was not inserted. But it is enough to say upon that, the objection relied upon in the argument, that the

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(*e*) 29 Car. 2, c. 3.

(*f*) They clearly might. See *Hudson* v. *Bartram*, 3 Madd. 440; *Boehm* v. *Wood*, 1 J. & W. 410.

plaintiff might have sold after the two months were expired, admits of this answer; that it is assuming the whole question. If you make out that he would have been at liberty to resell, that does not make out that he lets the other off; but, under the circumstances, he would not have been at liberty to resell. The evidence clearly imports that the defendant did not understand it to have bound them in that mutual respect in which he seems in his letter to think it reasonable they should be bound. But I will construe it, for the purpose of this case, as if it had mutually bound them; and that, if the title was not made out by the day, then the defendant should be at liberty to say he was off; for if that clause had been in this agreement he might have waived the benefit of it; and it must have been made out that his conduct did not occasion the non-fulfilling the agreement. Take it, that there was the mutual clause. The moment after the sale, the auctioneer was no longer the agent of the plaintiff. He was his agent only to sell, not to deal with the terms upon which a title was to be made. The defendant must show the auctioneer had acquired a character to bind the plaintiff in that respect. There is no evidence of that: on the contrary, the defendant applies to the auctioneer as such agent, and he refuses to act as such, and refers him to the plaintiff. But he applies again to the auctioneer, and never to the plaintiff. One clause of this letter is very important; marking the knowledge of the title in the law-agent of the vendee, and that he was able, in the first instance, the day after, to state the material objections, viz., the proceedings in Chancery, and Darby's claim. That is distinct evidence that the defendant did not then understand that he had entered into an agreement, by force of which he thought he had a right to say, the time of two months was absolutely of the essence of the contract. Whether that was misunderstanding or not, that was his understanding. By the last words he seems desirous of having an agreement, which would for the first time give a mutuality as to time. But he does not choose to give up the one till he gets the other, reserving to himself the power to deal with the first agreement as he thinks fit, though he may not get the stipulation he wishes. If the plaintiff acceded to that proposition, he would be bound. But what is the evidence that he did? There is a

good deal of reasoning in support of the argument that Phipps's letter is not merely a statement that he would pay interest, but, with regard to some circumstances, that the contract was to be off, viz., the deposit-money to be returned with interest, connected with the dissolution of the agreement, which might either be within or after the expiration of the two months; but, if the former, it ought to be shown to be clearly the effect of something that passed subsequently, and was acceded to. The letter of Phipps in answer is no evidence of the facts stated in it. Does the defendant conceive the matter as resting on that letter, and consider it as an undertaking to the extent he proposed, or as completely settling that mutuality he desired, giving him a right to insist upon the time as the essence of the contract? No; for afterwards he goes again to Phipps, not an agent, to bind the plaintiff for this purpose, and, not being able to prove the date further than that it was between April 13 and June 5. This proves that the defendant, by repeated inquiries addressed to his solicitors, who knew a good deal of the title, was informed from time to time that the abstract was not delivered. The proof is complete as to that. This is a complete waiver of any objection from the non-delivery of the abstract at the time the defendant proposed that Phipps should write that letter. Being told Phipps would not write that letter, he does not write himself, or direct his solicitors to apply; but, upon June 7, by his solicitors, he receives the abstract, they knowing the history of the title and the estate, and stating the two grounds of objection the day after the contract took place. There was a note at the bottom of the abstract, stating distinctly that the plaintiff had only a title under an agreement, but that all necessary parties were ready to convey, and making a proposal for that purpose, which might or might not be completed within the time. The abstract was delivered on June 7. No objection was made to receiving it. It was kept till the time expired, without objection. Ought not the objection to have been made on the 7th? The plaintiff was bound till the 12th. He could not sell to another: and if the solicitors had returned the abstract upon the objection, the plaintiff was at liberty to say he had undertaken to remove all objections, or to tender a conveyance; and he might have pro-

ceeded to prepare a conveyance, which, under the circumstances, was to be prepared by the defendant; and he might have tendered that conveyance so as to have a right to an action, or to file a bill, as upon an agreement which he had undertaken to make good within the time.

This case is not like *Lloyd* v. *Collett* (*g*), in which the defendant immediately sent the abstract back, and would not look at it. What right had this defendant to read the abstract if it came too late? He had either an intention to execute the contract, or a hope that he had time to get through the abstract, in order to carry it into execution; but the evidence in this respect is totally silent; and it is clear, upon the objections stated in the solicitor's depositions, that at some period or other he had gone into the abstract.

As to the other circumstances stated by the defendant, his selling out stock, etc., there is no evidence whatsoever. As to his intention of making this place his residence, there is nothing in the contract having the least reference to that; and upon an intention, not disclosed in the contract, or afterwards, as essential, this Court has never been in the habit of acting.

Under the circumstances, therefore, whether the time is or is not an objection, founded upon the authorities the Reports of this Court furnish—which I will not discuss, let the authorities upon that point turn the scale either for the defendant or the plaintiff—there is no authority that has not some reference to the conduct of the party in the mean time; and upon the conduct, this defendant has no right, under the circumstances, to say this contract was not performed within the two months.

There must, therefore, be a decree for a specific performance; and as to all the rest, a reference to the Master, to see whether a good title can be made. Where the party has not been able to make his title before the decree, it is always a question very important as to the costs, but not whether he shall take the title or not. According to old cases, it was sufficient if the title was made by the time of the report (*h*).

(*g*) 4 Bro. Ch. 469; 4 V. 689 (n.).
(*h*) See *Jenkins* v. *Hiles*, 6 V. 646.

NOTES.

1. Generally.
2. Delay, p. 435.
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   (a) From the nature of the property, p. 445.
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5. Compensation where the vendor has not the interest in the estate which he has contracted to sell, or there is some deficiency in the quantity or quality thereof, p. 451.

1. Generally.

"A Court of Equity frequently decrees specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious that the agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance; and to sustain an action at law, performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case" (*i*).

Where, for instance, some of the steps towards the completion of the contract have not been taken, or, as in the principal case, the contract itself has not been completed at the time agreed upon by the parties, or where the vendor had not the same interest in the estate as that which he had contracted to sell, or there was some deficiency in the quality or quantity of it, the party not able strictly to perform the contract on his part formerly, at law, had no remedy by way of damages against the other; but, in equity, in many cases he would be able to obtain specific performance, if adequate compensation could be made for the non-literal performance of the contract (*k*).

These doctrines of equity have been extended to all the divisions of the High Court of Justice. The Law of Property Act, 1925, s. 41 (replacing section 25, sub-section 7 of the Judicature Act, 1873) provides that: "Stipulations in a contract, as to time or otherwise, which according to rules of Equity are not deemed to be or to have

(*i*) *Per* Lord Redesdale in *Davis* v. *Hone*, 2 Sch. & L. 347. See also *Lennon* v. *Napper*, 2 Sch. & L. 684; *Parkin* v. *Thorold*, 2 Si. (N.S.) 6, 8.

(*k*) See Fry (6th ed.), p. 23.

become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."

At *law*, in all cases, time was considered as of the essence of the contract. A Court of equity, however, enforced specific performance, notwithstanding a failure to keep the dates agreed upon, either for the completion itself or for the steps towards completion, if it could do justice between the parties, and if there was nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right (*l*). This is what is meant and all that is meant, when it is said that in equity time is not of the essence of the contract (*m*).

2. Delay.

Unreasonable delay will of itself be a bar to either party obtaining a decree for specific performance; for " a party cannot call upon a Court of Equity for a specific performance unless he has shown himself ready, desirous, prompt and eager " (*n*). A continual claim without any active steps in support of it, will not keep alive a right which would otherwise be debarred by *laches* (*o*).

" The doctrine of *laches* in Courts of Equity is not an arbitrary or a technical doctrine. * * * In every case, if an argument against relief which would otherwise be just is founded upon mere delay, the validity of that defence must be tried upon principles substantially equitable " (*p*).

Delay arising from the conduct of either party.—In ordinary cases, where there was nothing special in the nature of the property, or of the purposes for which it was intended, although a particular day might be fixed for the completion of the contract, the Court of equity considered that the real object was the sale of the estate, and the particular day named was merely formal; and that the stipula-

(*l*) See *per* Turner, L.J., in *Roberts* v. *Berry*, 3 De G. M. & G., p. 291.

(*m*) *Tilley* v. *Thomas*, L. R. 3 Ch., p. 67; and see *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, [1913] A. C. 319; *Stickney* v. *Keeble*, [1915] A. C., pp. 415-6.

(*n*) *Per* Lord Alvanley, M.R., 5 V. 720 (n.); see also *Lloyd* v. *Collett*, 4 Bro. Ch. 469; *Harrington* v. *Wheeler*, 4 V. 686; *Guest* v. *Homfray*, 5 V. 818; *Alley* v. *Deschamps*, 13 V. 225; *Dorin* v. *Harvey*, 15 Si. 49; *Alloway* v. *Braine*, 26 B. 575; *Sharp* v. *Wright*, 28 B. 150; *Mills* v. *Haywood*, 6 Ch. D. 196, 202; cf. *M'Murray* v. *Spicer*, 5 Eq. 527, 537.

(*o*) *Lehmann* v. *McArthur*, L. R. 3 Ch. 496; Fry (6th ed.), pp. 514 and 520.

(*p*) See *New Sombrero Co.* v. *Erlanger*, 3 A. C., p. 1279; *Rochefoucauld* v. *Bowstead*, [1897] 1 Ch., p. 210; cf. *Brooks* v. *Muckleston*, [1909] 2 Ch. 519.

tion meant, in truth, that the purchase should be completed within a reasonable time, regard being had to all the circumstances of the case, including the nature of the title to be made.

At *law*, unless the vendor had his abstract and title-deeds ready at the appointed time, his remedy was gone, and the purchaser might recover his deposit (*q*). In *equity*, however, the rule was, that it was not alone the duty of the vendor to tender the abstract, but unless the purchaser asked for it at the appointed day (*r*), or on such other day as would leave sufficient time for the completion of the contract (*s*), the time would be considered to be waived. So, if the abstract were delivered to the purchaser *after* the day appointed, and he made no objection to the delay, he would be considered as having waived it (*t*).

If a vendor did not deliver the abstract of title within the time specified, he could not hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was stipulated that time in that respect should be of the essence of the contract (*u*). In such a case, the time within which objections would be considered as waived, would depend upon the general principles of the Court, and the conduct of the parties (*x*).

Where, however, a vendor had taken *no steps whatever* to complete the contract, and the purchaser had immediately, when the time elapsed, insisted upon the return of his deposit and refused to perform his agreement, equity would not decree specific performance of the contract, or grant an injunction to restrain the purchaser from proceeding at law to recover his deposit (*y*). But if the vendor had endeavoured to make out his title, and had not been guilty of gross *laches* or negligence, it would do so (*z*).

If, after the period at which the contract ought to have been completed, some time has elapsed before the completion of the repairs of a house described as being in good repair (*a*); or before

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(*q*) *Berry* v. *Young*, 2 Esp. 640 (n.).

(*r*) *Guest* v. *Homfray*, 5 V. 818, 823; *Compton* v. *Bagley*, [1892] 1 Ch. 313.

(*s*) *Jones* v. *Price*, 3 Anst. 924.

(*t*) *Smith* v. *Burnam*, 2 Anst. 527; *Pincke* v. *Curteis*, 4 Bro. Ch. 329; *Paine* v. *Meller*, 6 V. 349.

(*u*) *Upperton* v. *Nickolson*, L. R. 6 Ch. 436; *Re Todd and McFadden*, [1908] 1 Ir. R. 213.

(*x*) *Ibid.*, and *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*y*) *Lloyd* v. *Collett*, 4 Bro. Ch. 469; *Omerod* v. *Hardman*, 5 V. 737; *Warde* v. *Jeffery*, 4 Price, 294.

(*z*) *Fordyce* v. *Ford*, 4 Bro. Ch. 495; *Radcliffe* v. *Warrington*, 12 V. 326.

(*a*) *Dyer* v. *Hargrave*, 10 V. 505.

the expiration of a lease of property, when it was stated that the purchaser would, several months before, be entitled to possession (*b*); the purchaser will still not be able to resist specific performance, unless he can show that he wanted the house for his own occupation before the time when the repairs would be completed, or the lease would expire.

Where the delay was due to the purchaser's default the vendor was held to be entitled to specific performance although he had written that he would not extend the time fixed for completion (*c*).

And although *delay* may be solely attributable to disputes between the vendor and a mortgagee, it is not a sufficient excuse for delay on the part of the purchaser, for it was his duty to insist upon fulfilment of the contract if he desired specific performance, and if necessary to commence an action for that purpose (*d*). The rule as to delay will be relaxed where a strict application of it would work injustice (*e*).

Specific performance of a contract will not be decreed when the purchaser has lain by and delayed completing it, even although he may have paid part of the purchase-money (*f*). Nor will a purchaser be aided who has taken trifling and vexatious objections to the title, and has shown a disinclination to perform the contract, especially when the value of the property has increased by the dropping of lives, or otherwise (*g*); or where the purchaser was in reality unable to pay the purchase-money (*h*); and, where either the vendor or purchaser has not completed the contract on his part at the appointed time, if the contract be inequitable, or the price unreasonable—that is to say, inadequate in one case, or exorbitant in the other—specific performance will not be decreed (*i*).

Possession.—It seems that where the purchaser is in possession

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(*b*) *Hall* v. *Smith*, 14 V. 426; and see *Alley* v. *Deschamps*, 13 V. 225.

(*c*) *Laughton* v. *Port Erin Commissioners*, [1910] A. C. 565.

(*d*) *Mills* v. *Haywood*, 6 Ch. D. 196, 202; *Walker* v. *Jeffreys*, 1 Ha. 341; *Colby* v. *Gadsden*, 34 B. 418.

(*e*) *Shepheard* v. *Walker*, 20 Eq. 659; Fry (6th ed.), p. 517.

(*f*) *Harrington* v. *Wheeler*, 4 V. 686; *per* Erskine, C., in *Alley* v. *Deschamps*, 13 V., p. 229; *S. E. Ry. Co.* v. *Knott*, 10 Ha. 122; *Firth* v. *Greenwood*, 1 Jur. (N.S.) 866; *Alloway* v. *Braine*, 26 B. 575.

(*g*) *Hayes* v. *Caryll*, 1 Bro. P. C. 126; *Spurrier* v. *Hancock*, 4 V. 667; *Main* v. *Melbourn*, 4 V. 720; *Pope* v. *Simpson*, 5 V. 145; *Burke* v. *Smyth*, 3 Jo. & Lat. 193; Fry (6th ed.), p. 505.

(*h*) *Gee* v. *Pearse*, 2 De G. & Sm. 325; *Aberaman Iron Works* v. *Wickens*, 5 Eq., pp. 507, 508; *Howe* v. *Smith*, 27 Ch. D. 89; *Hall* v. *Burnell*, [1911] 2 Ch. 551.

(*i*) *Whorwood* v. *Simpson*, 2 Vern. 186; *Lewis* v. *Lord Lechmere*, 10 Mod. 503; but see *City of London* v. *Richmond*, 2 Vern., p. 423.

under the contract sought to be enforced, and the vendor knows, or ought to know, that the purchaser claims possession under the contract, the purchaser will not by delay lose his right to specific performance (*k*); for in such a case his possession is an assertion of his right under the contract, and acquiescence in his possession is a recognition by the vendor of his right (*l*).

But where a tenant in possession contracts for the purchase of his landlord's interest, the case is different. His right under the contract is to be no longer tenant, and his possession is not an assertion of right under the contract of purchase; for it is not clearly referable to the contract of purchase, and consequently does not necessarily amount to a claim under the contract. Thus, the fact that the purchaser, after the purchase-money becomes due, continues to pay rent, instead of insisting on his right to be treated as liable only for the purchase-money and interest, is strong evidence to show that the plaintiff was in possession as tenant only (*m*); and the mere fact of the expenditure of considerable sums of money on the property, will not, in the absence of any recognition on the part of the vendor to that effect, be sufficient to show that he was in possession as purchaser (*n*).

In a case where the contract provided that the purchase-money was to be paid by instalments, and the purchaser, who had been let into possession, paid all the instalments but one and then fell into arrears and deserted the property, and, afterwards, the vendor, failing to find him, had let the land with an option to purchase to a tenant who built upon it, it was held that the purchaser's conduct did not amount to a repudiation and that though he was not entitled to specific performance he was entitled to damages (*o*).

Delay arising from the State of the Title.—Delay which arises from the state of the title will not prevent specific performance being decreed, if the time fixed for completing the contract is not made material either by the contract of the parties or from the nature of the property. The purchaser may repudiate the contract as soon as he discovers that the vendor has no title, but unless he

(*k*) *Clarke* v. *Moore*, 1 Jo. & Lat. 727; Fry (6th ed.), p. 517.
(*l*) See *per* Cotton, L.J., in *Mills* v. *Haywood*, 6 Ch. D. 202.
(*m*) *Mills* v. *Haywood*, 6 Ch. D. 196, 203.
(*n*) *Ibid.*, 203, 204.
(*o*) *Cornwall* v. *Henson*, [1900] 2 Ch. 298; *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, [1913] A. C. 319; and see *Mayson* v. *Clouet*, [1924] A. C. 980.

does so at once he cannot afterwards defend an action of specific performance on the ground of want of mutuality if the vendor can then make a title (*p*). After a decree for specific performance the purchaser cannot repudiate without the leave of the Court (*q*). So that, if a vendor commence an action for specific performance, it is sufficient if he can procure a good title at the time of the decree (*r*). The title, however, ought generally to be made out in time for the certificate of the Master (*s*).

If either of the parties is guilty of delay either through defect of title or conveyance, the proper course for the other side is to give a written notice to the party in default to complete within a reasonable time named in the notice, and that if the contract be not then completed it will be considered at an end (*t*). Such a notice will make time of the essence of the contract (*u*).

A purchaser, by buying up the title of a third party which might, had it remained outstanding, have constituted a valid objection to the vendor's title, will not be able to object to specific performance on the ground that the vendor has not got that title in himself (*x*).

But where the vendor does not make out his title until after action commenced, he is liable to pay costs up to the time when he showed title (*y*); but not if the suit was occasioned solely by the conduct of the purchaser; for example, where he simply disputes the authority of the vendor to sell, and does not ask for his title (*z*); or where the requisitions were not made until after the suit was commenced (*a*), or where, although the requisitions were made before then, the noncompliance of the vendor was due to the

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(*p*) *Halkett* v. *Dudley* (*Earl*), [1907] 1 Ch. 590; and see *Hoggart* v. *Scott*, 1 R. & M. 293; *Eyston* v. *Simonds*, 1 Y. & C. Ch. 608; *Chamberlain* v. *Lee*, 10 Si. 444; *Phillipson* v. *Gibbon*, L. R. 6 Ch. 428.

(*q*) *Halkett* v. *Dudley* (*Earl*), *supra*.

(*r*) *Wynn* v. *Morgan*, 7 V. 202; cf. *Mortlock* v. *Buller*, 10 V. 292; *Langford* v. *Pitt*, 2 P. W. 630; *Jenkins* v. *Hiles*, 6 V. 646; *Sidebotham* v. *Barrington*, 4 B. 110; *Murrell* v. *Goodyear*, 1 De G. F. & J. 432; Fry (6th ed.), p. 627.

(*s*) *Kirwan* v. *Blake*, cited 2 Moll. 581, 582; *Cowgill* v. *Lord Oxmantown*, 3 Y. & C. Ex., pp. 376—7.

(*t*) *Green* v. *Sevin*, 13 Ch. D. 589; *Crawford* v. *Toogood*, 13 Ch. D. 153; *Howe* v. *Smith*, 27 Ch. D. 89; *Hatten* v. *Russell*, 38 Ch. D. 334; *Compton* v. *Bagley*, [1892] 1 Ch. 313; Fry (6th ed.), p. 510.

(*u*) See *Stickney* v. *Keeble*, [1915] A. C. 386.

(*x*) *Murrell* v. *Goodyear*, 1 De G. F. & J. 432.

(*y*) *Long* v. *Collier*, 4 Russ. 269; *Scoones* v. *Morrell*, 1 B. 251; *Wilkinson* v. *Hartley*, 15 B. 183.

(*z*) *Peers* v. *Sneyd*, 17 B. 151.

(*a*) *Lyle* v. *Yarborough*, Johns. 70.

purchaser having claimed abatement or compensation, in respect of an objection upon which he failed in the action (*a*).

In a case where the vendor had been right on all points on which objections had been taken before the suit was commenced, but might with reasonable diligence have informed himself before selling of a defect in the title, which was discovered before the certificate approving of the title was signed, no costs were given on either side except the costs of the original hearing which the vendor was ordered to pay to the purchaser (*b*). There is a disinclination to extend the rule, by which a purchaser is compelled to take the estate although a title is not made out till after the time fixed by the contract (*c*).

Where a vendor, claiming specific performance, insisted, down to and at the trial, upon a wrong interpretation of the contract, he was nevertheless held entitled to judgment for specific performance of the contract as rightly interpreted, the defendant's pleading containing an offer to complete on those terms; but the plaintiff had to pay the costs of the action (*d*).

Defect of conveyance, not title.—Where a person sells property, but is neither able to convey himself nor has the power to compel a conveyance of it on the day fixed, the purchaser is not entitled to repudiate the contract until he has given notice to the vendor to remove the defect within a reasonable time, and the vendor has failed to do so (*e*).

3. Compensation for Delay.

In all cases where specific performance has been decreed notwithstanding the time for completing the contract has elapsed, care has been taken that proper compensation should be made, and the parties, in fact, put in the same situation as if the contract had been strictly fulfilled (*f*). Thus, ordinarily, the purchaser is entitled to the profits of the estate from the time when the contract ought to have been completed (*g*); and the vendor, whether the estate be in possession or reversion, is entitled to interest upon the purchase-

(*a*) *Lyle* v. *Yarborough*, Johns. 70.

(*b*) *Phillipson* v. *Gibbon*, L. R. 6 Ch. 428.

(*c*) See *Lechmere* v. *Brasier*, 2 J. & W. 289; *Dalby* v. *Pullen*, 1 Russ. & M. 296; *Magennis* v. *Fallon*, 2 Moll., p. 580; *Chamberlain* v. *Lee*, 10 Si. 444; *Blacklow* v. *Laws*, 2 Ha. 40; *Fraser* v. *Wood*, 8 B. 339.

(*d*) *Berners* v. *Fleming*, [1925] Ch. 264.

(*e*) *Hatten* v. *Russell*, 38 Ch. D. 334; and see *Brewer* v. *Broadwood*, 22 Ch. D. 105; *Farrer* v. *Nash*, 35 B., p. 171; Fry (6th ed.), p. 512.

(*f*) *Royal Bristol, etc. Socy.* v. *Bomash*, 35 Ch. D. 390.

(*g*) *De Visme* v. *De V.*, 1 Mac. & G. 346; cf. *Vickers* v. *Hand*, 26 B. 630

money from the same time (*h*), even if the money were lying dead, if the delay had arisen from the fault of the purchaser (*i*); but the purchaser should give notice that the money was not making interest, and even then, if he had not appropriated it for the vendor, or had in any way benefited by it, he must pay interest (*k*).

If there is an express agreement to pay interest, the purchaser must pay it unless of course the delay in completion arises from the vendor's bad faith or gross negligence (*l*), and where there is such an agreement the purchaser cannot free himself from it by paying the purchase-money into a bank (*m*). When the contract provides that interest is to be paid unless the delay is caused by the vendor's "wilful default," the purchaser must prove such default (*n*), and, similarly, if the provision is that "the purchaser in default" is to pay interest, he is not liable if the delay arises from the state of the title or from any cause due to the vendor (*o*).

Where the contract provided for interest being paid by the purchaser in the event of delay in completion, with a proviso that if the delay arose from any cause other than "*the default*" of the purchaser he might place the money on deposit, etc., and delay arose in consequence of an objection to the title taken by the purchaser, which was upheld by the Court of first instance but overruled on appeal by the Court of Appeal and House of Lords, Parker, J., held that the purchaser (who had placed the money on deposit) must pay interest (*p*).

Where the delay in completion arises from the default of the vendor, the purchaser, upon depositing his purchase-money in a bank to a separate account, and giving notice of the fact to the

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(*h*) *Lowther* v. *Andover*, 1 Bro. Ch. 396; *Davy* v. *Barber*, 2 Atk., p. 490; *Owen* v. *Davies*, 1 Ves. Sen. 82; *Monro* v. *Taylor*, 8 Ha. 70; 3 Mac. & G. 713; *Grove* v. *Bastard*, 1 De G. M. & G. 69; *Bailey* v. *Collett*, 18 B. 179; *Beresford* v. *Clarke*, [1908] 2 Ir. R. 317.

(*i*) *Calcraft* v. *Roebuck*, 1 V. 221; *Enraght* v. *Fitzgerald*, 2 Ir. Eq. R. 87. For cases where the vendor has been in default, see *Howland* v. *Norris*, 1 Cox, 59; *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517; *Vickers* v. *Hand*, 26 B. 630; *Williams* v. *Glenton*, L. R. 1 Ch. 200.

(*k*) *Powell* v. *Martyr*, 8 V. 146; *Roberts* v. *Massey*, 13 V. 561; *M'Cann* v. *Forbes*, 1 Hogan, 13; *Dyson* v. *Hornby*, 4 De G. & Sm. 481; *Winter* v. *Blades*, 2 S. & S. 393; and see *Re Bayley-Worthington and Cohen*, *infra*.

(*l*) *Sherwin* v. *Shakspear*, 5 De G. & M. G. 517.

(*m*) *Riley to Streatfield*, 34 Ch. D. 386; Fry (6th ed.), p. 649.

(*n*) *Re Mayor of London and Tubbs*, [1894] 2 Ch. 524; *Bennett* v. *Stone*, [1903] 1 Ch. 509; and see *Re Woods, etc.*, [1898] 2 Ch. 211.

(*o*) *Denning* v. *Henderson*, 1 De G. & Sm. 689; *Jones* v. *Gardiner*, [1902] 1 Ch. 191.

(*p*) *Re Bayley-Worthington and Cohen*, [1909] 1 Ch. 648.

vendor, is relieved, as from the receipt of such notice by the vendor, from payment of interest, even when he has been in possession or receipt of the rents under the contract, and the contract provides that he shall pay interest " if from any cause whatever " the purchase is not completed on the day named. The vendor is, however, entitled to the interest (if any) allowed by the bank on the deposit (*q*).

Where a purchaser makes default in payment, and the vendor is not bound to give up possession until payment, if the latter occupies the property for the purpose of his business, and continues the business not on account of the purchaser, but on his own behalf, he will not be compelled to pay the purchaser an occupation rent from the time when the purchase ought to have been completed; but the purchaser will be ordered to pay interest on the purchase-money from that day (*r*).

In ordinary contracts, where no time is fixed for completion, interest will generally be payable by the purchaser from the time he might prudently take possession, supposing it to be offered to him, and that is at the time when a good title was shown (*s*); especially if he has received the rents and profits (*t*). And therefore, if there is a weighty objection to the title, the purchaser is not bound to take possession, nor, consequently, to pay interest until it is cleared up (*u*).

Companies which acquire land under compulsory powers are on the same footing as ordinary purchasers in respect of the liability to pay interest on taking possession (*x*).

Upon a sale of a reversion, interest is payable from the time appointed for completing the purchase. For " upon the sale of a reversion, the time at which the purchaser takes possession has

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(*q*) *Kershaw* v. *K.*, 9 Eq., 56; *Re Monckton and Gilzean*, 27 Ch. D. 564; *Roberts* v. *Massey*, 13 V. 561; *Re Gold's and Norton's Contract*, 33 W. R. 333.

(*r*) *Leggott* v. *Met. Ry. Co.*, L. R. 5 Ch. 716; and see *Golden Bread Co., Ltd.* v. *Hemmings*, [1922] 1 Ch. 162.

(*s*) *Re Pigott and the G. W. Ry. Co.*, 18 Ch. D., p. 150; *Ex p. Manning*, 2 P. W. 410; *Birch* v. *Joy*, 3 H. L. Cas. 565; *Ballard* v. *Shutt*, 15 Ch. D. 122; cf. *Fletcher* v. *L. and Y. Ry. Co.*, [1902] 1 Ch. 901; and see *Smith* v. *Dolman*, 6 Bro. P. C. 291 (where a receiver had been appointed).

(*t*) *Powell* v. *Martyr*, 8 V., p. 148; and see *Fludyer* v. *Cocker*, 12 V. 25; *Binks* v. *Lord Rokeby*, 2 Swans., p. 226; *Att.-Gen.* v. *Christ Church*, 13 Si. 214; but see *Blount* v. *B.*, 3 Atk. 636; *Ballard* v. *Shutt*, 15 Ch. D. 122.

(*u*) *Horniblow* v. *Shirley*, 13 V. 81; *Carrodus* v. *Sharp*, 20 B. 56; and see *Beresford* v. *Clark*, [1908] 2 Ir. R. 317.

(*x*) *Rhys* v. *Dare Ry. Co.*, 19 Eq. 93; *Re Pigott and G. W. Ry.*, 18 Ch. D. 146; *Re Shaw and Birmingham Corporation*, 27 Ch. D. 614; *Catling* v. *G. N. Ry. Co.*, 18 W. R. 121.

nothing to do with the question of interest on the purchase-money. The advantage obtained by the delay, and wearing out of the prior life interest, is equivalent to the receipts of the rents of a property in possession " (*y*).

On the sale *by the order of the Court* of an estate in *possession*, the purchaser will be entitled to the rents and profits from the quarter day preceding his purchase, and he must pay the purchase-money before the following one (*z*).

If the estate be *reversionary*, the purchaser will be entitled to any benefit from the dropping of lives, from the time of confirming the report absolute, and will, consequently, be liable to pay interest from that time (*a*), and where time was fixed for money to be paid into Court, from which date the purchaser was to have the rents and profits and pay interest, but the vendor did not deliver the abstract until long after that date, it was held that the condition did not apply and interest was not due, but the purchaser must pay interest in respect of the benefit accrued by reason of the dropping of lives (*b*).

Even where there is an express stipulation, " that interest is to be paid on the purchase-money, *from whatever cause the delay may have arisen* " if the delay in completing the contract is due to the fraud or wilful delay of the vendor, he will be left in possession of the rents and profits until a good title be shown; and from that period only will he become entitled to interest, and the purchaser to the rents and profits (*c*); and if such interest be paid to the vendor under protest, it may, it seems, be recovered back from him on summons under section 49 of the Law of Property Act, 1925, which takes the place of section 9 of the Vendor and Purchaser Act, 1874 (*d*). Where, however, the delay in such a case is occasioned by the *state of the title* (*e*), alone and not by the fraud or wilful

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(*y*) *Bailey* v. *Collett*, 18 B., p. 182. And see *Davy* v. *Barber*, 2 Atk., p. 490; *Owen* v. *Davies*, 1 Ves. Sen. 82.

(*z*) *Mackrell* v. *Hunt*, 2 Madd. 34 (n.); and see *Holroyd* v. *Wyatt*, 1 De G. & Sm. 125.

(*a*) *Ex p. Manning*, 2 P. W. 410; *Davy* v. *Barber*, 2 Atk. 489; *Child* v. *Lord Abingdon*, 1 V. 94; *Champernowne* v. *Brooke*, 3 Cl. & Fin. 1; 4 Cl. & Fin. 589; *Townsend* v. *Champernowne*, 3 Y. & C. Ex. 505.

(*b*) *Wallis* v. *Sarel*, 5 De G. & Sm. 429; *Robertson* v. *Skelton*, 13 B. 91.

(*c*) *Vickers* v. *Hand*, 26 B. 630; *Re Hetling & Merton*, [1893] 3 Ch. 269; *Re Strafford & Maples*, [1896] 1 Ch. 235.

(*d*) *Re Young & Harston's Contract*, 31 Ch. D. 168.

(*e*) See *Hatten* v. *Russell*, 38 Ch. D. 334; Fry (6th ed.), p. 647.

default of the vendor, he will be entitled to interest according to the express terms of the stipulation (*f*).

A vendor may lawfully stipulate that the rate of interest shall be increased on default by the purchaser. In *Herbert* v. *Salisbury, etc., Ry. Co.* (*g*), the contract provided that the company should pay interest at four per cent. from the time of taking possession until the date fixed for completion, and from that date for six months at five per cent., and from the end of such six months until actual completion at eight per cent. Without negligence on the part of either party the purchase was not completed for nearly seven years after the date fixed. It was held that the company must pay interest at the rates agreed.

From the date of the contract for sale until completion, the vendor is a trustee for the purchaser, and, consequently, is liable to him for any injury to the property caused by his failing to take reasonable care to prevent the property deteriorating (*h*); and the purchaser may recover the loss either by compensation allowed or by a separate action for damages.

If the purchaser has paid the purchase-money into Court under an order, he is entitled to interest on the amount of the compensation, from the time of such payment (*i*); but he will not be entitled to compensation for deterioration after the time when he took, or ought to have taken, possession (*k*); or if he has himself occasioned the deterioration, *e.g.*, by causing the tenant to quit before the completion of the contract (*l*). Where it was provided that if the purchase of a quarry which was let to a third person was not completed on the date fixed, the vendor should receive the " rents and profits " until completion in lieu of interest, he was held entitled to the royalties payable under the lease from the date of the agreement until actual completion (*m*).

In the absence of any express stipulation, the expenses and out-

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(*f*) *Mayor of London* v. *Tubbs*, [1894] 2 Ch. 524; *Esdaile* v. *Stephenson*, 1 S. & S. 122; *Bannerman* v. *Clarke*, 26 L. J. Ch. 77; *Lewis* v. *S. Wales Ry. Co.*, 10 Ha. 113; *Palmerston* v. *Turner*, 33 B. 524; *Bennett* v. *Stone*, [1903] 1 Ch. 509; *Re Bayley-Worthington & Cohen*, [1909] 1 Ch. 648.

(*g*) 2 Eq. 221; Fry (6th ed.), p. 659.

(*h*) *Phillips* v. *Silvester*, 8 Ch. 173; *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456; *Foster* v. *Deacon*, 3 Madd. 394; *Lord* v. *Stephens*, 1 Y. & C. Ex. 222; *Golden Bread Co.* v. *Hemmings*, [1922] 1 Ch. 162, 171.

(*i*) *Ferguson* v. *Tadman*, 1 Si. 530.

(*k*) *Binks* v. *Lord Rokeby*, 2 Swans., p. 226; *Minchin* v. *Nance*, 4 B. 332; *Phillips* v. *Silvester*, L. R. 8 Ch., p. 178.

(*l*) *Harford* v. *Purrier*, 1 Madd. 532.

(*m*) *Leppington* v. *Freeman*, 40 W R. 348.

goings of property sold must be borne by the vendor, down to the time when the purchaser could prudently take possession, that is, when a good title was shown (*n*); and until then, the vendor is also entitled to the incomings.

In the *Golden Bread Co., Ltd.* v. *Hemmings* (*o*), the plaintiffs, by their liquidator, agreed to sell and the defendant to purchase certain shop premises, together with the goodwill of the business carried on thereat. Through the defendant's default the purchase was not completed on the date agreed. The vendors carried on the business, giving the purchaser notice that they were doing so on his behalf. It was held that the purchaser was bound to indemnify the vendors in respect of the losses incurred in thus carrying on the business.

Under section 47 of the Law of Property Act, 1925, where, after a contract for sale, money becomes payable under a policy of insurance maintained by the vendor in respect of any damage to property included in the contract, the money (on completion) is to be held by the vendor on behalf of the purchaser and to be paid to the purchaser on completion or so soon thereafter as the same is received by the vendor. This provision only applies to contracts made after the commencement of the Act, and has effect subject to any stipulation to the contrary, and subject to payment by the purchaser of a proportionate part of the premium from the date of the contract (*p*).

4. Where Time is of the Essence of the Contract.

From the Nature of the Property.—The rule that time is not of the essence of the contract has no application to *mercantile* contracts (*q*). Nor where the thing sold is of greater or less value, according to the effluxion of time; for instance, the sale of *reversionary* interests (*r*), unless the intention of the parties clearly appears to have been otherwise (*s*).

Time is of the essence of the contract in contracts with

(*n*) *Carrodus* v. *Sharp*, 20 B. 56.

(*o*) [1922] 1 Ch. 162.

(*p*) As to the previous law, see *Rayner* v. *Preston*, 18 Ch. D. 1; *Castellain* v. *Preston*, 8 Q. B. D. 613.

(*q*) *Per* Cotton, L.J., *Reuter* v. *Sala*, 4 C. P. D., p. 249.

(*r*) *Newman* v. *Rogers*, 4 Bro. Ch. 393; *Levy* v. *Stogdon*, [1899] 1 Ch. 5. See also *Spurrier* v. *Hancock*, 4 V. 667; *Wyvill* v. *Exeter* (*Bishop*), 1 Price, p. 298; Fry (6th ed.), pp. 504—5.

(*s*) *Patrick* v. *Milner*, 2 C. P. D. 342; 348; *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401, 416.

ecclesiastical corporations; for example, a contract for a concurrent lease, where the lapse of every day changed the value and nature of the thing, and changed also the persons who were to participate in the sum to be paid (*t*); also, where the property was of a fluctuating value, such as stock (*u*), and mines, mining lease, and works (*x*); or of a wasting or determinable character, such as a life estate or a life annuity (*y*); or a leasehold, a short time of which only is unexpired (*z*); or if the estate were wanted for commercial purposes (*a*); or for immediate residence (*b*); or for some other immediate purpose (*c*); or if the estate were sold for the purpose of paying off debts of the vendor which bear a higher rate of interest than he would get for the unpaid purchase-money (*d*); but time is not of the essence of the contract where the land had been purchased for the purpose of building a residence on it (*e*).

Thus, upon the sale, by the occupier, of a public-house as a going concern, time is of the essence of the contract (*f*); and it is also essential in contracts for the working of collieries, as the object is to make them immediately productive (*g*); and in contracts for the payment of money to be applied towards obtaining patents (*h*).

So where shares in a company are by contract forfeitable by non-payment of calls for a fixed period after notice sent, no relief can be given against forfeiture, as in such cases interest would not be an adequate compensation (*i*).

(*t*) *Carter* v. *Ely* (*Dean*), 7 Si., p. 228.

(*u*) *Doloret* v. *Rothschild*, 1 S. & S. 590, and see *Lewis* v. *Lord Lechmere*, 10 Mod. 503.

(*x*) *Macbryde* v. *Weeks*, 22 B. 533; *Prendergast* v. *Turton*, 1 Y. & C. Ch. 110; *Clegg* v. *Edmondson*, 8 De G. M. & G., p. 814; *City of London* v. *Mitford*, 14 V., p. 58; *Walker* v. *Jeffreys*, 1 Ha. 341; *Eads* v. *Williams*, 4 De G. M. & G. 674; *Glasbrook* v. *Richardson*, 23 W. R. 51.

(*y*) *Withy* v. *Cottle*, Turn. & R. 78. (*z*) *Hudson* v. *Temple*, 29 B., p. 543.

(*a*) *Parker* v. *Frith*, 1 S. & S. 199 (n.); *Wright* v. *Howard*, 1 S. & S. 190; *Walker* v. *Jeffreys*, 1 Ha., p. 348.

(*b*) *Tilley* v. *Thomas*, L. R. 3 Ch. 61, 67; *Levy* v. *Lindo*, 3 Mer., p. 84; but see *Gedye* v. *Duke of Montrose*, 26 B. 45; *Webb* v. *Hughes*, 10 Eq. 281.

(*c*) *Wright* v. *Howard*, 1 Si. & S. 190; *Parker* v. *Frith*, *ibid.* 199 (n.); and see *Stickney* v. *Keeble*, [1915] A. C., p. 416.

(*d*) *Popham* v. *Eyre*, Lofft. 786. (*e*) *Wells* v. *Maxwell*, 32 B. 408.

(*f*) *Day* v. *Luhke*, 5 Eq. 336; *Farnham Brewery* v. *Hunt*, 68 L. T., p. 443; *Cowles* v. *Gale*, L. R. 7 Ch. 12; *Tadcaster Brewery* v. *Wilson*, [1897] 1 Ch., p. 711; see also *Coslake* v. *Till*, 1 Russ. 376; *Seaton* v. *Mapp*, 2 Coll. 556; *Weston* v. *Savage*, 10 Ch. D. 736.

(*g*) *Sparrow's Case*, cited 2 Sch. & L. 603; see also *Pollard* v. *Clayton*, 1 K. & J. 462; *Macbryde* v. *Weeks*, 22 B. 539; cf. *Huxham* v. *Llewellyn*, 21 W. R. 766.

(*h*) *Payne* v. *Banner*, 15 L. J. Ch. 227; Fry (6th ed.), p. 506.

(*i*) *Sparks* v. *The Liverpool Waterworks*, 13 V. 428, 434, and see *Campbell* v. *L. & B. Ry. Co.*, 5 Ha. 519; *Re Schwabacher*, 98 L. T., p. 129.

Seton v. Slade.

But even when, from the nature of the property, the time fixed for completion is essential, if the conduct of the parties shows that they contemplated that the execution of the contract might be postponed beyond the day fixed, the contract must be completed although delay has occurred (*k*).

An option to purchase is always construed strictly, and must be exercised at the time prescribed (*l*). Upon the same principle, where a general meeting of the shareholders of a company had agreed to certain conditions on which dissenting members were to have the option to retire from the company, one of which fixed the date at which the assent to the arrangement was to be declared, it was held by the House of Lords that the date was essential, and consequently, after it had expired, that the directors had no power to enter into arrangements with any member who desired to retire but had not expressed his wish to do so within the limited time (*m*).

In all cases where time is of the essence of the contract, the postponement of the date agreed upon does not necessarily operate as a waiver, but merely substitutes another time which is also material (*n*).

By Agreement.—It was at one time thought that the parties could not make time of *the essence of the contract* (*o*); but it is now settled, that if by the contract it *clearly appears* that the parties intended time to be of the essence of the contract, their intention will be enforced even as to matters which otherwise would not be essential (*p*), *e.g.*, with regard to payment of the deposit (*q*), the balance of the purchase-money (*r*), or to covenants for the renewal of leases (*s*).

(*k*) *Webb* v. *Hughes*, 10 Eq. 281; *Patrick* v. *Milner*, 2 C. P. D. 342, 348; cf. *Nokes* v. *Lord Kilmorey*, 1 De G. & Sm. 444.

(*l*) *Brooke* v. *Garrod*, 2 De G. & J. 62, 66; see also *Alderson* v. *White*, 2 De G. & J. 97; *Lord Ranelagh* v. *Melton*, 2 Dr. & Sm. 278; *Austin* v. *Tawney*, L. R. 2 Ch. 143; *Mills* v. *Haywood*, 6 Ch. D. 196; *Campbell* v. *L. & B. Ry. Co.*, 5 Ha., p. 529; *Starkey* v. *Barton*, [1909] 1 Ch., p. 289; Fry (6th ed.), p. 515.

(*m*) *Houldsworth* v. *Evans*, L. R. 3 H. L. 263.

(*n*) *Barclay* v. *Messenger*, 43 L. J. Ch. 449; *Gedye* v. *Montrose* (*Duke*), 26 B. 45.

(*o*) *Gregson* v. *Riddle*, cited 7 Ves. 268.

(*p*) *Hudson* v. *Bartram*, 3 Madd., p. 477; *Lloyd* v. *Rippingdale*, cited 1 Y. & C. Ex. 410; *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401; 416; *Nokes* v. *Lord Kilmorey*, 1 De G. & S. 444; *Parkin* v. *Thorold*, 16 B. 59; *Hudson* v. *Temple*, 29 B. 536; *Hatten* v. *Russell*, 38 Ch. D., p. 339; *Brickles* v. *Snell*, [1916] 2 A. C. 599; Fry (6th ed.), p. 505.

(*q*) *Honeyman* v. *Marryatt*, 21 B. 14, 24.

(*r*) *Barclay* v. *Messenger*, 43 L. J. Ch. 449.

(*s*) *Baynham* v. *Guy's Hospital*, 3 V. 295.

For this purpose, the intention must be clearly expressed (*t*). A statement in the conditions of sale that the abstract will be delivered on or before a particular day, has not that effect, even if the purchaser upon the expiration of the time gave notice immediately that he would not proceed (*u*); nor has the mention of a day for completion (*x*). Nor has a mere stipulation that possession is to be given on a certain day, unless there is something in the nature of the property to make the date essential (*y*). And, a stipulation to that effect with regard to one of the steps towards completion, raises a presumption that time was *not* to be material with respect to others (*z*). Even where the parties fix the time, if the contract shows that they contemplated a possible postponement, time will not be of the essence of the contract (*a*).

In *Kilmer* v. *British Columbia, etc., Ltd.* (*b*), the contract provided for payment of the purchase-money by instalments, and forfeiture of the contract and of all payments made in the event of default in punctual payment; and time was declared to be of the essence of the contract. The purchaser paid one instalment but did not pay the second on the due date. It was held that the forfeiture provision was in the nature of a penalty from which the purchaser was entitled to be relieved, and specific performance was decreed on that footing. In *Steedman* v. *Drinkle* (*c*), however, in which case the facts were very similar, it was held that the parties having made time of the essence of the contract and default having been made by the purchaser, he was not entitled to specific performance, but that the forfeiture of the money paid was a penalty from which relief should be granted on proper terms.

Notice.—Though time be not originally of the essence of a contract, where there has been unreasonable delay on one side, the other party has a right to fix a *reasonable* time within which the contract is to be completed (*d*). But it was held that the purchaser was not justified, while negotiations were going on for the removal

(*t*) *Webb* v. *Hughes*, 10 Eq., p. 286; *Hearne* v. *Tenant*, 13 V., p. 289.

(*u*) *Roberts* v. *Berry*, 16 B. 31, 3 De G. M. & G. 284, 292; *Venn* v. *Cattell*, 27 L. T. 469.

(*x*) *Parkin* v. *Thorold*, 16 B. 59; and see *Barclay* v. *Messenger*, 43 L. J. Ch. 449.

(*y*) *Tilley* v. *Thomas*, L. R. 3 Ch. 61, 66; *Webb* v. *Hughes*, 10 Eq. 281.

(*z*) *Wells* v. *Maxwell*, 32 B., p. 444; 33 L. J. Ch. 44.

(*a*) *Webb* v. *Hughes*, 10 Eq., p. 286.

(*b*) [1913] A. C. 319. (*c*) [1916] 1 A. C. 275.

(*d*) *Benson* v. *Lamb*, 9 B. 502; *Eads* v. *Williams*, 4 De G. M. & G. 674; *Nott* v. *Riccard*, 22 B. 307; *Taylor* v. *Brown*, 2 B. 183; *Compton* v. *Bagley*, [1892] 1 Ch. 313; *Stickney* v. *Keeble* [1915] A. C. 386, 418—9.

of his objections to the title, in giving the vendor notice to complete within a month, or the contract would be rescinded (*e*).

The reasonableness of the notice must be judged with reference to the date on which it is given (*f*), and it also depends on the nature of the subject-matter of the contract (*g*). If one party has already refused to remove an objection, a notice given to him after his refusal may be reasonable, which would not have been so in the first instance (*h*). The notice must be distinct and unequivocal (*i*); but writing, it seems, is not essential (*k*).

When time is of the essence of the contract, either originally or during the negotiations, it may be enlarged or waived by subsequent agreement, or by contract amounting to a waiver. Thus, if the time is once allowed to pass, and then the parties go on negotiating, it will amount to a waiver, and then time will cease to be of the essence of the contract (*l*), unless the negotiations were *without prejudice* (*m*).

But if, as in the principal case, a purchaser is aware of the objections to the title; or he receives the abstract after the day appointed (*n*); or proceeds with the purchase, although the time fixed for completion has elapsed, and a much longer period may be requisite in order to make a good title (*o*), he will have waived his right to object to the delay, and not be able to resist specific performance (*p*).

If a vendor receives and entertains the requisitions of the purchaser after the time specified, he will be considered to have waived his right under the conditions, unless he expressly reserves it (*q*).

If one party to a contract for the sale of lands, gives the other

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(*e*) *Wells* v. *Maxwell*, 33 L. J. Ch. 44; *Pegg* v. *Wisden*, 16 B. 239 (six weeks); *Parkin* v. *Thorold*, 16 B. 59 (fourteen days); *McMurray* v. *Spicer*, 5 Eq. 527 (five weeks); *Webb* v. *Hughes*, 10 Eq. 281; *Green* v. *Sevin*, 13 Ch. D. 589; *Wylson* v. *Dunn*, 34 Ch. D., p. 578; *Hatten* v. *Russell*, 38 Ch. D., p. 334.

(*f*) *Crawford* v. *Toogood*, 13 Ch. D. 153.

(*g*) *Macbryde* v. *Weeks*, 22 B. 533; *Stickney* v. *Keeble*, [1915] A. C. 386, 419.

(*h*) *Nott* v. *Riccard*, 22 B. 307; *Stickney* v. *Keeble*, *supra*.

(*i*) *Reynolds* v. *Nelson*, 6 Madd. (Madd. & G.) 18.

(*k*) *Nokes* v. *Lord Kilmorey*, 1 De G. & Sm. 444; Fry (6th ed.), p. 513.

(*l*) *Boyes* v. *Liddell*, 6 Jur. 725; *Flint* v. *Woodin*, 9 Ha. 618; *King* v. *Wilson*, 6 B. 124; *Pegg* v. *Wisden*, 16 B. 239; *Webb* v. *Hughes*, 10 Eq. 286; but see *Dyas* v. *Rooney*, 27 L. R. Ir. 4.

(*m*) *Tilley* v. *Thomas*, L. R. 3 Ch. 61.

(*n*) *Pincke* v. *Curteis*, 4 Bro. Ch. 329; *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401.

(*o*) *Wood* v. *Bernal*, 19 V. 220; *Smith* v. *Burnam*, 2 Anst. 527; *Paine* v. *Meller*, 6 V. 349; *Warde* v. *Jeffery*, 4 Price, 294; *Smith* v. *Dolman*, 6 Bro. P. C. 291; *Ex p. Gardner*, 4 Y. & C. Ex. 503; *Wood* v. *Machu*, 5 Ha. 158.

(*p*) *Hoggart* v. *Scott*, 1 Russ. & M. 293; Fry (6th ed.), p. 629.

(*q*) *Oakden* v. *Pike*, 34 L. J. Ch. 620.

notice that he does not hold himself bound to perform, and will not perform, the contract, and the other makes no prompt assertion of his right to enforce it, he will be considered to have acquiesced, and to have abandoned any right he had to enforce performance (*r*).

The time within which objections are to be made to a title may be enlarged by the consent of the vendor (*s*).

A purchaser may, under certain circumstances, waive objections to the title; for instance, by taking possession forcibly (*t*). If, however, he take possession with the consent of the vendor (*u*), or under the terms of the contract, when he knows that the objections to the title are removable (*x*), it does not amount to waiver. But if a purchaser takes possession with knowledge that there are irremovable objections to the title, as where the estate is known to be, subject to a right of sporting over it, vested in some third person over whom the vendor has no control, the purchaser will have waived his right to call for the release of the sporting right, or, if it could not be released, to repudiate his contract (*y*).

If a vendor turns a purchaser out of possession of a house, where residence in the house was an essential part of the contract, he will be held to have abandoned the contract (*z*); but where a purchaser was let into the receipt of the rents and profits, under a contract which was to be completed at a definite period, from which time the purchaser was to receive the rents and profits, and, on the other hand, pay interest on the purchase-money, and the vendor, finding that he could get neither purchase-money nor interest, gave notice to the tenants to pay no more rent to the purchaser, it was held that he had not thereby abandoned his right to obtain specific performance (*a*).

The vendor may, it seems, insist upon the contract being rescinded, where the circumstances render it improbable that the purchase-money can be paid for a long time, *e.g.*, the bankruptcy of

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(*r*) *Guest* v. *Homfray*, 5 V. 818; *Heaphy* v. *Hill*, 2 S. & S. 29; *Watson* v. *Reid*, 1 Russ. & M. 236; *Walker* v. *Jeffreys*, 1 Ha. 341.

(*s*) *Cutts* v. *Thodey*, 13 Si. 206; Fry (6th ed.), p. 522.

(*t*) *Calcraft* v. *Roebuck*, 1 V. 221.

(*u*) *Vancouver* v. *Bliss*, 11 V. 458; *Burroughs* v. *Oakley*, 3 Swans. 159; *Simpson* v. *Sadd*, 4 De G. M. & G. 665.

(*x*) *Dixon* v. *Astley*, 1 Mer., p. 134; *Stevens* v. *Guppy*, 3 Russ. 171.

(*y*) *Re Gloag & Miller*, 23 Ch. D. 320, 329. As to the effect of the purchaser's knowledge of incurable defects in title, at the time of entering into the contract, see *Alderdale Estate Co.* v. *McGrory*, [1917] 1 Ch. 414.

(*z*) *Knatchbull* v. *Grueber*, 3 Mer. 124.

(*a*) *Colby* v. *Gadsden*, 34 B. 416, 420.

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the purchaser; or his death, and the inability of his representatives to get in his assets (*b*).

Although time may be made of the essence of the contract, as, for instance, in taking objections to the title in reference to any matter appearing upon the abstract, the vendor is not entitled to enforce his rights in that respect, where there has been unfair dealing, and a want of *bona fides* on his part, as where the conditions were so framed as to deceive the purchaser, and throw him off his guard by suppressing a fatal defect in the title (*c*).

5. Compensation where the Vendor has not the interest in the Estate which he has Contracted to Sell, or there is some Deficiency in the Quantity or Quality thereof.

In granting specific performance with compensation in these cases, the Court (unless the contract provides for compensation) does more than enforce the contract. It enforces performance in a way not contemplated by the contract, with payment of compensation which the parties never agreed to make. It is, of course, open to the parties to agree expressly that compensation shall be given, or that it shall not be given, for any error or misdescription of the property.

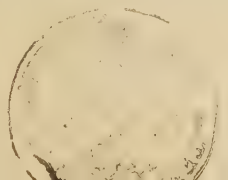
The position of the vendor is materially different from that of the purchaser. The former, as a rule, can only obtain specific performance of his contract if he is prepared to fulfill his part, but an unsubstantial error innocently made will not preclude him from obtaining it. He cannot do so, where the error amounts to a misrepresentation, or where it is substantial, whether the error is made innocently or fraudulently. He cannot obtain compensation in his own favour.

The purchaser, on the other hand, can as a rule elect to take the property the vendor has, receiving compensation for the deficiency or difference in tenure. But he cannot do so, if specific performance would be prejudicial to third parties, or the difference cannot be estimated in money value, or if it would involve hardship on the vendor.

Where Vendor seeks Specific Performance.—Formerly at law,

(*b*) *Mackreth* v. *Marlar*, 1 Cox, 259; *Whittaker* v. *W.*, 4 Bro. Ch. 31; *Lowther* v. *Lady Andover*, 1 Bro. Ch. 396; *Rome* v. *Young*, 3 Y. & C. Ex. 199; *Neale* v. *Mackenzie*, 1 Keen, 474; and see *Levy* v. *Stogdon*, [1899] 1 Ch. 5; and see *Sprague* v. *Booth*, [1909] A. C. 576.

(*c*) *Boyd* v. *Dickson*, 10 Ir. R. Eq. 239, 255. See as to misrepresentation, *Tibbatt* v. *Boulter*, 73 L. T. 534.



where a person contracted to sell an interest, for instance a term of years, and it appeared that the term was of less duration than the vendor represented it to be, the vendee might recover any deposit which he may have paid, even although the vendor might offer compensation (*d*). In *equity*, however, if the purchaser could get substantially what he contracted for, specific performance would be decreed against him at the suit of the vendor, but he would be allowed compensation for the difference in value between what he would get and what he contracted for (*e*).

If the misdescription, although not fraudulent, is material and substantial, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for the misdescription, the purchaser might never have entered into the contract, the contract is avoided altogether, if the purchaser so wills (*f*); for the Court has been approaching nearer to the doctrine that a purchaser shall have that which he contracted for or not be compelled to take that which he did not mean to have (*g*). Thus, where a man sells a lease, and nothing is said about the title, he will not make a good title, unless he shows that he holds direct from the freeholder (*h*); nor can the vendor in such a case rely upon a condition which provides that, "the description of the property in the particulars is believed to be correct, but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed the vendor or purchaser in respect thereof" (*i*).

Where, however, the particulars and conditions of sale which described property as held under a lease, contained enough to give notice to a purchaser that the property was held under a derivative lease, it was held that the purchaser could not on that account refuse to complete, or claim compensation on the ground of misdescription (*k*).

(*d*) *Halsey* v. *Grant*, 13 V. 73; *Dyer* v. *Hargrave*, 10 V. 505; *Long* v. *Fletcher*, 2 Eq. Ca. Abr. 5, pl. 4; and *Spunner* v. *Walsh*, 11 Ir. Eq. R. 597; *Nash* v. *Wooderson*, [1884] W. N. 210.

(*e*) *Halsey* v. *Grant*, *supra*.

(*f*) *Per* Tindal, C.J., in *Flight* v. *Booth*, 1 Bing. N. C., p. 377.

(*g*) *Knatchbull* v. *Grueber*, 3 Mer., p. 146.

(*h*) *Madeley* v. *Booth*, 2 De G. & Sm. 718; *Camberwell Building Soc.* v. *Holloway*, 13 Ch. D. 754. This last case contains a dictum of Jessel, M.R., adversely criticising *Madeley* v. *Booth*; but the dictum was disapproved by the C. A. in *Re Beyfus and Masters*, 39 Ch. D. 110.

(*i*) *Re Beyfus and Masters*, *supra*.

(*k*) *Camberwell, etc. Building Society* v. *Holloway*, 13 Ch. D. 754; cf. *Darlington* v. *Hamilton*, Kay, 558; *Henderson* v. *Hudson*, 15 W. R. 860; *Flood*

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A purchaser is not bound to accept land of a different tenure from that for which he contracted, for although, when a party gets substantially that for which he contracts, any small difference might be remedied by compensation, that will not be the case where it extends to the nature of the property itself (*l*). And a purchaser will not be compelled to take a perpetual rentcharge instead of an estate in fee simple (*m*).

A vendor cannot obtain specific performance when his misdescription of the property amounts to a misrepresentation (*n*).

Objections to tenure may be waived by the conduct of the purchaser; for example, if he proceeds with the treaty for the purchase after becoming acquainted with the nature of the tenure (*o*). But although he may be compelled to fulfil his contract, he will be entitled to compensation (*p*).

A purchaser of the entirety cannot be compelled to take an undivided share of an estate (*q*), or of the proceeds of sale thereof (*r*); nor can a purchaser be compelled to take a remainder expectant upon the determination of a previous life interest, instead of an estate in possession (*s*); nor an estate which is subject to a right of sporting not mentioned in the particulars of sale, although he may waive the objection, for example, by taking possession after notice of it (*t*); nor an estate subject to an undisclosed right of digging for mines (*u*), or to restrictive covenants (*x*), or to a reservation of minerals to the lord of the manor on enfranchisement (*y*); nor an estate which is a mere sheep-walk and not a

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v. *Pritchard*, 40 L. T. 873; *Turner* v. *T.*, [1881] W. N. 70; *Broom* v. *Phillips*, 74 L. T. 459.

(*l*) *Drew* v. *Corp*, 9 V. 368; *Wright* v. *Howard*, 1 S. & S. 190; *Barton* v. *Lord Downes*, 1 Flan. & K. 505; *Twining* v. *Morrice*, 2 Bro. Ch. 331; *Hick* v. *Phillips*, Pr. Ch. 575; *Ayles* v. *Cox*, 16 B. 23.

(*m*) *Prendergast* v. *Eyre*, 2 Hog. 81.

(*n*) *Clermont* v. *Tasburgh*, 1 J. & W. 112; *Price* v. *Macaulay*, 2 De G. M. & G. 339; *Dimmock* v. *Hulett*, L. R. 2 Ch., p. 28; *Re Terry & White*, 32 Ch. D., p. 29.

(*o*) *Fordyce* v. *Ford*, 4 Bro. Ch. 494; *Burnell* v. *Brown*, 1 J. & W. 168; *Martin* v. *Cotter*, 3 Jo. & Lat. 496.

(*p*) *Calcraft* v. *Roebuck*, 1 V. 221.

(*q*) *Att.-Gen.* v. *Day*, 1 Ves. Sen. 218; *Roffey* v. *Shallcross*, 4 Madd. 227; *Dalby* v. *Pullen*, 3 Si. 29; *Casamajor* v. *Strode*, 2 My. & K., p. 726.

(*r*) Law of Property Act, 1925, ss. 34 and 35.

(*s*) *Collier* v. *Jenkins*, You. 295; *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Hughes* v. *Jones*, 3 De G. F. & J. 307.

(*t*) *Burnell* v. *Brown*, 1 J. & W. 168.

(*u*) *Barton* v. *Lord Downes*, 1 Flan. & Kel. 505; *Seaman* v. *Vawdrey*, 16 V. 390.

(*x*) *Cato* v. *Thompson*, 9 Q. B. D. 616, 618; *Re Higgin's and Hitchman's Contract*, 21 Ch. D. 95; *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *May* v. *Platt*, [1900] 1 Ch. 616; *Hone* v. *Gakstetter*, 53 Sol. J. 286.

(*y*) *Upperton* v. *Nickolson*, L. R. 6 Ch. 436.

freehold (*z*); nor if it would render the purchaser liable to the repairs of a chancel (*a*).

Where redeemed land-tax was sold, described as being charged on three houses, whereas it turned out that it consisted of three separate sums charged on three houses separately, specific performance against the purchaser was refused, as the misdescription was not susceptible of compensation (*b*).

So where particulars of sale were misleading in not disclosing a ground rent, it was held that the purchaser was entitled to be discharged (*c*); but it seems that if there were undisclosed quit-rents, and rent-charges—at any rate, if they were of small amount—specific performance with compensation might be decreed (*d*). So also, if lands sold as tithe-free, turned out to be liable to a rent-charge in lieu of tithes, it would be a subject for compensation (*e*). If quit-rents were sold, a mistake in their amount would be immaterial, and compensation would be allowed (*f*).

Where the vendor cannot make a good title to a small portion of the estate, and compensation can be made for the deficiency, specific performance with compensation would be decreed (*g*). This doctrine was carried to a great extent in former times, but now it may be considered as settled, that where a good title cannot be made to a portion of the estate contracted to be sold *which is material to the possession and enjoyment of the rest*, specific performance would be refused (*h*). And so where an adjunct *essential* to the enjoyment of the property, such as fixtures in a public-house, is left to be appraised by valuers, specific performance of the contract to purchase the property without the adjunct, has not been enforced, but it is otherwise if it is not essential (*i*).

(*z*) *Vancouver* v. *Bliss*, 11 V. 458.

(*a*) *Horniblow* v. *Shirley*, 13 V. 81, cited as *Forteblow* v. *Shirley*, 2 Swans. 223.

(*b*) *Cox* v. *Coventon*, 31 B. 378.

(*c*) *Jones* v. *Rimmer*, 14 Ch. D. 588; cf. *Re Simpson & Moy*, 53 Sol. J. 376.

(*d*) *Esdaile* v. *Stephenson*, 1 S. & S. 122; *Bowles* v. *Waller*, 1 Hayes, p. 441; *Prendergast* v. *Eyre*, 2 Hog., p. 94; *Portman* v. *Mill*, 1 R. & M. 696.

(*e*) *Howland* v. *Norris*, 1 Cox, 59.

(*f*) *Cuthbert* v. *Baker*, Reg. Lib. A. 1790, fol. 442; *Johnson* v. *J.*, 3 B. & P. 162.

(*g*) *M'Queen* v. *Farquhar*, 11 V. 467; *Bowyer* v. *Bright*, 13 Price, 698; *Carver* v. *Richards*, 6 Jur. (N.S.) 667; *Re Fawcett and Holmes*, 42 Ch. D. 150; *Jacobs* v. *Revell*, [1900] 2 Ch. 858.

(*h*) *Peers* v. *Lambert*, 7 B. 546. And see *Shackleton* v. *Sutcliffe*, 1 De G. & Sm. 609; *Perkins* v. *Ede*, 16 B. 193; *Flight* v. *Booth*, 1 Bing. N. C., p. 377; *Re Arnold*, 14 Ch. D. 270; *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258.

(*i*) *Darbey* v. *Whitaker*, 4 Drew. 134; *Jackson* v. *J.*, 1 Sm. & G. 184; *Milnes* v. *Gery*, 14 V. 400.

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Where, however, vendors bound themselves to make out a good title to *all* the lands included in the contract, but were unable to show a title to one three hundred and thirtieth part not necessary to the enjoyment of the other parts included in the contract (which provided for compensation for errors in dimensions in the land), it was held that it was not competent to the vendors to seek specific performance with compensation (*k*).

In *Flight* v. *Booth* (*l*), a contract for sale contained a provision that if any error appeared in the particulars, the same should not annul the sale but that compensation should be allowed. There was a mistatement as to the nature of the restrictive covenants affecting the property, and it was held that the purchaser was entitled to rescind the contract and recover the deposit. Tindal, C.J., laid down the principle that "where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract, the contract is avoided and the purchaser is not bound to resort to the clause of compensation (*m*). In *Shepherd* v. *Croft* (*n*), the contract contained a provision that if any error should be found in the particulars, the same should not annul the sale, nor should any compensation be claimed in respect thereof. There was a latent defect consisting of a watercourse which had been enclosed in pipes about three feet below the surface. This defect, although known to the vendors, was not disclosed in the plan or particulars. In an action by the vendors, specific performance was granted. It became unnecessary to determine whether, in spite of the provision in the contract, compensation by way of deduction from the purchase-money could be ordered since the vendors expressed willingness to allow compensation. The purchase-price of the property was £9,000, and the Court allowed £600 to be deducted as compensation for the defect. In the course of his judgment, Parker, J., observed: "I have to ask myself whether, if specific performance were granted, the defendant would be getting something different from that which the plaintiffs contracted to give.

(*k*) *Ashton* v. *Wood*, 3 Sm. & G. 436.

(*l*) 1 Bing. N. C. 370, 377.

(*m*) And see *Jacobs* v. *Revell*, [1900] 2 Ch. 858; *Lee* v. *Rayson*, [1917] 1 Ch. 613.

(*n*) [1911] 1 Ch. 521. Upon the question whether a defect is latent, see also *Yandle* v. *Sutton*, [1922] 2 Ch. 199.

If this be so, then, notwithstanding the conditions, the defendant will have the right to rescind. If, on the other hand, the defendant would be getting substantially what the plaintiffs contracted to give, then, *Flight* v. *Booth* would have no application. . . . It appears to me that what the defendant was purchasing and the vendors were offering was a residential property, with certain building advantages; and, in my opinion, notwithstanding the existence of the underground watercourse, if I were to decree specific performance, the defendant would substantially be getting what the plaintiffs contracted to give her."

If an estate is sold by auction, and a good title cannot be made to some of the lots, specific performance will, it seems, be decreed as to the lots to which a good title can be made, if they are not complicated with the others (*o*); but there is no case apportioning purchase-money on the sale of two estates for one sum upon the failure of title to one of the estates (*p*).

Where the vendor has a title to an estate, but misrepresents the acreage, then, whether the estate be sold at so much the acre (*q*) or not (*r*), the purchaser is entitled to compensation for a deficiency (*s*).

The intimate acquaintance of the purchaser with the estate (*t*), or even the fact of his being the occupier of it, raises no inference that he was acquainted with its exact admeasurement, so as to disentitle him to an abatement (*u*).

Where there is a mis-statement in the description of the property, made in good faith, *and there is no stipulation for compensation*, either in the contract or the conveyance, then *after conveyance* no claim for compensation can be maintained (*x*).

(*o*) *Poole* v. *Shergold*, 2 Bro. Ch. 118; *Lewin* v. *Guest*, 1 Russ. 325; *Harwood* v. *Bland*, 1 Flan. & Kel. 540; *Casamajor* v. *Strode*, 2 My. & K. 724.

(*p*) *Prendergast* v. *Eyre*, 2 Hog., p. 89.

(*q*) *Shovel* v. *Bogan*, 2 Eq. Ca. Abr. 688, pl. 4.

(*r*) *Hill* v. *Buckley*, 17 V. 394.

(*s*) *Re Gore's Estate*, 3 Ir. R. Eq. 260; *Flewitt* v. *Walker*, [1885] W. N. 151; *Portman* v. *Mill*, 1 R. & M. 696; *Winch* v. *Winchester*, 1 V. & B., p. 377; *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; cf. *Powell* v. *Elliot*, L. R. 10 Ch. 424; *Hughes* v. *Jones*, 3 De G. F. & J. 307.

(*t*) *Winch* v. *Winchester*, 1 V. & B. 375.

(*u*) *King* v. *Wilson*, 6 B. 124.

(*x*) *Joliffe* v. *Baker*, 11 Q. B. D. 255; and see *Clayton* v. *Leech*, 41 Ch. D. 103; *Greswolde-Williams* v. *Barneby*, 83 L. T. 708; *Debenham* v. *Sawbridge*, [1901] 2 Ch. 98. The dictum of Watkin Williams, J., in *Joliffe* v. *Baker*, 11 Q. B. D., p. 269, that to enable a purchaser to claim compensation after conveyance, there must, in the absence of fraud, be a provision for compensation under which it can be claimed "*in the conveyance itself*," cannot be considered law. See *Palmer* v. *Johnson*, 13 Q. B. D. 351, 359; Fry (6th ed.), pp. 594—6.

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If lands are purchased with the usual condition for compensation for misdescription, and they turn out to be of *much greater extent* than they were described, the purchaser can enforce the contract on payment of compensation, but the vendor cannot compel the purchaser to complete, on payment of a proportionately larger sum (*y*).

The question sometimes arises, how far a purchaser's knowledge of a defect of title will prevent his setting up that defect as a defence to specific performance. If there is no misstatement in the particulars or condition of sale, and the purchaser is aware of a defect of the title (*z*), he cannot, as a rule, rely upon it as a defence. But a vendor is not relieved from the obligation of showing a good title, by proving that the purchaser was aware of a defect, if the contract expressly provides that a good title shall be made (*a*).

In the absence of express agreement, a vendor, it seems, cannot obtain specific performance with compensation in his own favour (*b*), but, if the mistake be serious, the Court will not grant to the purchaser specific performance unless he agrees to take what the vendor meant to sell or to pay the price which he meant to ask. In such cases, however, the Court will not rescind the contract at the instance of the vendor (*c*).

Where the Purchaser seeks Specific Performance.—A purchaser may, subject to some exceptions, compel a vendor, who has contracted to sell a larger interest than he has, to convey to him such interest as he is entitled to, with compensation for the difference (*d*).

Thus, where a person contracts to sell a fee simple, and has only a term of years, the purchaser has a right to have an assignment of the term if he thinks fit (*e*).

If a landlord is unable to give, in point of duration, a lease for the whole of the interest which he agreed to give, and the intended lessee is willing to take the interest which the landlord can give, the latter must grant a lease to the full extent which

(*y*) *Price* v. *North*, 2 Y. & C. Ex. 620; *Re Orange*, [1885] W. N. 72.

(*z*) *Alderdale Estate Co.* v. *McGrory*, [1917] 1 Ch. 414; [1918] A. C. 503; and see *Re Hare & O'More*, [1901] 1 Ch. 93.

(*a*) *Cato* v. *Thompson*, 9 Q. B. D. 616, 620; *Alderdale Estate Co.* v. *McGrory*, [1917] 1 Ch., p. 418.

(*b*) *Manser* v. *Back*, 6 Ha., p. 447, 448.

(*c*) *Neap* v. *Abbott*, Coop. C. P. 333; *Leslie* v. *Thompson*, 9 Ha. 268; *Alvanley* v. *Kinnaird*, 2 Mac. & G., p. 7; cf. *North* v. *Percival*, [1898] 2 Ch. 128.

(*d*) *Mortlock* v. *Buller*, 10 V. 315; see also *Bolingbroke's Case*, 1 Sch. & L. 19 (n.); *Halsey* v. *Grant*, 13 V. 73; *Dyer* v. *Hargrave*, 10 V. 505; Fry (6th ed.), pp. 583—5.

(*e*) *Wood* v. *Griffith*, 1 Wils. Ch. Ca. 44; *Mortlock* v. *Buller*, *supra*.

his estate or power authorises, and compensation will be made by the Court to the lessee for any loss that he may have sustained by reason of the agreement not being carried out to the full extent (*f*). So likewise, although the purchaser of the entirety cannot, upon a failure to make a title to the whole, be compelled to take a part only of the estate, he may, in general, if he wishes it, take what he can get, with compensation (*g*). So if A enters into an agreement to purchase property from B and C, and it afterwards appears that B has no interest in the property, C may nevertheless be compelled to convey his interest to A (*h*).

Where the purchaser, at the time of the contract, knows of (or would, if he had taken reasonable steps, have ascertained) the limited interest of the vendor, he will not be able to insist upon a conveyance of such interest, with compensation (*i*).

Where it turns out that land is subject to some undisclosed right, such as a right to dig for mines, although the vendor cannot, the purchaser may demand specific performance, with compensation (*k*).

Where the title of the vendor is doubtful or defective, the purchaser cannot compel a conveyance of such interest as he has, with compensation (*l*).

The neglect of a purchaser to make inquiries, may disentitle him from claiming compensation for some defect which with ordinary care he might have discovered (*m*).

(*f*) *Leslie* v. *Crommelin*, 2 Ir. R. Eq. 134, 140; *Jones* v. *Evans*, 17 L. J. Ch. 469; *Dale* v. *Lister*, cited 16 V., pp. 7, 11; *Hanbury* v. *Litchfield*, 2 My. & K. 629; *Neale* v. *Mackenzie*, 1 Keen, 474; *Graham* v. *Oliver*, 3 B. 124; *Painter* v. *Newby*, 11 Ha. 26.

(*g*) *Att.-Gen.* v. *Day*, 1 V. 218; and see *Paton* v. *Rogers*, 1 V. & B., p. 353; *Western* v. *Russell*, 3 V. & B. 187; *Hooper* v. *Smart*, 18 Eq. 683; *Richardson* v. *Smith*, L. R. 5 Ch. 648; *McKenzie* v. *Hesketh*, 7 Ch. D. 675; *Burrow* v. *Scammell*, 19 Ch. D. 175.

(*h*) *Horrocks* v. *Rigby*, 9 Ch. D. 180, but see *Wheatley* v. *Slade*, 4 Si. 126; *Jones* v. *Evans*, 12 Jur. 664; *Price* v. *Griffith*, 1 De G. M. & G. 80, 85; *Reynell* v. *Sprye*, *ibid.* 660; *Burrow* v. *Scammell*, 19 Ch. D., p. 183; *Hexter* v. *Pearce*, [1900] 1 Ch. 341.

(*i*) *Lawrenson* v. *Butler*, 1 Sch. & L., p. 19; *Mortlock* v. *Buller*, 10 V. 292; *Nelthorpe* v. *Holgate*, 1 Coll., p. 215; *Colyer* v. *Clay*, 7 B. 188; *Edwards* v. *Sykes*, 62 L. T. 445; *Besley* v. *B.*, 9 Ch. D. 103; *Clayton* v. *Leech*, 41 Ch. D. 103; cf. *Hone* v. *Gakstetter*, 53 Sol. J. 286.

(*k*) *Seaman* v. *Vawdrey*, 16 V. 390; see also *Peacock* v. *Penson*, 11 B. 355; *Painter* v. *Newby*, 11 Ha. 26.

(*l*) *Williams* v. *Higden*, 1 Coop. C. P. 500; and see *Castle* v. *Wilkinson*, L. R. 5 Ch. 534.

(*m*) *Edwards-Wood* v. *Marjoribanks*, 1 Gif. 384; 7 H. L. Ca. 806; *Clayton* v. *Leech*, *supra*.

Seton v. Slade.

In *James* v. *Lichfield* (*n*), the contract was for sale of five adjacent houses at Hanwell and six acres of land behind them. The purchaser was aware that all the houses were in the occupation of tenants, the purchaser himself being tenant of two of the houses and part of the land; but he did not learn until after the contract that one of the other tenants had an agreement for a twenty-one years' lease of his house and of the rest of the land at the back. An action by the purchaser for specific performance with an abatement of the purchase-money by way of compensation was dismissed. In *Caballero* v. *Henty* (*o*), on the other hand, where a public-house was put up for sale "as the same is now in the occupation of Mr. Slatter at the low rent of £20 per annum," and was purchased by a firm of brewers, the purchasers discovered, after the contract, that a lease of the premises was held by another firm of brewers, Slatter being, apparently, their tenant or nominee. An action by the vendors for specific performance was dismissed with costs. "If there is anything in the nature of the tenancies which affects the property sold," said James, L.J. (*p*), "the vendor is bound to tell the purchaser, and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser: 'If you had gone to the tenant and inquired, you would have found out all about it.'"

Where the statement as to quantity was simply a mistake, and it would be unjust to the vendor to decree specific performance, with compensation, the purchaser has been compelled to elect whether he would perform the contract without compensation, or have his bill dismissed (*q*). Compensation for restrictive covenants is not assessable, and therefore, if they exist, a purchaser who bought without knowledge of them, must either take the land as it is without compensation, or rescind the contract (*r*).

Compensation excluded by Express Contract.—The right to compensation may be excluded by express contract. Thus, where one of the conditions of sale was, "That the admeasurements are presumed to be correct, but if any error be discovered therein no allowance shall be made or required either way," and the purchaser claimed specific performance with compensation, the Court decreed

(*n*) 9 Eq. 51; and see *Phillips* v. *Miller*, L. R. 9 C. P. 196.
(*o*) L. R. 9 Ch. 447.
(*p*) *Ibid.* p. 450.
(*q*) *Durham* v. *Legard*, 34 L. J. Ch. 589.
(*r*) *Rudd* v. *Lascelles*, [1900] 1 Ch. 815.

specific performance, without compensation, and ordered the plaintiff to pay the costs of the suit (*s*).

But such a condition will, as a rule, be construed so as to extend to small unintentional inaccuracies only, and not to considerable deficiencies of area (*t*). The purchaser's right to compensation will not be excluded by acts on his part which merely amount to a waiver of objections to the title (*u*).

Where any deficiency exists as to the extent or duration of an interest in an estate contracted to be sold, and that deficiency does not admit of compensation, then, in the absence of express provision (*x*), a purchaser cannot be compelled to take, nor a vendor to give, an indemnity (*y*).

Specific performance will not be decreed if there has been misrepresentation on the part of the person claiming it, even although he be satisfied with a performance of the contract subject to any outstanding interests, without compensation (*z*).

Where it turned out that the vendor could not make out a title, the purchaser's bill for specific performance has been dismissed, without costs, leaving him to his remedy for damages (*a*). But where the vendor has filed a bill in such a case, he has been ordered to return his deposit with interest (*b*).

Although, as a general rule, a purchaser will not be allowed to pay his purchase-money into Court, and to enter into the possession of the purchased land, until after the acceptance of the title, where he only asks that his claim to compensation may be reserved, an order to pay the purchase-money into Court will be made even before the title has been accepted (*c*).

Where there is a special provision for compensation, the purchaser may, *even after a conveyance* and payment of the

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(*s*) *Cordingley* v. *Cheeseborough*, 4 De G. F. & J. 379. And see *Nicoll* v. *Chambers*, 11 C. B. 996.

(*t*) *Whittemore* v. *W.*, 8 Eq. 603; *Jacobs* v. *Revell*, [1900] 2 Ch. 858; *Lee* v. *Rayson*, [1917] 1 Ch. 613, 617—8; and see *Re Courcier and Harrold's Contract*, [1923] 1 Ch. 565, 575.

(*u*) *Calcraft* v. *Roebuck*, 1 V. 221.

(*x*) *Aylett* v. *Ashton*, 1 My. & C. 105; *Paterson* v. *Long*, 6 B. 598; and see *Walker* v. *Barnes*, 3 Madd. 247. Cf. *Shepherd* v. *Croft*, [1911] 1 Ch. 521.

(*y*) *Balmanno* v. *Lumley*, 1 V. & B. 225; *Paton* v. *Brebner*, 1 Bligh, p. 66; *Powell* v. *S. Wales Ry. Co.*, 1 Jur. (N.S.) 773; *Bainbridge* v. *Kinnaird*, 32 B. 346; *Ridgway* v. *Gray*, 1 Mac. & G. 109; *Milligan* v. *Cooke*, 16 V. 1; Fry (6th ed.), p. 571.

(*z*) *Clermont* v. *Tasburgh*, 1 J. & W. 112; Fry, pp. 344—5.

(*a*) *Thomas* v. *Dering*, 1 Keen, 729; *Malden* v. *Fyson*, 9 B. 347.

(*b*) *Lord Anson* v. *Hodges*, 5 Si. 227.

(*c*) *Man* v. *Ricketts*, 5 De G. & Sm. 116.

purchase-money (unless by the conditions the claim for compensation must be made before completion), claim compensation under the condition for any deficiency, as, for instance, in the acreage, the rental, or the length of a term, as stated in the particulars (*d*).

But where there has been no special contract as to compensation, compensation cannot after the conveyance be claimed for innocent misrepresentation (*e*); although it might be claimed if there had been a fraud or breach of some contract or warranty contained in the conveyance (*f*).

Rescission by Vendor.—The vendor frequently makes a term of the contract a provision to the effect that if the purchaser makes any requisition or objection which the vendor shall be unable or unwilling to comply with or remove, the vendor shall be at liberty to rescind the contract. In such a case, however, he will not be allowed to rescind if he fails to show any title either to the whole (*g*) or any material part of the property (*h*); or if he has been guilty of wilful misrepresentation (*i*), or if he has omitted to state in the particulars something which it was essential the vendor should tell the purchaser (*k*).

So if the right to rescind only arises upon a requisition being sent upon information appearing in the abstract, which the vendor is unable or unwilling to satisfy, he will not be able to rescind when the requisition is made in respect of a fact which does not appear there, for instance, an equitable mortgage by deposit of an underlease (*l*).

The right to rescind may, moreover, be lost by the vendor

(*d*) *Cann* v. *C.*, 3 Si. 447; *Bos* v. *Helsham*, L. R. 2 Ex. 72; *Re Turner and Skelton*, 13 Ch. D. 130; *Palmer* v. *Johnson*, 13 Q. B. D. 351, 357—8; *Brownlie* v. *Campbell*, 5 A. C. 936; *Leuty* v. *Hillas*, 2 De G. & J. 110. Cf. *Debenham* v. *Sawbridge*, [1901] 2 Ch. 98, in which it was held by Byrne, J., that the condition for compensation in that case did not apply to a defect in title: *Eastwood* v. *Ashton*, [1913] 2 Ch. 39.

(*e*) *Brett* v. *Clowser*, 5 C. P. D. 376; *Joliffe* v. *Baker*, 11 Q. B. D. 255; cf. *Re Hare and O'More*, [1901] 1 Ch. 93.

(*f*) *Joliffe* v. *Baker*, 11 Q. B. D. 255; *Nash* v. *Wooderson*, [1884] W. N. 210.

(*g*) *Bowman* v. *Hyland*, 8 Ch. D. 588; cf. *Re Deighton and Harris*, [1898] 1 Ch. 458; Fry (6th ed.), pp. 499 and 607.

(*h*) *Re Jackson & Haden*, [1905] 1 Ch. 603; [1906] 1 Ch. 412; and cf. *Mawson* v. *Fletcher*, L. R. 6 Ch. 91, 93; *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Thomas* v. *Dering*, 1 Keen, 729.

(*i*) *Price* v. *Macaulay*, 2 De G. M. & G., p. 346; Fry (6th ed.), p. 581.

(*k*) *Brewer* v. *Brown*, 28 Ch. D. 309; *Denny* v. *Hancock*, L. R. 6 Ch. 1; *Re Simpson and Moy*, 53 Sol. J. 376.

(*l*) *Re Jackson and Oakshott*, 14 Ch. D. 851; and see *Page* v. *Adam*, 4 B. 269, 286.

replying to the purchaser's objections or requisitions (*m*), and by acquiescence in, or confirmation of, the contract (*n*), unless the replies have been made without prejudice (*o*).

If the vendor makes it a term of the contract that he may rescind the sale, upon being "unable or unwilling" to remove an objection, he is entitled, as a rule, to avail himself of this power, unless he acts unfairly or recklessly (*p*).

Where the purchaser's requisitions are reasonable, the vendor cannot arbitrarily rescind (*q*).

But where a purchaser has accepted the title and has his purchase-money ready, the vendor cannot, under a condition that if "any objection or requisition is made *or insisted on*, which the vendor shall be unable or unwilling to comply with," he may rescind, exercise this power because the purchaser has required the vendor to state what were the restrictions subject to which the property was to be conveyed (*r*). Nor could such a power be exercised where the purchaser struck out of the draft conveyance words added by the vendors, and upon the insertion of which they had no right to insist (*s*).

In *Re Arbib and Class* (*t*) a vendor sold an estate under conditions of sale, one of which was, that if the vendor should be unable or unwilling to meet any requisition or objection, he might annul the sale and return the purchaser's deposit without interest and costs, notwithstanding any previous negotiation or litigation. An objection to the title having been taken by the purchaser, the vendor took out a vendor and purchaser summons to decide the question, and judgment was given against him. It was held too late for the vendor after the judgment to exercise his power of annulling the sale. But where there is such a condition, the mere institution of proceedings does not take away the power of rescission; although, if after the commencement of proceedings, the vendor is guilty of delay in giving notice of rescission, he may be

(*m*) *Tanner* v. *Smith*, 10 Si. 410; *M'Culloch* v. *Gregory*, 1 K. & J., p. 295.

(*n*) *Cole* v. *Gibbons*, 3 P. W. 290; *Attwood* v. *Small*, 6 Cl. & F., p. 432; *Flint* v. *Woodin*, 9 Ha. 618.

(*o*) *Morley* v. *Cook*, 2 Ha., p. 111.

(*p*) *Duddell* v. *Simpson*, L. R. 2 Ch. 102; *Re Dames and Wood*, 29 Ch. D. 626; *Merrett* v. *Schuster*, [1920] 2 Ch. 240; *Re Des Reaux and Setchfield*, [1926] Ch. 178.

(*q*) *Quinion* v. *Horne*, [1906] 1 Ch. 596; *Re Des Reaux and Setchfield*, *supra*.

(*r*) *Re Monckton and Gilzean*, 27 Ch. D. 555.

(*s*) *Hardman* v. *Child*, 28 Ch. D. 712.

(*t*) [1891] 1 Ch. 601; *Re Quigley and McClay*, [1918] 1 Ir. R. 347.

visited with costs (*u*). In *Proctor* v. *Pugh* (*x*), the purchaser, under a contract containing a similar condition, issued a summons for a declaration that a good title had not been shown and for return of the deposit. The vendor subsequently gave notice rescinding the contract under the conditions and returning the deposit. The purchaser then issued a writ for a declaration that the vendor was not entitled to rescind, and that he was liable to pay the expenses of investigating the title and interest on the deposit. It was held by Sargant, J., that the vendor's notice of rescission was valid and he dismissed the purchaser's action with costs.

(*u*) *Re Spindler and Mear*, [1901] 1 Ch. 908, 910.
(*x*) [1921] 2 Ch. 256.

WOOLLAM *v.* HEARN.

1802. 7 V. 211; 6 R. R. 113.

Distinction between Seeking and Resisting Specific Performance, as to the Admission of Evidence.

Though a defendant resisting a specific performance may go into parol evidence [to show] that, by fraud, the written agreement does not express the real terms, a plaintiff cannot (*a*) do so, for the purpose of obtaining a specific performance with a variation.

William Hearn, being possessed of a house in Ely Place, under an agreement for a lease of seven, fourteen or twenty-one years, from December 25, 1794, agreed to let the house to Penelope Woollam for seventeen years and a memorandum, dated December 11, 1798, was executed by them stating an agreement for a lease to the plaintiff from the defendant for seventeen years, to commence at Christmas next, at the yearly rent of £73 10s., the tenant paying all taxes except the land tax, which Hearn agreed to pay: the lease to contain all usual covenants, and also covenants that no public trade should be carried on in the premises; and that no alteration should be made in the front; that the lessee should leave the premises in tenantable repair, with other covenants relative to the situation of Ely Place, as being extra-parochial.

The bill was filed by Mrs. Woollam against Hearn, stating that the rent of £73 10s. was inserted by mistake, or with some unfair view; the real agreement being that the plaintiff was to have the lease upon the same rent as the defendant paid to his lessor, and that he did not pay more than £60: and in confidence that a lease would be executed to her, she paid £60 to the defendant at the time of executing the agreement, being the moiety of the sum which the defendant alleged he had laid out in repairs. She also paid £33 15s. 6d. for fixtures.

(*a*) The word "cannot" should, it is thought, now be read as "could not before the Judicature Acts."

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The bill prayed a specific performance, and that the defendant may be decreed to execute a lease according to the agreement, at the rent of £60, or such other rent as the defendant paid his lessor.

The defendant by his answer denied that £73 10s. was inserted by mistake, or with any unfair view; or that the agreement was that the plaintiff should pay the same rent as the defendant paid, which he admitted to be £63. He stated that he believed he might say, in the course of the treaty, that she would have the premises upon the same terms as the defendant had; not meaning that she was to have them at the same rent, but that she would, on the whole, have them upon terms of equal advantage with the defendant, considering the money he had expended upon them. He admitted the payment of £60, stating that it was not a moiety of the money laid out by him, though at the time of payment it might have been so called.

On the part of the plaintiff, her son stated by his depositions, that when he treated with the defendant for a lease of the house, he said he had got a lease of it, but could not at that moment lay his hands upon it; that he did not exactly know what the rent was, but it was somewhere about £70 a year, that he did not want to get anything by her, and she should have the house upon the same terms he had it himself, which he repeated several times afterwards. The plaintiff's solicitor stated that the defendant repeatedly said, upon being pressed to execute a lease, that the plaintiff held the house upon the same terms upon which he held; but, when the deponents proposed to him to execute an assignment of the original lease, he objected that it was always his maxim not to part with the original lease but to hold it in his own possession for his security.

Mr. Romilly and Mr. Wetherell, for the plaintiff.—To the objection that the plaintiff cannot vary the written agreement, the answer is, that this is a case of fraud, upon which you must have recourse to parol evidence, otherwise it cannot be made out; and that takes it out of the statute (*b*). * * * There are several cases before Lord Thurlow, in which it is laid down that

(*b*) Stat. 29 Car. 2, c. 3.

a party may alter a term in the agreement, in the case of fraud * * * In *Joynes* v. *Statham* (*c*), and *Walker* v. *Walker* (*d*), Lord Hardwicke intimates an opinion that the plaintiff might have done so, if the parties had been reversed. * * * The defendant must go the length of saying that no proof of fraud, however clearly it may be made out that the written agreement was not the actual agreement, will be adequate.

[They also cited *Buxton* v. *Lister* (*e*).]

Mr. Leach, for the defendant.—The plaintiff signed this agreement under the notion that the rent specified was paid by the defendant to his landlord. Assume that fact. She undertook it with full knowledge. This is not within the principle upon which the Court permits a written agreement to be varied by parol. The meaning of that rule is, that the writing must differ from the intention of the party when signing it. * * * If she meant only to pay a rent of £63, and the other by fraud inserted £73, the Court would correct it; but this is an attempt to repeal the Statute of Frauds. * * *

Mr. Romilly, in reply.—* * * It has been decided in many instances that a case of fraud is always an exception out of the statute. If the party undertakes to show, that by fraud he was induced to sign an agreement different from the actual agreement, he may read evidence to that. There can be no difference whether the party producing the evidence is plaintiff or defendant: the question being as to the rule of evidence, and a positive rule of evidence being equally applicable to both cases. * * *

1802. June 3.

The Master of the Rolls (*f*).—This bill calls upon the Court for a specific execution of an agreement for a lease, at a rent of £60 a year. There is no agreement in writing for a lease at that rent; the agreement expressing a rent of £73 10s. The plaintiff contends, however, that she signed that agreement

(*c*) 3 Atk. 388.
(*d*) 2 Atk. 98.
(*e*) 3 Atk. 383.
(*f*) Sir Wm. Grant.

under a belief that such was the rent payable by the defendant: the real agreement being for a lease at the same rent he paid to his landlord. The defendant in his answer admits he might have said she should have it upon the same terms; not meaning the same rent, but upon terms upon the whole equally advantageous; insisting that, as he had laid out a great deal of money, she would upon the whole have as good a bargain. She offers parol evidence to prove an express agreement that she was to have it upon the same terms as he had it, and to show that nothing could be meant by that expression but the same rent, nothing being in discussion between them but the amount of the rent. He alleges a particular reason for not stating it—that he had not his own lease at hand. The question is, whether the evidence is admissible? for, though read, it has been read without prejudice. The defendant controverts the effect of the evidence, supposing it can be received: but I own, my opinion is, that, if received, it will make out the plaintiff's case; for taking the whole together, there is hardly a doubt that the impression meant to be conveyed was, that the rent should be the same; and, whatever he meant, that is the impression any person would have received from his language.

By the rule of law, independent of the statute (*g*), parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry that the rule of law was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply.

Thus stands the rule of law. But when equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed: and there are many cases in which parol evidence of such circumstances has been admitted, as in

(*g*) 29 Car. 2, c. 3.

Buxton v. *Lister* (*h*), which is very like this case. There, upon the face of the instrument, a specific sum was to be given for the timber; but it was shown by parol that the defendants were induced to give that upon the representation that it was valued by two timber merchants, which was not true. So here by the agreement upon the face of it she is to pay this rent; but by the evidence she was induced to do so because she thought, from his representation, that it was the rent he paid. If this had been a bill brought by this defendant for a specific performance, I should have been bound by the decisions to admit the parol evidence and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree: first to falsify the written agreement, and then to substitute in its place a parol agreement, to be executed by the Court. Thinking, as I do, that the statute has been already too much broken in upon by supposed equitable exceptions, I shall not go farther in receiving and giving effect to parol evidence than I am forced by precedent. There is no case in which the Court has gone the length now desired. But two cases are produced, in which it is said there is an intimation from Lord Hardwicke to that effect. Upon that it might be sufficient to say it was not decided. But it is evident, from the manner in which that great Judge qualifies his own doubts, that he thought it impossible to maintain such a proposition as the plaintiff is driven to maintain. In *Walker* v. *Walker* (*i*), it is to be observed, first, that the parol evidence was not offered for the purpose of contradicting anything in the written agreement. It was admitted that, as far as it went, it stated the true meaning. But it was contended by the defendant that there was another collateral agreement which the plaintiff ought to execute before he could have the benefit of the written agreement. It was evidence, too, offered in defence to resist a decree. Lord Hardwicke, after stating the ground, expresses himself thus:—

"The plaintiff, for these reasons, is not entitled to relief in this Court, for supplying the defect of a legal conveyance, but it is rebutted by the equity set up by the defendant. I am not at all clear whether, if the defendant had brought his cross bill to

(*h*) 3 Atk. 383.

(*i*) 2 Atk. 98.

have this agreement established, the Court would not have done it, upon considering it in the light of those cases, where one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other; and the defendant would have had the benefit of it as an agreement."

So he states the special reason; not being at all clear that the defendant would have been so entitled. There is nothing of admitting parol evidence to contradict a written agreement, and next to set up a parol agreement, to be executed by the Court.

The other case referred to is *Joynes* v. *Statham, supra*, referred to for the opinion expressed by Lord Hardwicke: —

"Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have been allowed the benefit of disclosing this to the Court."

But the reason is assigned: —

"Because it was an agreement executory only; and as in leases there are always covenants relating to taxes, the Master will inquire what the agreement was as to taxes, and, therefore, the proof offered here is not a variation of the agreement, but is explanatory only of what those taxes were. I am of opinion to allow the evidence of the omission in the lease to be read."

The parol evidence was received for the purpose of resisting performance of the agreement, and received likewise, not to contradict it, but to show that, as it stood, it did not fully express the meaning and intention of the parties, there being another stipulation agreed upon, but not introduced into the written instrument. And even if that had been a bill by the defendant, to carry into execution the agreement, he would not have found it necessary to offer parol evidence to contradict anything in it; for he allowed it to contain the intention, as far as it went; but the provision, that the rent was to be clear of taxes, was omitted. And Lord Hardwicke, from the particular nature of that stipulation, expresses a doubt whether, if the defendant had been plaintiff, he might not have been permitted to give evidence, it being usual to leave that open; intimating that it would be merely explanatory as to the taxes.

But this is evidence to vary an agreement in a material part;

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and having varied it, to procure it to be executed in another form. There is nothing to show that ought to be done; and my opinion being that it ought not, I must dismiss the bill, but without costs (*k*).

NOTES.

1. Rectification and enforcement of rectified contracts.
2. Defences : Parol variation and mistake, p. 495; misrepresentation, want of fairness, p. 479; hardship and uncertainty, p. 481; surprise, p. 483; breach of trust, p. 484; doubtful title, p. 485; entirety, p. 486; want of mutuality, p. 486.

This case has been retained in the present edition, since, although the actual decision cannot, it seems, be now relied upon, the case is of value as illustrating the undoubted difference of the position of a plaintiff and that of a defendant in an action for specific performance. The decision rests upon the rule of evidence that parol evidence cannot be received to vary or contradict a written agreement, and that to admit such evidence would be "to falsify the written agreement and substitute in its place a parol agreement to be executed by the Court." It also appears that the Court desired to avoid further encroachment upon section 4 of the Statute of Frauds.

In cases of mutual mistake, the Court, it seems, has always had jurisdiction to rectify not only deeds and instruments made in execution of antecedent agreements, but also executory agreements when the written executory agreement fails to express the actual agreement of the parties (*l*).

In *Davies* v. *Fitton* (*m*) rectification was asked of a lease made in strict conformity with the terms of a written agreement upon the ground that the written agreement omitted a term of the real agreement between the parties. Lord St. Leonards (*n*) refused to admit parol evidence to rectify the lease on the ground that he could not have admitted parol evidence to vary the written

(*k*) The bill was dismissed without prejudice to another bill for a lease at the rent of £73 10s.

(*l*) *Henkle* v. *Money* (1749), 1 Ves. Sen. 317; *Baker* v. *Paine* (1750), *ibid.* 456; *Hodgkinson* v. *Wyatt* (1846), 9 V. 566; *Stedman* v. *Collett* (1854), 17 B. 608.

(*m*) 2 Dr. & W. 225, 232, followed by Farwell, J., in *May* v. *Platt*, [1900] 1 Ch. 616, and followed (reluctantly) by Neville, J., in *Thompson* v. *Hickman*, [1907] 1 Ch. 550. But see as to these cases the text, *infra*.

(*n*) Citing *Townshend* (*Marquis*) v. *Stangroom*, 6 V. 328.

agreement and then have ordered specific performance of the agreement so varied.

Under the Supreme Court of Judicature (Consolidation) Act, 1925, which replaces the Judicature Act, 1873, law and equity are to be administered concurrently, and in matters in which there was formerly any conflict between rules of equity and rules of common law, the rules of equity are to prevail. By section 44 (re-enacting section 24, sub-section 7 of the Act of 1873) the Court is to grant " all such remedies as any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided." In *Olley* v. *Fisher* (*o*), there was a written agreement by which (according to its terms) the plaintiff agreed to erect six houses on a piece of ground belonging to the defendant, and the defendant agreed within three months after completion of the houses to erect a bridge. The plaintiff erected four houses and brought an action to rectify the agreement by substituting " four " for " six," as the number of houses agreed to be erected, the figure six (as he alleged) having been inserted by mistake; and the plaintiff also claimed damages for the defendant's breach of agreement in not erecting the bridge. The defendant did not plead the Statute of Frauds. North, J., held evidence of mistake to be admissible. The parties then compromised the action; but the learned Judge proceeded to state that he felt no difficulty in admitting parol evidence to rectify the contract, and no difficulty, if the evidence showed that there ought to be rectification—the Statute of Frauds not having been pleaded—in " going on to give consequential relief in the nature of specific performance on the footing of the contract as rectified, upon the principle that under section 24, sub-section 7 of the Judicature Act, 1873, the Court can have no difficulty in entertaining an action for the reformation of a contract and for the specific performance of the reformed contract in every case in which the Statute of Frauds does not create a bar." In *May* v. *Platt* (*p*), the plaintiff sued for damages for the breach of the vendor's implied covenant for title relating to a portion of the land comprised in the conveyance. The

(*o*) 34 Ch. D. 367; *Craddock Bros., Ltd.* v. *Hunt*, [1922] 2 Ch. 809; [1923] 2 Ch. 136.

(*p*) [1900] 1 Ch. 616.

Woollam v. Hearn.

defendant alleged that the piece of land had been included by a mutual mistake and counterclaimed for rectification. The conveyance was in accordance with the terms of the written contract. Farwell, J., refused to allow evidence of mistake to be given. "The vendor first asks the Court to rectify the contract, and then to grant specific performance of the contract as rectified. This is contrary to the well-settled practice, established by such cases as *Woollam* v. *Hearn*" (*q*). In *Thompson* v. *Hickman* (*r*), Neville, J., felt himself bound to follow *May* v. *Platt* and *Davies* v. *Fitton* (*s*), although he dissented from the reasoning in those cases, and in the course of his judgment the learned Judge said (*t*): "The doctrine of *Woollam* v. *Hearn* appears to me to have no bearing upon a case of rectification." It will be seen above, however, that in *Woollam* v. *Hearn* there was an agreement for a lease but the lease itself had not been executed, and the plaintiff claimed rectification of the agreement and specific performance by the defendant executing a lease according to the agreement as rectified.

In *Craddock Bros., Ltd.* v. *Hunt* (*u*), in 1877 a plot of land containing 432 square yards was conveyed to R., who built a house on it, which became known as Powlett House. In 1885 an adjoining plot of land, containing 332 square yards, was conveyed to R., and in 1905 he fenced off this piece of land and a portion of the plot first conveyed to him and used the same as a builder's yard. As thus fenced off, the yard comprised 497 square yards, and the house 267 square yards. R. died in 1913 and in 1920 his representatives put up the property for sale. The yard was purchased by C. and the house by the defendant. In the defendant's contract the house, owing to a mistake of the auctioneers and the solicitors, was stated to contain 432 square yards (being all the land conveyed to R. in 1877), and in the plaintiffs' contract the yard was stated to contain 332 square yards (being only that portion of the yard which was comprised in the conveyance of 1885). C. made over the benefit of his contract to the plaintiff company. Conveyances were executed which followed the contracts. The error was discovered some months after completion and the defen-

(*q*) *Supra*.
(*r*) [1907] 1 Ch. 550.
(*s*) 2 Dr. & War. 225.
(*t*) [1907] 1 Ch., p. 561.
(*u*) [1922] 2 Ch. 809; [1923] 2 Ch. 136.

dant thereupon claimed to be entitled to the piece of the land comprised in the deed of 1877 which had been fenced off as part of the yard. The plaintiffs brought this action claiming a declaration that the defendant was a trustee of the piece of land in question for the plaintiffs and for an order on him to convey the same accordingly. P. O. Lawrence, J., and the Court of Appeal, by a majority (Lord Sterndale, M.R., and Warrington, L.J.; Younger, L.J., dissenting) upheld the plaintiffs' claim. The Master of the Rolls expressed his opinion (*x*) that "since the Judicature Act, rectification can be granted of a written agreement on parol evidence of mutual mistake, although that agreement is complete in itself and has been carried out by a more formal document. . . . After rectification, the written agreement does not continue to exist with a parol variation; it is to be read as if originally drawn in its rectified form"; and Warrington, L.J., observed (*y*): "It seems to me that, on principle, if an instrument of whatever nature is rectified, it ought to be treated as if the necessary alteration had actually been made with the pen and had been part of the document at the date of its completion."

The decision in *Craddock Bros., Ltd.* v. *Hunt* has been approved by the Privy Council in *United States of America* v. *Motor Trucks, Ltd.* (*z*), in which case Lord Birkenhead observed: "The Statute of Frauds only provides that no agreement not in writing and not duly signed shall be sued on; but when the written instrument is rectified there is a writing which satisfies the statute, the jurisdiction to rectify being outside the prohibition of the statute. . . . There seems no reason on principle why a Court of equity should not at one and the same time reform and enforce a contract; the matter, however, has been much discussed in the Courts, and the balance of distinguished authority not unequally maintained. But the difficulty, which was almost entirely technical, has been, in the view of the Board, removed by the provisions of the Judicature Act. . . . Since the Judicature Act the Court can entertain an action in which combined relief will be given simultaneously for the reformation of a contract, and for the specific performance of the reformed contract."

The rule of evidence excluding parol evidence varying the terms of a written contract does not exclude evidence of terms not

(*x*) [1923] 2 Ch., p. 151.
(*y*) *Ibid.* p. 160.
(*z*) [1924] A. C. 196.

inconsistent with the instrument where it is proved that the parties did not intend the instrument to be a complete statement of the whole agreement (*a*). Further, in such a case parol evidence showing the intentional incompleteness of the instrument is not excluded by the statute of Frauds. Thus in *Jervis* v. *Berridge* (*b*), J., the purchaser of an estate had, previously to the signature of the contract of purchase, verbally agreed to assign the benefit of the contract when formed to B., upon certain terms. A written memorandum of the assignment was drawn up before the purchase, from which, at B.'s request, certain stipulations in favour of J. were omitted. The vendors completed the sale with B., who reconveyed the estate to them to secure payment of the balance of the purchase-money. B. repudiated the omitted stipulations. J., treating B.'s rights under the verbal agreement and memorandum as determined by that repudiation, brought an action against the vendors and B., claiming in substance specific performance of his contract of purchase. The Court held that B. could not set up the memorandum in answer to the claim. Evidence of the whole contract between J. and B. was admitted, and B., by his repudiation having determined his rights thereunder, the written agreement between J. and the vendors was in effect specifically enforced. Lord Selborne remarked (*c*) : " To the question raised, the *Statute of Frauds* (*which is a weapon of defence, not offence, and which does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties*) *is wholly irrelevant* " (*d*).

The case of *W. Higgins, Ltd.* v. *Northampton Corporation* (*e*) seems hardly consistent with *Craddock Bros., Ltd.* v. *Hunt* (*supra*) and *United States of America* v. *Motor Trucks, Ltd.* (*supra*). The facts were these. The defendants invited tenders for certain work, and H. sent in a tender which was accepted. A formal contract under seal was executed but it failed to express H.'s intentions, and the plaintiffs (to whom H. had assigned the benefit of his contract) brought this action claiming rectification. The learned Judge found as a fact that H. was " labouring under a serious mistake " in

(*a*) Stephen, Digest of Law of Evidence (6th ed.), p. 99.

(*b*) L. R. 8 Ch. 351.

(*c*) L. R. 8 Ch., p. 359.

(*d*) See also *Hussey* v. *Horne-Payne*, 4 A. C. 311; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 207; *Jacobs* v. *Batavia and General Plantations Trust, Ltd.*, [1924] 1 Ch. 287.

(*e*) [1927] 1 Ch. 128.

entering into the contract in its present form, and that the mistake was brought about by the carelessness of an official of the defendants in drawing up the bill of quantities; but the plaintiffs' claim for rectification was refused. The Judge took the view that the mistake was not mutual but he also dealt with the case upon the footing of there having been a mutual mistake and came to the same conclusion. "I cannot rectify the contract," said Romer, J. (*f*), "because having regard to section 174 of the Public Health Act, the defendant council were incapable of entering into a contract with Mr. Higgins other than under seal. . . . There was no contract between these parties at all until the seal of the Council was put to the formal contract which was entered into." It is remarkable that in this case, *Craddock Bros. Ltd.* v. *Hunt* (*g*), and *United States of America* v. *Motor Trucks, Ltd.* (*h*) do not appear to have been cited, but upon the principle adopted in those cases it would seem that the plaintiffs in *W. Higgins, Ltd.* v. *Northampton Corporation* (*supra*) should have succeeded. There was in fact a contract under seal, and on rectification the altered words would be read into the contract in place of those struck out. As stated by Warrington, L.J. (*i*): "It seems to me that, on principle, if an instrument *of any nature* is rectified, it ought to be treated as if the necessary alteration had actually been made with the pen and had been part of the document at the date of its completion"; and to quote Lord Birkenhead (*k*), "when the instrument is rectified there is a writing"—(and as applied to *W. Higgins, Ltd.* v. *Northampton Corporation*, the words "under seal" might have been added after the word "writing")—"which satisfies the statute, the jurisdiction to rectify being outside the prohibition of the statute."

2. Defences.

Parol Variation and Mistake.—As a *defence* to specific performance, parol evidence has long been admissible to show, not only that by fraud, but by mistake, or even surprise, the written agreement does not contain the real terms (*l*); and, for this

(*f*) [1927] 1 Ch. 136.
(*g*) [1922] 2 Ch. 802; [1923] 2 Ch. 136.
(*h*) [1924] A. C. 196.
(*i*) [1923] 2 Ch., p. 160.
(*k*) [1924] A. C., p. 201.
(*l*) *Joynes* v. *Statham*, 3 Atk. 388; *Ramsbottom* v. *Gosden*, 1 V. & B. 165; *Townshend* v. *Stangroom*, 6 V. 328.

purpose, such evidence is admissible not only as collateral to the written agreement (*m*), but also in contradiction to it (*n*).

Where the terms of a written agreement are ambiguous, and on one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the Court has, upon that ground only, refused to enforce the agreement (*o*), and that, whether the plaintiff or defendant is the author of the ambiguity (*p*).

So where a purchaser entered into a contract to purchase land under a mistake as to the boundaries, caused by a plan which was presented to him, drawn by the vendor's agent, the Court refused to decree specific performance (*q*). The refusal is not in the arbitrary discretion of the Judge; there will only be such refusal if the Court is satisfied that the agreement would not have been entered into if its true effect had been understood (*r*).

When a defendant sets up a parol variation as a defence to specific performance of a written agreement, it will depend on the circumstances of each case whether it will defeat the plaintiff's title to specific performance, or whether the Court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for (*s*).

Thus, where it appears that after the agreement had been come to, a mistake occurred in putting the agreement into writing, specific performance will be decreed with the variation necessary to make the written contract really agree with the intention of the parties (*t*).

But where the mistake or parol variation set up shows that there was a misunderstanding, the one party meaning one thing,

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(*m*) *Clowes* v. *Higginson*, 1 V. & B. 524.

(*n*) See *Ramsbottom* v. *Gosden*, *supra*; *Winch* v. *Winchester*, 1 V. & B. 375; *Price* v. *Ley*, 32 L. J. Ch. 530.

(*o*) *Calverley* v. *Williams*, 1 V. 210; *Jenkinson* v. *Pepys*, cited 6 V. 330; *Clowes* v. *Higginson*, 15 V., p. 521; 1 V. & B. 524; *Neap* v. *Abbott*, Coop. C. P. 333.

(*p*) *Baxendale* v. *Seale*, 19 B. 601; *Swaisland* v. *Dearsley*, 29 B. 430; *Moxey* v. *Bigwood*, 4 De G. F. & J. 351.

(*q*) *Denny* v. *Hancock*, L. R. 6 Ch. 1, 12; Fry (6th ed.), pp. 357—8; cf. *Higgins* v. *Northampton Corp.*, [1927] 1 Ch. 128 (where the plaintiff's mistake was brought about by carelessness of an official of defendants).

(*r*) See *Watson* v. *Marston*, 4 De G. M. & G., pp. 238, 239; *Jones* v. *Rimmer*, 14 Ch. D., p. 592; *Phelps* v. *White*, 5 L. R. Ir., p. 335; *Brewer* v. *Brown*, 28 Ch. D. 309; Fry, p. 370.

(*s*) *London and Birmingham Ry. Co.* v. *Winter*, Cr. & Ph., p. 62; *Smith* v. *Wheatcroft*, 9 Ch. D. 223; *Nash* v. *Dix*, 78 L. T. 445; Fry, p. 367.

(*t*) *Joynes* v. *Statham*, 3 Atk. 388; *Walker* v. *W.*, 2 Atk. 98; *Fife* v. *Clayton*, 13 V. 546; *Gwynn* v. *Lethbridge*, 14 V. 585.

and the other party meaning something different, there is no contract which the Court will enforce (*u*).

When a plaintiff submits to perform a provision omitted in a written agreement, the Court, in the absence of fraud or mistake, will make a decree in his favour (*x*). Where, however, a parol variation set up by the defendant shows that he entered into the written contract under a mistake occasioned by the plaintiff, the plaintiff will be put to his election either to have his action dismissed or to have specific performance of the written contract with the parol variation : thus if one of the parties has reasonable grounds for presuming that a certain stipulation is implied in the contract, specific performance will only be decreed against him, upon the terms of such stipulation being inserted, for instance, in a lease (*y*).

Where, however, the mistake in the instrument is *unilateral*; where it carries out the plaintiff's expressed although not his real intention, he cannot claim rectification; his remedy, if any, is rescission, and that only in case of fraud (*z*). In certain cases, however, where the defendant knew that the real intention of the plaintiff differed from that expressed in the instrument the Court has put the defendant to the option of taking what the plaintiff meant to give, or rescission of the contract (*a*).

Mistake as to the existence of a private legal right may be a ground for equitable relief (*b*), but a mere mistake, either as to the legal effect of the contract (*c*), or of the legal consequences of an act (*d*), or a mistake as to the interest which the purchase will enable a person to acquire (*e*), cannot be set up as a defence against

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(*u*) *Clowes* v. *Higginson*, 1 V. & B. 524; *Butterworth* v. *Walker*, 13 W. R. 168; cf. *Dear* v. *Verity*, 38 L. J. Ch. 486; *Clark* v. *Grant*, 14 V. 519; *Mickle-thwaite* v. *Nightingale*, 12 Jur. 638; *Flood* v. *Finlay*, 2 Ball & B. 9.

(*x*) *Martin* v. *Pycroft*, 2 De G. M. & G. 785; *Barnard* v. *Cave*, 26 B. 253; *Leslie* v. *Tompson*, 9 Ha. 268; *Smith* v. *Wheatcroft*, 9 Ch. D. 223; *Gordon* v. *Marquis of Hertford*, 2 Madd., p. 122; and see *North* v. *Loomes*, [1919] 1 Ch. 378, 386.

(*y*) *Ramsbottom* v. *Gosden*, 1 V. & B. 165; and see *Ricketts* v. *Bell*, 1 De G. & Sm. 335; and see *Chappell* v. *Gregory*, 34 B. 250; *Leslie* v. *Tompson*, 9 Ha. 268; *McKenzie* v. *Hesketh*, 7 Ch. D. 675; Fry (6th ed.), pp. 365—6.

(*z*) See *Fowler* v. *F.*, 4 De G. & J. 250, 264—5, 273; *Thompson* v. *Whitmore*, 1 J. & H. 268.

(*a*) *Paget* v. *Marshall*, 28 Ch. D. 255; *Garrard* v. *Frankel*, 30 B. 445; *Harris* v. *Pepperell*, 5 Eq. 1.

(*b*) *Cooper* v. *Phibbs*, L. R. 2 H. L. 149, 170.

(*c*) *Powell* v. *Smith*, 14 Eq. 85.

(*d*) *G. W. Ry. Co.* v. *Cripps*, 5 Ha. 91.

(*e*) *Mildmay* v. *Hungerford*, 2 Vern. 243; see also *Marshall* v. *Collett*, 1 Y. & C. Ex. 232, 238.

proceedings for specific performance (*f*). Nor can a mere *indefinite misrepresentation*, such as ought to put a person upon inquiry (*g*). And this will especially be the case where the purchaser has equal means of acquiring knowledge with the vendor, even though he may not avail himself of them (*h*).

Mistake on the part of a defendant, set up as a defence to specific performance, must be clearly proved; but for such purpose parol evidence is sufficient (*i*). Where there has been no misrepresentation, and there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance thereof by the simple statement that he has made a mistake (*k*).

Thus, the inadvertent omission to propose an intended term to an agreement (*l*), or its intentional omission upon the supposition that it was illegal (*m*), is not a sufficient reason for the Court declining to grant specific performance. And if an agreement is drawn up without certain stipulations, negotiated by a party who deliberately and without any fraud or surprise being suggested, executes such agreement, the omission is no bar to specific performance (*n*).

And where two parties in the same agreement contract to purchase each an estate from the other, unless it is clearly stipulated that the two contracts are to be dependent on each other, one party may enforce specific performance of the contract to sell his estate, although the other party is unable to make a good title to his property (*o*).

(*f*) See Fry (6th ed.), 361, 374—6.

(*g*) *Fenton* v. *Browne*, 14 V. 144; *Lowndes* v. *Lane*, 2 Cox, Eq. 363; *Scott* v. *Hanson*, 1 Russ. & My. 128; *Trower* v. *Newcome*, 3 Mer. 704; *Partridge* v. *Usborne*, 5 Russ. 215; *Abbott* v. *Sworder*, 4 De G. & Sm. 448; *Colby* v. *Gadsden*, 34 B. 416.

(*h*) *Attwood* v. *Small*, 6 Cl. & Fin. 232; *Clapham* v. *Shillito*, 7 B., p. 149; *Pulsford* v. *Richards*, 17 B., p. 96; *Jennings* v. *Broughton*, 5 De G. M. & G. 126.

(*i*) *Webster* v. *Cecil*, 30 B. 62; *Clay* v. *Rufford*, 14 Jur. 803; *Monro* v. *Taylor*, 8 Ha., p. 56; *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1; *Darnley* (*Earl*) v. *L. C. & D. Ry. Co.*, L. R. 2 H. L. 43.

(*k*) *Per* Baggallay, L.J., in *Tamplin* v. *James*, 15 Ch. D. 217; *Powell* v. *Smith*, 14 Eq. 85; *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266 (reversed on other grounds, [1903] 1 Ch. 434); *Swaisland* v. *Dearsley*, 29 B. 430; *Holliday* v. *Lockwood*, [1917] 2 Ch., p. 55.

(*l*) *Parker* v. *Taswell*, 2 De G. & J. 559; but see *Broughton* v. *Hutt*, 3 De G. & J. 501; cf. *Zimbler* v. *Abrahams*, [1903] 1 K. B. 577.

(*m*) *Lord Irnham* v. *Child*, 1 Bro. Ch. 92.

(*n*) *Shelburne* v. *Inchiquin*, 1 Bro. Ch. 350.

(*o*) *Croome* v. *Lediard*, 2 My. & K. 251; Sugd. V. & P. (14th ed.), p. 162; *Lloyd* v. *L.*, 2 My. & C. 192; *Green* v. *Low*, 22 B. 625; cf. *Atkinson* v. *Smith*, 14 M. & W. 695.

Woollam v. Hearn.

A parol waiver of a written contract, amounting to a complete abandonment, and clearly proved, will bar a specific performance (*p*).

Where a written agreement is *afterwards* varied by parol, upon proceedings being taken for specific performance with or without the variation, the Court will it seems, put the defendant to his election, and, if he declines to elect, will decree specific performance of the written agreement without the variation (*q*). But if an agreement is correctly put into writing, and at the *same time* the parties add a term by parol, evidence of it is not, it appears, admissible even as a defence to specific performance (*r*). Although parol variations of a written contract are not of themselves sufficient to prevent a decree for specific performance of the written contract, yet if they are so acted upon as to make it impossible to enforce the written contract without injury to the party, specific performance will only be decreed of the contract with those variations (*s*).

In *North* v. *Loomes* (*t*), the plaintiff verbally agreed to sell to the defendant certain premises for £590. Defendant paid £50 as a deposit, for which the plaintiff gave a receipt, and such receipt together with a letter afterwards sent by defendant's solicitor, was held to constitute a sufficient memorandum. It was part of the verbal agreement that defendant should pay the costs of himself and the plaintiff; but this was not stated in either the receipt or the letter. In an action for specific performance the defendant pleaded the Statute of Frauds, but he did not in terms refer to the arrangement come to that he should bear the costs. The plaintiff expressed willingness to waive the term of the verbal agreement relating to the payment of costs; and it was held by Younger, J., that the defendant could not rely on the omission of this term from the receipt and the letter, and specific performance of the contract (this term being waived) was accordingly decreed.

Misrepresentation, Want of Certainty and Fairness, etc.—Since

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(*p*) *Price* v. *Dyer*, 17 V. 356; *Inge* v. *Lippingwell*, Dick, 469. And see *Jordan* v. *Sawkins*, 1 V., p. 404; *Rich* v. *Jackson*, 4 Bro. Ch. 519; *Filmer* v. *Gott*, 6 V. 337 (n.); *Coles* v. *Trecothick*, 9 V., p. 250; *Robinson* v. *Page*, 3 Russ. 119; *Legal* v. *Miller*, 2 Ves. Sen. 299; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634.

(*q*) *Robinson* v. *Page*, 3 Russ. 114. And see *Price* v. *Dyer*, 17 V. 356; *Saunderson* v. *Graves*, L. R. 10 Ex. 234.

(*r*) *Omerod* v. *Hardman*, 5 V., p. 730; see *Jenkins* v. *Hiles*, 6 V., pp. 654, 655; cf. *De Lasalle* v. *Guildford*, [1901] 2 K. B. 215.

(*s*) *Anon.*, 5 Vin. 522, pl. 38; *Legal* v. *Miller*, 2 Ves. Sen. 299; *Pitcairn* v. *Ogbourne*, *ibid.* 375; *Price* v. *Dyer*, 17 V. 356; *Van* v. *Corpe*, 3 My. & K. 277.

(*t*) [1919] 1 Ch. 378, 386.

the jurisdiction is discretionary, unless the plaintiff comes with perfect propriety of conduct (*u*), clear from all circumvention and deceit (*x*), and the agreement is certain (*y*), fair and just in all its parts (*z*), and the conditions of sale are not misleading or erroneous (*a*), specific performance will not be decreed. But an agreement, fair as between the parties, is not affected merely because it is brought about by a third party, with the fraudulent intention of benefiting himself (*b*). So, too, an agreement which is so uncertain that the Court would not grant specific performance of it, will be specifically enforced in spite of that objection if it has been confirmed by Act of Parliament (*c*).

If a definite and material representation be made, by one party affecting the subject-matter of the contract, and the other relies upon it, and it turns out to be untrue, the person deceived can resist specific performance (*d*).

And the rule is the same, where the misrepresentation has been made by the agent of the vendor. Thus, an agent, commissioned by a vendor to find a purchaser, has authority to describe the property, and to state any fact or circumstance which affects the value, so as to bind the vendor, and if he makes a false statement as to the description or value (though not instructed so to do), upon which the purchaser relies, the vendor cannot obtain specific performance (*e*).

A party who obtains an agreement by a misrepresentation as to

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(*u*) *Harnett* v. *Yielding*, 2 Sch. & L. 554; *Cadman* v. *Horner*, 18 V. 10; *Robinson* v. *Wall*, 2 Ph. 372.

(*x*) *Davis* v. *Symonds*, 1 Cox, 407; *Reynell* v. *Sprye*, 8 Ha. 222; 1 De G. M. & G. 660; Fry (6th ed.), p. 185.

(*y*) *Tillett* v. *Charing Cross Bridge Co.*, 26 B. 419; *Darbey* v. *Whitaker*, 4 Drew. 134; *Williams* v. *Brisco*, 22 Ch. D. 441; *Harnett* v. *Yielding*, *supra*.

(*z*) *Underwood* v. *Hitchcox*, 1 Ves. Sen. 279; *Buxton* v. *Lister*, 3 Atk. 383, 386; *Ellard* v. *Lord Llandaff*, 1 Ball & B. 241; *Martin* v. *Mitchell*, 2 J. & W. 413; *Stanley* v. *Robinson*, 1 Russ. & M. 527; *Warde* v. *Dickson*, 28 L. J. Ch. 315.

(*a*) *Harnett* v. *Baker*, 20 Eq. 50; *Re Banister*, 12 Ch. D. 131; *Re Marsh and Earl Granville*, 24 Ch. D. 11; *Heywood* v. *Mallalieu*, 25 Ch. D. 357.

(*b*) *Bellamy* v. *Sabine*, 2 Ph. 425.

(*c*) *Manchester S. C. Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352.

(*d*) *Lord Brooke* v. *Rounthwaite*, 5 Ha. 298; *Brealey* v. *Collins*, You. 317; *Lowndes* v. *Lane*, 2 Cox. Eq. 363; *Stewart* v. *Alliston*, 1 Mer. 26; *Harris* v. *Kemble*, 5 Bligh (N.S.) 730; *Cox* v. *Middleton*, 2 Drew. 209; *Price* v. *Macaulay*, 2 De G. M. & G. 339; *Rawlins* v. *Wickham*, 3 De G. & J. 304; *Higgins* v. *Samuels*, 2 John. & H. 460; *Leyland* v. *Illingworth*, 2 De G. F. & J. 248; *Caballero* v. *Henty*, L. R. 9 Ch. 447; *Redgrave* v. *Hurd*, 20 Ch. D. 1; *Smith* v. *Land, etc. Corporation*, 28 Ch. D. 7; *Dawsons, Ltd.* v. *Bonnin*, [1922] 2 A. C. 413.

(*e*) *Mullens* v. *Miller*, 22 Ch. D. 194.

part of the subject-matter, is not entitled to specific performance on waiving the part affected by it, as such a misrepresentation does not alter or modify the agreement *pro tanto*, but destroys it entirely, and operates as a bar to the person who has practised it (*f*).

Not only actual misrepresentation, but also suppression of the truth may prevent specific performance being decreed (*g*). But in one case the plaintiff had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterwards the defendant cleared the pit and examined the coal in the shaft with other persons, and subsequently contracted for a lease. The colliery turned out to be worthless. It was held that the defendant could not resist specific performance, on the ground of the plaintiff not having communicated the fact of his having worked the mine and found it unprofitable (*h*).

In the absence of fraud or undue advantage, specific performance would not be refused merely because the price was inadequate (*i*).

Hardship and Uncertainty.—Specific performance of a contract will not be enforced where it would subject a person to great *hardship*, but the plaintiff will be left to obtain damages (*k*).

In general, hardship, to be a sufficient defence against specific performance, must have existed at the date of the contract (*l*); mere ignorance of the nature of the property, which turns out to be worthless, will not prevent the specific performance of a contract respecting it. As, for instance, where a person contracts to take a lease of an abandoned colliery which turns out to be worthless (*m*). Nor will a person, who has purchased property merely as agent for an undisclosed principal, be able to resist specific performance on account of hardship (*n*).

(*f*) *Lord Clermont* v. *Tasburgh*, 1 J. & W. 112, 120; *Cadman* v. *Horner*, 18 V. 10.

(*g*) See *Young* v. *Clerk*, Pr. Ch. 538; *Maddeford* v. *Austwick*, 1 Si. 89; *Bonnett* v. *Sadler*, 14 V. 526; *Drysdale* v. *Mace*, 5 De G. M. & G. 103; *Shirley* v. *Stratton*, 1 Bro. Ch. 440; *Baskcomb* v. *Beckwith*, 8 Eq. 100; *Denny* v. *Hancock*, L. R. 6 Ch. 1; *Brewer* v. *Brown*, 28 Ch. D. 309; *Hope* v. *Walter* [1900] 1 Ch. 257; cf. *Shepherd* v. *Croft*, [1911] 1 Ch. 521.

(*h*) *Haywood* v. *Cope*, 25 B. 140.

(*i*) *Stillwell* v. *Wilkins*, Jac. 280; *Abbott* v. *Sworder*, 4 De G. & Sm. 448. See the notes to *Chesterfield* v. *Janssen*, vol. i, *ante*.

(*k*) *Wedgewood* v. *Adams*, 6 B. 600; 8 B. 103; *Pope* v. *Harris*, cited Lofft, 791; *Howell* v. *George*, 1 Madd. 1; *White's Case*, 3 Swans. 108 (n.); *Kimberley* v. *Jennings*, 6 Si. 340; *Talbot* v. *Ford*, 13 Si. 173; *Ryan* v. *Daniell*, 1 Y. & C. Ch. 60; *Watson* v. *Marston*, 4 De G. M. & G. 230, 239; *Browne* v. *Coppinger*, 4 Ir. Ch. R. 72; *Williamson* v. *Wooton*, 3 Drew. 210; Fry (6th ed.), p. 199.

(*l*) *Webb* v. *Direct London and Portsmouth Ry. Co.*, 1 De G. M. & G. 521.

(*m*) *Haywood* v. *Cope*, 25 B. 140.

(*n*) *Saxon* v. *Blake*, 29 B. 438; and see *Chadwick* v. *Maden*, 9 Ha. 188.

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But where the defendant agreed to take from the plaintiff a lease of an unfinished house, containing covenants on the part of the defendant to repair and keep in repair, and the plaintiff agreed to finish the house, the defendant was held entitled to refuse to take the lease, upon the ground that the house had been finished in such a defective manner as to make it unreasonable for him to take the liability upon himself (*o*).

Upon the same principle, a decree will not be made for specific performance of an agreement of which the consequence would be a *forfeiture* (*p*). But when a defendant sets up this defence, the Court must be satisfied that forfeiture will follow from specific performance of the agreement, and it must look also at the fact by whose act and conduct the forfeiture would be occasioned; for the Court will not permit a defendant to put himself in such a position that performance of his agreement will create a forfeiture, and then to turn round and say that the plaintiff shall not for that reason have specific performance (*q*).

And a purchaser cannot be compelled to take a lease when a forfeiture may be incurred by reason of a continuing breach of covenant (*r*).

Nor will specific performance be decreed where there is uncertainty (*s*), or a mistake as to what forms the subject-matter of the contract (*t*). But it will be decreed, where, although the description of the property sold be general, parol evidence can be produced to show what was intended (*u*). Where a person purchases an estate at an auction, under a mistake as to the lot put up,

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(*o*) *Tildesley* v. *Clarkson*, 30 B. 419. See and consider *Oxford* v. *Provand*, L. R. 2 P. C. 135.

(*p*) *Faine* v. *Brown*, cited 2 Ves. Sen. 307; *Peacock* v. *Penson*, 11 B. 355; cf. *Stevens* v. *Theatres, Ltd.*, [1903] 1 Ch. 857.

(*q*) *Helling* v. *Lumley*, 3 De G. & J., pp. 498, 499; *Lewis* v. *Bond*, 18 B. 85; Fry (6th ed.), p. 205.

(*r*) *Lewis* v. *Bond*, 18 B. 87; *Gregory* v. *Wilson*, 9 Ha. 683; Fry (6th ed.), pp. 450—458; cf. *White* v. *Hay*, 72 L. T. 281.

(*s*) *Swaisland* v. *Dearsley*, 29 B. 430; *Tillett* v. *Charing Cross Bridge Co.*, 26 B. 419; *Morrison* v. *Barrow*, 1 De G. F. & J. 633; *Taylor* v. *Portington*, 7 De G. M. & G. 328; *Price* v. *Salusbury*, 32 L. J. Ch. 441; *Pearce* v. *Watts*, 20 Eq. 492; and see *S. E. Ry. Co.* v. *Assocd. Portland Cement Manufacturers* (1900), *Ltd.*, [1910] 1 Ch. 12.

(*t*) See *Harnett* v. *Yielding*, 2 Sch. & L. 549, 554; *Neap* v. *Abbott*, Coop. C. P. 333; *Butterworth* v. *Walker*, 13 W. R. 168; *Re Tottenham's Estate*, 15 Ir. Ch. R. 308; *Hood* v. *Oglander*, 34 L. J. Ch. 528; *Denny* v. *Hancock*, L. R. 6 Ch. 1; *Bray* v. *Briggs*, 26 L. T. 817; *Brewer* v. *Brown*, 28 Ch. D. 309; *Plant* v. *Bourne*, [1897] 2 Ch. 281.

(*u*) *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Bleakley* v. *Smith*, 11 Si. 150; *Shardlow* v. *Cotterell*, 20 Ch. D. 90.

he would not be compelled to complete his contract (*x*). So where, at the time of the sale of a sum of money as a reversionary interest, neither of the parties were aware that it had fallen into possession by the death of the tenant for life, as both of the parties had entered into the contract under a common mistake, it was held to be manifestly unjust to enforce it as it stood and specific performance was refused (*y*). As it was in a case where a vendor, believed by mistake that he had given the auctioneer a discretion to sell, but not to let the property go under a reasonable sum, and consequently told a friend not to bid for him, with the result that the property sold for a less sum than he intended (*z*).

The same rule was applied in an action by a purchaser where the vendor offered to sell an estate for £1,100, a sum he had arrived at by a wrong addition, instead of £2,100 (*a*).

So a decree will not be made when it is doubtful whether the defendant meant to contract to the extent to which it is sought to charge him (*b*), or when the parties cannot be put into the condition stipulated for when the agreement was entered into (*c*).

Surprise.—Surprise is another ground upon which specific performance may be refused (*d*). In *Twining* v. *Morrice* (*e*), the vendor's agent bid for the plaintiff and the property was knocked down to him. Specific performance was refused; for it might appear to the persons present that the vendor was bidding, which would prejudice the sale (*f*).

The mere improvidence of a contract is ordinarily no sufficient defence against proceedings for specific performance (*g*), but the omission by an agent of all usual specific stipulations in favour of his principal may be so (*h*).

(*x*) *Malins* v. *Freeman*, 2 Keen, 25; *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266.

(*y*) *Colyer* v. *Clay*, 7 B. 188; cf. *Cochrane* v. *Willis*, L. R. 1 Ch. 58; *Scott* v. *Coulson*, [1903] 1 Ch. 249.

(*z*) *Day* v. *Wells*, 30 B. 220.

(*a*) *Webster* v. *Cecil*, 30 B. 62; *Tamplin* v. *James*, 15 Ch. D. 221; *Cochrane* v. *Willis*, L. R. 1 Ch. 58; cf. *Griffiths* v. *Jones*, 15 Eq. 279.

(*b*) *Harnett* v. *Yielding*, 2 Sch. & L., p. 554, and see *Lehmann* v. *McArthur*, L. R. 3 Ch. 496, 503.

(*c*) *Re The Mercantile and Exchange Bank*, 12 Eq. 268.

(*d*) *Willan* v. *W.*, 2 Dow, 275; *Magrane* v. *Archbold*, 1 Dow, 107; *Blakeney* v. *Baggott*, 3 Bligh (N.S.) 237.

(*e*) 2 Bro. Ch. 326.

(*f*) See *Townshend* v. *Stangroom*, 6 V. 338; *Mortlock* v. *Buller*, 10 V. 313; and see *Pym* v. *Blackburn*, 3 V. 34; *Mason* v. *Armitage*, 13 V. 25; *Hill* v. *Buckley*, 17 V. 394.

(*g*) *Sullivan* v. *Jacob*, 1 Moll. 472, 477.

(*h*) *Helsham* v. *Langley*, 1 Y. & C. Ch. 175; *White* v. *Cuddon*, 8 Cl. & Fin. 766; *Dawson* v. *Brinckman*, 3 De G. & Sm. 376; *Manser* v. *Back*, 6 Ha. 443.

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Where instructions are given to an agent merely to "procure a purchaser," or even to "dispose of" a property, this will not *prima facie* authorise the agent in signing a binding contract (*i*). But if definite instructions are given to an agent to sell and the price is named, this will entitle the agent to sign a contract (*k*). So, likewise, where one of two executors erroneously believing that he was acting with the authority of the other, contracted to sell part of the testator's estate, it was held that the purchaser could not enforce specific performance of the contract (*l*).

Breach of Trust, etc.—Nor will specific performance of a contract be decreed which was entered into for an illegal purpose (*m*), or which would be against public policy (*n*), or would involve a breach of trust (*o*), or of a former agreement (*p*), or an act *ultra vires* (*q*), or render a person liable for a devastavit (*r*), or which would give a benefit to a person in a fiduciary position, or to a firm of which he is member, as against the persons for whom he stands in the position of trustee (*s*).

And a person will not be compelled specifically to perform an act which he is not lawfully authorised to do, for, if he were, he would be exposed to an action for damages at the suit of the person injured. Thus, if proceedings be taken for a specific performance of an agreement entered into by a vendor who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such title as he can give; and that only in cases where an injury would be sustained by the plaintiff, in case he were not to get such an execution of the agreement as the defendant can give (*t*).

(*i*) *Hamer* v. *Sharp*, 19 Eq. 108; *Keen* v. *Mear*, [1920] 2 Ch. 574, 579.

(*k*) *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267; *Keen* v. *Mear*, [1920] 2 Ch., p. 579.

(*l*) *Sneesby* v. *Thorne*, 7 De G. M. & G. 399.

(*m*) *Thomson* v. *T.*, 7 V. 470; *Knowles* v. *Haughton*, 11 V. 168; *Ewing* v. *Osbaldiston*, 2 My. & C. 53, 85; *London and Brighton Ry. Co.* v. *L. & S. W. Ry. Co.*, 4 De G. & J. 389; but see *Aubin* v. *Holt*, 2 K. & J. 66; *Carolan* v. *Brabazon*, 3 Jo. & Lat. 200.

(*n*) *Cooth* v. *Jackson*, 6 V. 12, 30.

(*o*) *Mortlock* v. *Buller*, 10 V. 292; *Ord* v. *Noel*, 5 Madd. 438; *Bridger* v. *Rice*, 1 J. & W. 74; *Turner* v. *Harvey*, Jac. 169; *Neale* v. *Mackenzie*, 1 Keen, 474; *Wood* v. *Richardson*, 4 B. 174; *Thompson* v. *Blackstone*, 6 B. 470; *Bellringer* v. *Blagrave*, 1 De G. & Sm. 63; *Shrewsbury, etc. Ry. Co.* v. *L. & N. W. Ry. Co.*, 4 De G. M. & G. 115; *Maw* v. *Topham*, 19 B. 576; *Law* v. *Urlwin*, 16 Si. 377; *Rede* v. *Oakes*, 4 De G. J. & S. 505; Fry (6th ed.), p. 194; *Tolson* v. *Sheard*, 5 Ch. D. 19.

(*p*) *Willmott* v. *Barber*, 15 Ch. D. 96.

(*q*) *Corbett* v. *S. E. & C. Ry. Co.*, [1906] 2 Ch. 12.

(*r*) *Sneesby* v. *Thorne*, 7 De G. M. & G. 399.

(*s*) *Flanagan* v. *G. W. Ry. Co.*, 7 Eq. 116.

(*t*) *Harnett* v. *Yielding*, 2 Sch. & L. 554; *Lawrenson* v. *Butler*, 1 Sch. & L.

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Doubtful Title.—Nor will a contract be enforced where the Court considers the title good, but yet sufficiently doubtful, that it might reasonably give rise to litigation at a future time between the purchaser and persons not bound by the decree of the Court (*u*). To force a title upon a purchaser, the opinion of the Court must be so clear that it does not apprehend that another Judge would form a different opinion (*x*).

Where a contract for a purchase is entered into, subject to the approval of the title by a specified person, for instance the purchaser's solicitor, in the absence of bad faith or unreasonable conduct, his opinion on the matter will be conclusive, and specific performance will not be decreed in opposition thereto (*y*).

Upon the same principle specific performance will not be decreed of the contract for the purchase of a lease, where, from pending or threatened litigation, it is impossible to ascertain to whom the ground-rent is payable, and consequently the purchaser must be involved in immediate litigation (*z*). Where, however, there is a condition that the last receipt of rent shall be conclusive evidence that all covenants have been performed, or the breaches thereof waived up to the time of the completion of the purchase, the purchaser is bound by his agreement to assume that the covenants have been kept or the breaches so condoned as not to affect the title (*a*). But a vendor who has committed a wilful breach of the covenant after the contract, cannot avail himself of the condition (*b*).

Specific performance of a contract which it is impossible to perform (*c*), or the material terms whereof the Court has it not in its power to enforce (*d*), will not be decreed.

19; *Ellard* v. *Lord Llandaff*, 1 Ball & B. 241; *Peacock* v. *Penson*, 11 B. 355; *Howe* v. *Hunt*, 31 B. 420.

(*u*) *Parkin* v. *Thorold*, 16 B. 67.

(*x*) *Rogers* v. *Waterhouse*, 4 Drew. 329; but cf. *Baker* v. *White*, 20 Eq. 166. And see Fry (6th ed.), p. 414 *et seq.*

(*y*) *Hudson* v. *Buck*, 7 Ch. D. 683.

(*z*) *Pegler* v. *White*, 33 B. 403; *Re Hollis' Hospital and Hague's Contract*, [1899] 2 Ch. 540; *George* v. *Thomas*, 90 L. T. 505.

(*a*) *Bull* v. *Hutchens*, 32 B. 615; *Lawrie* v. *Lees*, 7 A. C. 19; cf. L. P. Act, 1925, s. 45, sub-s. 2, taking the place of section 3, sub-section 4 of the Conveyancing Act, 1881; and see *Re Highett and Bird*, [1903] 1 Ch. 287; *Re Taunton, etc., Building Soc. and Roberts' Contract*, [1912] 2 Ch. 381.

(*b*) *Howell* v. *Knightley*, 21 B. 331.

(*c*) *Green* v. *Smith*, 1 Atk. 573.

(*d*) *Waring* v. *M. S. & L. Ry. Co.*, 7 Ha., p. 492. See also *Downs* v. *Collins*, 6 Ha. p. 437; *S. Wales Ry. Co.* v. *Wythes*, 5 De G. M. & G. 880; *Ford* v. *Stuart*, 15 B. 493; *Counter* v. *Macpherson*, 5 Moo. P. C. 83.

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Entirety of Agreement.—As a general rule, all agreements must be considered as *entire*. The consideration for the performance of an agreement by one party to it is, usually, the performance of the whole of it by the other, and therefore if the Court is not in a position to compel the plaintiff, who comes for specific performance, to perform the whole of his part, the Court will not compel the defendant to perform his part of the agreement or any of it (*e*).

Where property is sold in one lot, the contract will generally be considered indivisible, and specific performance of a part thereof to which only a good title could be made will be refused (*f*).

Where, however, property is sold in separate lots, a vendor in the absence of special circumstances can compel the purchaser of two or more lots to complete the purchase of one lot, although he may be unable to make out the title to the other lots (*g*).

The fact that different prices are fixed upon different parts of the property comprised in a contract for sale will not of itself make the contract divisible (*h*).

Where, however, an agreement is divisible, that is to say, it is so worded as to constitute two or more separate agreements, specific performance may be decreed of one of such separate agreements, although the party seeking specific performance has not, and possibly never will, perform the rest of the whole agreement. And the assignee of the whole agreement is entitled to the same relief (*i*).

Want of Mutuality.—Where from personal incapacity to contract, or any other cause, the contract is incapable of being enforced against one party, that party, as a general rule, is equally incapable of enforcing it against the other (*k*). The Court acts upon the ground that if the remedy exists at all it ought to be reciprocal (*l*).

(*e*) *Per* Mellish, L.J., in *Wilkinson* v. *Clements*, L. R. 8 Ch. p. 110; and see *Blackett* v. *Bates*, L. R. 1 Ch. 117; *Gervais* v. *Edwards*, 2 Dr. & War. 80; *Hills* v. *Croll*, 2 Ph. 60; *Kernot* v. *Potter*, 3 De G. F. & J. p. 459; *Merchants' Trading Co.* v. *Banner*, 12 Eq. 23. See *per* Parker, J., in *Jones* v. *Tankerville* (*Earl*), [1909] 2 Ch. 440, at p. 444.

(*f*) *Roffey* v. *Shallcross*, 4 Madd. 227; and see *Price* v. *Griffith*, 1 De G. M. & G. 80; and cf. *Hexter* v. *Pearce*, [1900] 1 Ch. 341.

(*g*) *Casamajor* v. *Strode*, 2 My. & K. 724; *Lewin* v. *Guest*, 1 Russ. 325.

(*h*) *Crosse* v. *Lawrence*, 9 Ha. 462; *Crosse* v. *Keene*, 9 Ha. 469; and see *Richardson* v. *Smith*, L. R. 5 Ch. 648.

(*i*) *Wilkinson* v. *Clements*, L. R. 8 Ch. 96. See also *Odessa Tramways Co.* v. *Mendel*, 8 Ch. D. 243.

(*k*) *Flight* v. *Bolland*, 4 Russ. 298, 301; *Clayton* v. *Ashdown*, 9 Vin. Abr. 393; *Avery* v. *Griffin*, 6 Eq. 606; *Vansittart* v. *V.*, 4 K. & J. 62; *Firth* v. *Ridley*, 33 B. 516; cf. *Jones* v. *Tankerville* (*Earl*), [1909] 2 Ch. 440.

(*l*) *Withy* v. *Cottle*, 1 Si. & S. 174; *Forrest* v. *Elwes*, 4 V. 497; Fry (6th ed.), p. 219; cf. *Blyth* v. *Carpenter*, 2 Eq. 501.

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The mutuality is to be judged of at the time the contract was entered into, so that although the defendant may by subsequent conduct have lost his right against the plaintiff, the right of the latter will not be affected thereby (*m*).

The rule is applied in many cases of want of capacity. Thus, an infant cannot obtain specific performance (*n*), and formerly it would seem a married woman could not obtain a decree (*o*).

As stated by Kekewich, J., in *Wylson* v. *Dunn* (*p*), the doctrine is founded on common sense, and amounts to this, that one party to a bargain shall not be held bound to that bargain when he could not enforce it against the other (*q*).

There are exceptions to the rule that specific performance will not be decreed where there is a want of mutuality. Thus, as before stated (*r*), where a vendor has not substantially all the interest he has contracted to sell, he cannot enforce his contract against the purchaser, but the purchaser can insist upon having all the vendor can convey, with compensation for the difference (*s*).

So a contract which by the Statute of Frauds does not require to be signed by both parties may be enforced by the one who has not signed it (*t*), and a contract contained in a unilateral instrument, such as a deed poll, may be enforced (*u*). It must be remembered that since the Judicature Act, 1873 (*x*), damages may be claimed in the alternative in an action for specific performance : so that an action cannot now, as formerly, be dismissed for want of mutuality, leaving the plaintiff to bring his action for damages (*y*), for the Court can give the proper relief in the same action.

(*m*) *S. E. Ry. Co.* v. *Knott*, 10 Ha. 122; *Hawkes* v. *E. C. Ry. Co.*, 5 H. L. C. 331; and see *Bolton* v. *Lambert*, 41 Ch. D. 295, 300; *Re Bayley and Shoesmith's Contract*, 87 L. J. Ch. 626, 628.

(*n*) *Flight* v. *Bolland*, 4 Russ. 298, 301; and see *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. 683.

(*o*) See *Avery* v. *Griffin*, 6 Eq. 606; but see Married Women's Property Act, 1882, s. 1, sub-s. 2.

(*p*) 34 Ch. D. p. 576.

(*q*) See also *Lee* v. *Soames*, 36 W. R. 884; *Bolton* v. *Lambert*, 41 Ch. D. p. 300.

(*r*) Notes to *Seton* v. *Slade*, *ante*.

(*s*) *Halsey* v. *Grant*, 13 V. 73, 77; *Cleaton* v. *Gower*, Finch, 164; *Dyer* v. *Hargrave*, 10 V. 506.

(*t*) Fry (6th ed.), p. 225.

(*u*) Fry, p. 224. See the observations of O'Connor, L.J., in *O'Regan* v. *White*, [1919] 2 Ir. R. 392—4, on the rule concerning mutuality in specific performance.

(*x*) Now replaced by the Judicature Act, 1925.

(*y*) See *Lawrenson* v. *Butler*, 1 Sch. & L. 13; *Harnett* v. *Yielding*, 2 *ibid.* 549.

SURETIES.

DERING *v.* EARL OF WINCHELSEA.

1787. 1 Cox, 318; 2 B. & P. 270; 1 R. R. 41 (*a*).

Contribution between Co-sureties.

The doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity, on the ground of equality of burthen and benefit. Therefore, where three sureties are bound by *different instruments*, but for the same principal and the same engagement, they shall contribute.

Thomas Dering, Esq., having been appointed collector of some of the duties belonging to the customs, it became necessary, upon such appointment, for him to enter into bonds to the Crown with three securities for the due performance of this office. Sir Edward Dering his brother, the Earl of Winchelsea, and Sir John Rous having agreed to become sureties for him, a joint and several bond was executed by Thomas Dering and Sir Edward Dering to the Crown in the penalty of £4,000; another joint and several bond by Thomas Dering and the Earl of Winchelsea, and a third by Thomas Dering and Sir John Rous, in the same penalty of £4,000; all conditioned alike for the due performance of Thomas Dering's duty as collector. Mr. Dering being in arrear to the Crown to the amount of £3,883 14s., the Crown put the first bond in suit against Sir Edward Dering, and judgment was obtained thereon for that sum; whereupon Sir Edward filed this bill against the Earl of Winchelsea and Sir John Rous, claiming from them a contribution towards the sum so recovered against him.

The cause had been argued at length in Michaelmas Term last, and now stood for judgment.

Lord Chief Baron [Eyre] (*b*).—This bill is brought by one surety against his two co-sureties, under the circumstances

(*a*) Sir John Rous and the Att.-Gen. (as the creditor) were defendants with the Earl of Winchelsea.

(*b*) According to the report in Cox the Court consisted of the L.C.B. and Hotham, B., but that in B. & P. mentions that Perrin, B., was present.

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(above-mentioned). Mr. Dering's appointment, the three bonds, and the judgment against the plaintiff, are in proof in the cause; the original balance due, and the present state of it, are admitted.

The demand is resisted on two grounds: first, that there is no foundation for the demand in the nature of the contract; and, secondly, that the conduct of Sir Edward Dering has been such as to disable him from claiming the benefit of the contract, though it did otherwise exist. There is also a formal objection, which I shall take notice of hereafter.

I shall consider the second ground of objection first, in order to lay it out of the case. The misconduct imputed to Sir Edward is, that he encouraged his brother in gaming and other irregularities; that he knew his brother had no fortune of his own, and must necessarily be making use of the public money; and that Sir Edward was privy to his brother's breaking the orders of the Lords of the Treasury, to keep the money in a particular box, and in a particular manner, etc. This may all be true, and such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward to come into this Court under these circumstances. He might possibly have involved his brother in some measure, but yet it is not made out to the satisfaction of the Court that these facts will constitute a defence. It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say, that his ill conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be that a man must come into a Court of equity with clean hands: but when this is said it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense. In a moral sense, the companion, and perhaps, the conductor of Mr. Dering, may be said to be the author of the loss, but, to legal purposes, Mr. Dering himself is the author of it; and if the evil example of Sir Edward led him on, this is not what the Court can take cognisance of. Cases, indeed, might be put, in which the proposition would be true. If a contribution

were demanded from a ship and cargo for goods thrown overboard to save the ship, if the plaintiff had actually bored a hole in the ship, he would in that case be certainly the author of the loss, and would not be entitled to any contribution. But speaking of the author of the loss is a mere figure of speech, as applied to Sir Edward Dering in this case.

The real point is, whether a contribution can be demanded between the obligors of distinct and separate obligations under the circumstances of this case. It is admitted, that, if there had been only one bond in which the three sureties had joined for £12,000, there must have been a contribution amongst them to the extent of any loss sustained; but it is said, that that case proceeds on the contract and privity subsisting amongst the sureties, which this case excludes; that this case admits of the supposition that the three sureties are perfect strangers to each other, and each of them might be ignorant of the other sureties, and that it would be strange to imply any contract as amongst the sureties in this situation; that these are perfectly distinct undertakings without connection with each other, and it is added, that the contribution can never be *eodem modo* as in the three joining in one bond for £12,000; for there, if one of them become insolvent, the two others would be liable to contribute in moieties to the amount of £6,000 each, whereas here it is impossible to make them contribute beyond the penalty of the bond. Mr. Madocks has stated what is decisive, if true, that nobody is liable to contribute who does not appear on the face of the bond. If this means only that there is no contract, then it comes back to the question whether the right of contribution is founded on contract.

If we take a view of the cases, both in law and equity, we shall find that *contribution is bottomed and fixed on general principles of justice, and does not spring from contract*; though contract may qualify it, as in *Swain* v. *Wall* (*c*). In the register, 176 b, there are two writs of contribution—one *inter co-hæredes*, the other *inter co-feoffatos*; these are founded on the Statute of Marlbridge. The great object of the statute is, to protect the inheritance from more suits than are necessary.

(*c*) 1 Ch. R. 149.

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Though contribution is a part of the provision of the statute, yet in Fitzherbert (*d*) there is a writ of contribution at common law amongst tenants in common, as for a mill falling to decay (*e*). In the same page Fitzherbert takes notice of contribution between co-heirs and co-feoffees; and as between co-feoffees, he supposes there shall be no contribution without an agreement, and the words of the writ countenance such an idea, for the words are "*ex eorum assensu*"; and yet this seems to contravene the express provision of the statute. As to co-heirs, the statute is express; it does not say so as to feoffees, but gives contribution in the same manner. In *Sir William Harbert's Case* (*f*) many cases of contribution are put; and the reason given in the books is, that *in æquali jure* the law requires equality: one shall not bear the burthen in ease of the rest; and the law is grounded in great equity. *Contract* is never mentioned. Now, the doctrine of equality operates more effectually in this Court than in a Court of law. The difficulty in *Coke's Cases* was how to make them contribute; they were put to their *audita querela* or *scire facias*. In equity there is a string of cases, in 1 Eq. Ca. Abr., tit. "Contribution and Average." Another case occurs in Hargr. Law Tracts (*g*), on the right of the King on the prisage of wine. The king is entitled to one ton before the mast, and one ton behind; and in that case a right of contribution accrues, for the King may take by his prerogative any two tons of wine he thinks fit, by which one man might suffer solely. But the contribution is given of course on general principles, which govern all these cases.

Now, to come to the particular case of sureties. It is clear that one surety may compel a contribution from another towards payment of a debt for which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of a joint bond? What if they are jointly and severally bound? What difference will it make if they are severally bound, and by *different* instruments, but for the *same* principal, and the *same* engagement? In all these cases the sureties have a common

(*d*) Fitz. Nat. Brev., p. 162 b.
(*e*) *Vide Leigh* v. *Dickeson*, 15 Q. B. D. p. 68.
(*f*) 3 Co. 11 b.
(*g*) P. 120.

interest and a common burthen; they are joined by the common end and purpose of their several obligations as much as if they were joined in one instrument, with this difference only, that the penalties will ascertain the proportion in which they are to contribute; whereas if they had joned in one bond, it must have depended on other circumstances.

In this case, the three sureties are all bound that Mr. Dering shall account for the moneys he receives. This is a common burthen. All the bonds are forfeited at law and in this Court, as far as the balance due. The balance might have been so great as to have exhausted all the penalties, and then the obligee forces them all to pay; but here the balance is something less than one of the penalties. Now, who ought to pay this? The one who is sued must pay it to the Crown, as in the case of prisage; but, as between themselves, there shall be a contribution, for they are *in æquali jure*. This principle is carried a great way where they are joined in one obligation; for if one should pay the whole £12,000 and the second were insolvent, the third shall contribute a moiety, though he certainly never meant to be liable for more than a third: this circumstance, and the possibility of one being liable for the whole, if the other two should prove insolvent, suggested the mode of entering into separate bonds; but this does not vary the reason for contribution, for there is the same principal and the same engagement; all are equally liable to the obligee to the extent of the penalty of the bonds when they are not all exhausted. If, in the common case of a joint bond no distinction is to be made, why shall not the same rule govern here? As in the case of average of cargo in a Court of law, *qui sentit commodum sentire debet et onus*. This principle has a direct application here; for the charging one surety discharges the other, and each therefore ought to contribute to the onus. In questions of average, there is no contract or privity in ordinary cases; but it is the result of general justice, from the equality of burthen and benefit. Then there is no difficulty or absurdity in making a contribution take place in this case, if not founded on contract, nor any difficulty in adjusting the proportions in which they are to contribute, for the penalties will necessarily determine this.

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The objection in point of form, which I before mentioned, is, that the bill cannot be sustained, inasmuch as it has not charged the insolvency of the principal debtor, and that such a charge is absolutely necessary. As a question of form it ought to have been brought on by demurrer; but, in substance, the insolvency of Mr. Dering may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment, and the defendants have made their defence on other grounds.

On the whole, therefore, we think that the plaintiff is entitled to the relief he prays, and declares that the balance due from Thomas Dering being admitted on all hands to amount to the sum of £3,883 14s. 8½d., the plaintiff, Sir Edward Dering, and the two defendants, the Earl of Winchelsea and Sir John Rous, ought to contribute in equal shares to the payment of that sum, and direct that the plaintiff and defendants do pay in discharge thereof, each of them, the sum of £1,294 11s. 7d.; and that on payment thereof, the Attorney-General shall acknowledge satisfaction on the record of the said judgment, and that the two bonds entered into by the Earl of Winchelsea and Sir John Rous be delivered up to them respectively. But this not being a very favourable case to the plaintiff, and the equity he asks being doubtful, we do not think it a case for costs.

NOTES.

1. Generally.
2. Contribution between sureties, p. 496.
Guarantees, p. 501.
Continuing Guarantees, p. 501.
Statutes of Limitation, p. 502.
3. Contribution where there is a common liability, p. 503.
4. Contribution between wrongdoers, p. 506.
5. Right of surety to securities of co-surety and creditor, p. 507.
6. Right of surety paying debt to stand in the place of the creditor in bankruptcy, p. 516.
Proof by surety against co-surety, p. 518.
The rule in *Ex p. Waring*, p. 519.

1. Generally.

Lord Eldon, who was counsel for the defendants in the principal case, stated later (*h*), that at the time he was much dissatisfied with

(*h*) *Coope* v. *Twynam*, 1 T. & R. at p. 429; *Craythorne* v. *Swinburne*, 14 V. at p. 165.

the judgment, and that it ran counter to the view then commonly accepted in Westminster Hall, but he had since been convinced that the decision was based on right principles.

With the possible exception of a principal debtor (*i*) who is under disability, suretyship necessarily implies the principal liability of another (*k*), for "there can be no suretyship unless there is a principal debtor, who may of course be constituted in the course of the transaction by matters *ex post facto* and need not be so at the time; but until there is a principal debtor, there can be no suretyship. Nor can a man guarantee anybody else's debt, unless there is a debt of some other person to be guaranteed" (*l*). And consequently if the principal debtor is absolutely released by the creditor from his debt, as by novation, the liabilities of the surety come to an end (*m*), unless the contract of suretyship contains provisions to the contrary (*n*).

A creditor's right of action against the principal debtor, and against the principal debtor's surety, will generally arise at the same time and become barred at the same time. But the fact that a creditor has, by neglect, allowed time to bar his right against the principal debtor, will not, of itself, operate to release the surety. Hence, where a creditor had in his hands securities of the surety for the guaranteed debt, he was held entitled to hold the same, although his right of action against the principal debtor had become barred (*o*).

The relation of principal and surety arises from the contract between them, but as regards the creditor, the surety's rights arise by notice to the creditor of the relation, which notice he may acquire either as a party to the contract or in any other way (*p*). Until he has notice, the creditor may deal with a principal debtor as with any other debtor, but not afterwards (*q*). The rule is:

(*i*) See *Garrard* v. *James*, [1925] Ch. 616.

(*k*) See *per* Lord Campbell, C.J., in *Arnott* v. *Holden*, 18 Q. B. at p. 615;

(*l*) *Per* Lord Selborne, in *Mountstephen* v. *Lakeman*, L. R. 7 H. L. at p. 24.

(*m*) *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C. 313; *Perry* v. *Nat. Prov. Bank*, [1910] 1 Ch. 464, 478.

(*n*) *Cowper* v. *Smith*, 4 M. & W. 519; *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; *Perry* v. *Nat. Prov. Bank*, [1910] 1 Ch. 464, 473.

(*o*) *Carter* v. *White*, 25 Ch. D. 666; Darby and Bosanquet (2nd ed.), p. 17.

(*p*) See the judgment of Lord Selborne, in *Duncan Fox & Co.* v. *N. & S. Wales Bank*, 6 A. C. 1; *Hollier* v. *Eyre*, 9 Cl. & F., p. 45; *Pooley* v. *Harradine*, 7 E. & B. pp. 434—6.

(*q*) *Stainbank* v. *Davies*, 6 De G. M. & G. 679; *Oakeley* v. *Pasheller*, 4 Cl. & F. 207; *Oriental, etc., Corporation* v. *Overend, etc.*, L. R. 7 H. L. 348; *Duncan Fox & Co.* v. *N. & S. Wales Bank*, 6 A. C. 1, 12.

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" where two or more persons, bound as full debtors, arrange, either at the time when the debt was contracted or *subsequently*, that, *inter se*, one of them shall only be liable as surety, the creditor, after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors " (*r*).

Not every person liable for another's debt is a surety. Where his liability arises from contract he is not a surety when there is no privity of contract between him and the other person liable. Thus, although an accommodation party to a bill is a surety (*s*), the indorser of a bill is not (*t*), although when the bill matures he is in a position sufficiently analogous thereto to bring him within the principle of *Dering* v. *Winchelsea*. So too the original lessee liable for the breaches of covenant of an assignee is not a surety, for his liability arises from his own covenant, which is quite independent of the assignee's liability (*u*). So too a person liable by operation of law, as for example, the transferor of shares not fully paid up (*x*) or the owner of goods distrained upon (*y*), is not a surety even though he has a right to recover against the person primarily liable.

The distinction between a contract of suretyship and of insurance is frequently hard to draw. The use of either word is not conclusive; it is a question of construction in each case (*z*).

Suretyship is always for a debt incurred or to be incurred by the principal debtor, and the surety is bound to see that the debtor pays. Insurance is a contract to pay an amount upon the happening of a specified event or events, and covers not only matters within the field of suretyship, but also losses due to acts of strangers or accidents (*a*).

The distinction is important, for insurance is a contract *uberrimae fidei*, but suretyship is not (*b*); and where an insurance policy is taken out to insure against default of the principal debtor *and his surety*, the surety cannot claim to be on the footing of a

(*r*) *Per* Lord Watson, in *Rouse* v. *Bradford Bank*, [1894] A. C. at p. 598.

(*s*) *Overend, etc.* v. *Oriental, etc., Corporation*, L. R. 7 H. L. 348; cf. *Godsell* v. *Lloyd*, 27 T. L. R. 383.

(*t*) *Duncan Fox & Co.* v. *N. & S. Wales Bank*, 6 A. C. 1, 11.

(*u*) *Per* Fry, L.J., *Baynton* v. *Morgan*, 22 Q. B. D. at p. 80.

(*x*) *Re Contract Corporation, Hudson's Case*, 12 Eq. 1; *Nevill's Case*, L. R. 6 Ch. 43; Rowlatt, Principal and Surety (2nd ed.), p. 8.

(*y*) *Exall* v. *Partridge*, 8 T. R. 308.

(*z*) *Seaton* v. *Heath*, [1899] 1 Q. B. 782, at p. 792; *Re Denton*, [1904] 2 Ch. 178; *Dane* v. *Mortgage, etc., Corporation*, [1894] 1 Q. B. p. 60. Cf. *Shaw* v. *Royce*, [1911] 1 Ch. 138; *Law Guarantee, etc., Case*, [1914] 2 Ch. 617.

(*a*) Rowlatt (2nd ed.), p. 10.

(*b*) See *post*, p. 526.

co-surety with the insurance company, so as to be equally entitled to the securities held by the creditor (*c*).

2. Contribution between Sureties.

In *Craythorne* v. *Swinburne* (*d*), Lord Eldon said of the leading case that "it is decided that whether they (the sureties) are bound by several instruments or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates. * * * The doctrine of contribution * * * stands on this: that all sureties are equally liable to the creditor; and it does not lie with him to determine upon whom the burden shall be thrown exclusively; that equality is equity; and if he will not make them contribute equally, this Court will finally, by some arrangement, secure that object" (*e*).

The result of *Dering* v. *Winchelsea* is that "where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law adds, that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally if each is a surety to an equal amount; and if not equal, then proportionately to the amount for which each is a surety" (*f*).

The principle, which is quite independent of contract (*g*), is the same as that of marshalling, and is similar to that of subrogation (*h*).

It is clear that a surety may compel contribution from another for payment of a debt for which they are jointly or severally, or jointly and severally, bound by the same instrument (*i*). But it was decided, for the first time, in the leading case that there is no difference whether the parties are bound in the same or different instruments, provided they are co-sureties for the *same* principal

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(*c*) *Re Denton*, *supra*.

(*d*) 14 V. at pp. 165, 169.

(*e*) Cited by Wright, J., in *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 523.

(*f*) *Pendlebury* v. *Walker*, 4 Y. & C. Ex. p. 441; and see *Steel* v. *Dixon*, 17 Ch. D. at p. 830; *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; *Stirling* v. *Burdett*, [1911] 2 Ch. 418, 423.

(*g*) *Per* Lord Redesdale, in *Stirling* v. *Forrester*, 3 Bli. p. 590; see also *Ex p. Gifford*, 6 V., p. 808; *Spottiswoode's Case*, 6 De G. M. & G. p. 371; *Ramskill* v. *Edwards*, 31 Ch. D. 100; *Robinson* v. *Harkin*, [1896] 2 Ch. p. 426; *Mills* v. *United Counties Bank*, [1912] 1 Ch. pp. 242—3.

(*h*) *Per* Lord Eldon, in *Aldrich* v. *Cooper*, 8 V. p. 389. See *Duncan Fox & Co.* v. *N. & S. Wales Bank*, 6 A. C. pp. 12, 13. As to subrogation generally, see notes to *Ryall* v. *Rowles*, Vol. I.

(*i*) *Fleetwood* v. *Charnock*, Nels. 10; *Underhill* v. *Horwood*, 10 V. at p. 226.

and in the *same* engagement. Nor is there any difference if they are bound in *different sums*, except that contribution cannot be required beyond the sum for which they have become bound (*k*), each surety being ordinarily bound to contribute his proportionate part (*l*).

And the right of a surety to enforce contribution against co-sureties will not be affected by his ignorance at the time he became surety that they were also co-sureties (*m*).

A surety has no right of contribution against a person who is a surety both for the principal debtor and for him (*n*). Where, moreover, sureties are bound by different instruments for distinct portions of a debt due from the same principal, if the suretyship of each is a *separate* and *distinct* transaction, and not the same transaction split into different parts, there will be no right of contribution among the sureties (*o*). And the same applies to sureties, bound by the *same* instrument, if they are only liable for *distinct* portions of a debt from the same principal, for which none of them are liable in the aggregate. Suppose, for instance, the principal under a bond was bound to the creditor in £1,000, and four sureties became thereby guarantors for the payment, not of the whole £1,000 jointly and severally with the others, but each severally of £250 parcel of the £1,000. Then the creditor could only apply to each surety for payment of the £250, or such proportion of it as remained due, and there could be no contribution between the sureties, because *they were not liable for the same debt* (*p*).

The liabilities of sucessive indorsers of a bill or note must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law merchant, whereby a prior indorser must indemnify a subsequent one; if, however, it appear from the evidence that the parties made the indorsements pursuant

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(*k*) See *Craythorne* v. *Swinburne*, 14 V. at p. 169; *Ware* v. *Horwood*, 14 V. at p. 31; *Mayhew* v. *Crickett*, 2 Swans. 192.

(*l*) *Re MacDonaghs*, Minors, 10 Ir. R. Eq. 269; *Whiting* v. *Burke*, L. R. 6 Ch. 342; Rowlatt, Principal and Surety (2nd ed.), pp. 221—3.

(*m*) *Craythorne* v. *Swinburne*, *supra*; *Reynolds* v. *Wheeler*, 10 C. B. (N.S.) 561; *Macdonald* v. *Whitfield*, 8 A. C. 733.

(*n*) *Craythorne* v. *Swinburne*, *supra*; *Re Denton*, [1904] 2 Ch. 178.

(*o*) *Coope* v. *Twynam*, 1 T. & R. 426; *Pendlebury* v. *Walker*, 4 Y. & C. Ex. 429; *Arcedeckne* v. *Lord Howard*, 45 L. J. Ch. 622; Rowlatt (2nd ed.), pp. 232—4.

(*p*) See *dictum* by Blackburn, J., in *Ellis* v. *Emmanuel*, 1 Ex. D. at p. 162; and see *Johnson* v. *Wild*, 44 Ch. D. at p. 146.

to a mutual agreement to be co-sureties, they will be entitled and liable to equal contributions *inter se* (*q*).

Courts of common law in modern times assumed a jurisdiction to compel contribution (*r*). But such jurisdiction was much more confined and less beneficial than that in equity. "Before the passing of the Judicature Act a right to contribution or indemnity arising otherwise than by special agreement was only enforceable at law by a person who could prove that he had already sustained a loss. But in equity it was very reasonably held that even in the absence of any special agreement a person who was entitled to contribution or indemnity from another could enforce his right before he had sustained actual loss provided loss was imminent" (*s*), and this principle will now prevail in all divisions of the High Court (*t*).

A surety's right to claim contribution from a co-surety does not necessarily arise at the same time as his right to claim indemnity from the principal debtor. A surety can, it seems, sue his principal to compel payment by the principal as soon as the debt for which principal and surety are liable becomes payable, although the creditor may have made no demand (*u*). In *Re Mitchell, Freelove* v. *Mitchell* (*x*), however, J. M., who was surety for his nephew, J. J. M., by his will released J. J. M. from all "debts" owing by him to the testator up to the time of the testator's death. J. M. had paid nothing on account of the debt, but after his death his executors were called upon to pay and they did pay a substantial sum on account of the debt. It was held by Parker, J., that the testator's right at the time of his death to be indemnified was not a "debt" which had been released by his will.

The right of a surety to claim contribution from a co-surety arises (1) when the surety has paid either the whole or more than a just proportion of the debt for which he is liable to the principal creditor (*y*);

(*q*) *Macdonald* v. *Whitfield*, 8 A. C. 733, 744, 745; *Reynolds* v. *Wheeler*, 10 C. B. (N.S.) 561.

(*r*) See *Craythorne* v. *Swinburne*, 14 V. at p. 164.

(*s*) Lindley, Partnership (9th ed.), p. 463. See *Wolmershausen* v. *Gullick*, [1893] 2 Ch. at p. 527, cf. *Hughes-Hallett* v. *Indian, etc., Co.*, 22 Ch. D. p. 565.

(*t*) Judicature Act, 1925, s. 44.

(*u*) *Ranelaugh* v. *Hayes*, 1 Vern. 189; *Lacey* v. *Hill*, 18 Eq. 182; *Ascherson* v. *Tredegar Dry Dock and Wharf Co.*, [1909] 2 Ch. 401; Rowlatt (2nd ed.), p. 185; Hewitt on Limitations, p. 16. Cf. *Bradford* v. *Gammon*, [1925] 1 Ch. 132.

(*x*) [1913] 1 Ch. 201.

(*y*) *Ex p. Gifford*, 6 V. 805; *Davies* v. *Humphreys*, 6 M. & W. at pp. 168, 169; *Ex p. Snowdon*, 17 Ch. D. 44; *Re Wolmershausen*, 62 L. T. 545; and see *Dixon* v. *Steel*, [1901] 2 Ch. 602, 607; *Stirling* v. *Burdett*, [1911] 2 Ch. 418.

(2) when the surety has not paid, but has had judgment against him for the full amount of the debt (*z*);

(3) where the claim of the principal creditor against a deceased surety has been allowed (*a*).

And a person entitled to contribution is not obliged to wait until he has suffered, and has perhaps been ruined (*b*), but when called upon to pay, he can, it seems, bring an action against his co-sureties to compel them to contribute to pay the debt to the creditor (*c*).

Where the debt guaranteed is entire and indivisible but is payable by instalments, a surety who pays the whole of an instalment is not entitled to contribution from a co-surety if the amount of the instalment is less than his proportion of the debt (*d*).

A surety, who has been compelled to pay the debt, may in the same action sue the principal debtor for repayment and the co-sureties for contribution. And in an action for contribution to which the principal debtor is a party, the principal debtor will be ordered to pay not only the amount which a co-surety has been ordered to pay by way of contribution to the plaintiff surety, but also the amount due to the plaintiff not satisfied by such contribution (*e*).

Where the creditor is a party to the action the surety may obtain an order upon his co-surety to pay his proportion to the creditor. Where the creditor is not a party the surety may obtain a prospective order directing his co-surety, upon payment by the surety of his own share, to indemnify him against further liability (*f*).

The surety, moreover, has the right at any time after maturity of the debt to pay off the debt and (on giving a proper indemnity for costs) to sue the principal debtor in the creditor's name (*g*).

A surety is entitled to interest from the date of payment by him on the amount recoverable from the principal debtor and his

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(*z*) *Macdonald* v. *Whitfield*, 8 A. C. 733; *Wolmershausen* v. *Gullick*, [1893] 2 Ch. p. 527. A judgment or an award against the principal does not bind the surety, and is not evidence against him. *Ex p. Young*, 17 Ch. D. 668, 674; Rowlatt (2nd ed.), p. 154.

(*a*) *Wolmershausen* v. *Gullick*, *supra*.

(*b*) See Lindley on Partnership; *Wolmershausen* v. *Gullick*, *supra*; and see Note 7 to *Rees* v. *Berrington*, *post*.

(*c*) *Per* James, L.J., in *Ex p. Snowdon*, 17 Ch. D. at p. 47.

(*d*) *Stirling* v. *Burdett*, [1911] 2 Ch. 418.

(*e*) *Lawson* v. *Wright*, 1 Cox, 275; *Hitchman* v. *Stewart*, 3 Drew. 271; *Greerside* v. *Benson*, 3 Atk. 253 (n). Seton (7th ed.), p. 2067.

(*f*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514.

(*g*) *Swire* v. *Redman*, 1 Q. B. D. 536, 541.

co-sureties respectively (*h*), except as against the estate of a deceased principal, and even then, if a fund assigned as a further security has made interest, he is allowed interest (*i*).

An executor may retain payments made by him on account of his testator's liability as surety for a person who is a beneficiary under the will (*k*).

A surety who has paid off a mortgage debt is entitled to *prove* against the estate of a co-surety to the extent of the *whole debt*, but he can only actually recover the proportion due as between himself and his co-surety (*l*). But where a surety has paid a judgment debt and obtained an assignment of the judgment, he must obtain the leave of the Court before he can issue execution against his co-surety to enforce contribution (*m*).

Although the principle of contribution is not founded upon contract, still a person may by contract qualify, or take himself out of the reach of, the principle. Thus, where three persons became bound as sureties, and agreed among themselves that, if the principal debtor failed to pay, they would pay their respective parts; two became insolvent, and the third paid the money; one of the insolvent sureties, afterwards becoming solvent, was held liable to contribute one-third only (*n*).

So also a person may take himself entirely out of the principle, as where he becomes merely a *collateral* surety, by limiting his liability to payment of the debt upon the default of the principal and other sureties; and on a bill in such a case, filed for contribution, parol evidence is admissible to show what the real contract was, and to rebut the implied contract which equity raises in cases of contribution (*o*). "In the case of A. undertaking that if the principal does not pay, and if B., who has already become security, does not pay, he, A., will pay, it seems perfectly clear that B., in that case paying the whole, would have no claim of contribution against A." (*p*).

(*h*) *Lawson* v. *Wright*, *Hitchman* v. *Stewart*, *supra*; *Petre* v. *Duncombe*, 15 Jur. 1187; *Re Swan*, 4 Ir. R. Eq. 209; *Ex p. Bishop*, 15 Ch. D. 400; as to the rate, see *L. C. & D. Ry. Co.* v. *S. E. Ry. Co.*, [1892] 1 Ch. 120.

(*i*) *Caulfield* v. *Maguire*, 2 Jo. & Lat. 141.

(*k*) *Re Watson*, [1896] 1 Ch. 925; *Re Mitchell*, [1913] 1 Ch. 201.

(*l*) *Re Parker*, [1894] 3 Ch. 400.

(*m*) *Kayley* v. *Hothersall*, [1925] 1 K. B. 607.

(*n*) *Swain* v. *Wall*, 1 Ch. R. 149. See also *Craythorne* v. *Swinburne*, 14 V. 165; *Coope* v. *Twynam*, 1 T. & R. 426; *Collins* v. *Prosser*, 1 B. & C. 682; *Re Ennis*, [1893] 3 Ch. 238; *Buchanan* v. *Main*, 3 Fraser, 215; Rowlatt (2nd ed.), p. 230.

(*o*) *Craythorne* v. *Swinburne*, *supra*.

(*p*) *Hartley* v. *O'Flaherty*, L. & G. t. Plunk. p. 217.

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Guarantees (*q*).—A question of construction often arises for the decision of the Court, as to whether it was the *intention* that the surety should merely guarantee *part* of the debt *or* whether he should guarantee the *whole* of the debt with a limitation on his liability as surety. It was laid down in *Ellis* v. *Emmanuel* (*r*), that where a surety gives a continuing guarantee limited in amount to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed (*prima facie* at least) as applicable to a *part* only of the debt co-extensive with the amount of the guarantee, and this upon the ground, at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety (*s*).

"And further, that if a creditor taking a limited security for a floating balance means it to be a security for the whole of the debt, and not merely for a part, he should take care that this is clearly expressed, for the *prima facie* construction is the other way, and the Court ought not to split hairs or make nice verbal distinctions on the words used" (*t*).

There appears to be no case, however, which lays down that where the suretyship limited in amount is for a debt already ascertained which exceeds that limit, it is *prima facie* to be construed as a security for part of the debt only; and there does not seem to be any principle on which such a construction ought to be adopted. It is in such a case a question of construction on which the Court is to say whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only (*u*).

Continuing Guarantees.—A continuing guarantee secures the payment of a general balance of account between debtor and creditor, and not merely the amount due in respect of one or more particular transactions or in respect of transactions up to a certain amount where the payment, or satisfaction (*x*), of that amount in respect of the first items satisfies the guarantee, even though the

(*q*) See *Birkmyr* v. *Darnell*, and notes Smith's L. C.
(*r*) 1 Ex. D. 157 (C. A.).
(*s*) *Per* Blackburn, J., in *Ellis* v. *Emmanuel*, *supra*.
(*t*) *Ibid.*, p. 168.
(*u*) *Ellis* v. *Emmanuel*, 1 Ex. D. p. 169.
(*x*) For instance, under the Rule in *Clayton's Case*, 1 Mer. 585, 608. See as to this rule, *Deeley* v. *Lloyds Bank*, [1912] A. C. 756.

course of dealings eventually shows a balance due to the creditor (*y*).

It is a question of construction in each case whether a guarantee is intended to be continuing. Documents of this nature are construed in the same way as other instruments (*z*). The natural meaning of the words used must first be looked to (*a*). The form of the guarantee is a material factor (*b*), and so is the absence of limitation of time or amount (*c*), for if a man means to limit his liability, he should take care to say so (*d*).

To be held to be continuing, a guarantee must not only be prospective (*e*), but also contemplate a course of dealing, and not merely one or more definite transactions (*f*). Evidence of the circumstances under which the guarantee was given is admissible not to alter the terms but as part of the conduct of the parties in order to determine the scope and object of the arrangement (*g*). And consequently where the guarantee is given under such circumstances that the intention appears to be to maintain another in his profession or trade, it will be held to be continuing even though there is a limitation of amount (*h*).

Statutes of Limitation.—As already pointed out (*i*), a surety's right of action against his co-surety for contribution does not necessarily arise at the same time as his right of action against the principal debtor for indemnity; and time only begins to run under the Statute of Limitations after a right of action has arisen. So again, where there are co-sureties, A and B, the fact that the creditor's right of action against A has become barred does not in itself prevent A being sued by B for contribution (*k*).

(*y*) *Kirby* v. *Marlborough*, 2 M. & S. 18; *Bovill* v. *Turner*, 2 Chit. 205; *Kay* v. *Groves*, 6 Bing. 276.

(*z*) *Hargrave* v. *Smee*, 6 Bing. 244, at pp. 248, 250.

(*a*) *Allnutt* v. *Ashenden*, 6 Scott. N. R. at p. 133; *Wood* v. *Priestner*, L. R. 2 Ex. 282; *Nottingham, etc., Co.* v. *Bottrill*, L. R. 8 C. P. 694.

(*b*) *Walker* v. *Hardman*, 4 Cl. & F. 258.

(*c*) *Coles* v. *Pack*, L. R. 5 C. P. 65.

(*d*) *Merle* v. *Wells*, 2 Camp. 413; Rowlatt (2nd ed.), p. 69.

(*e*) *Allnutt* v. *Ashenden*, 6 Scott, N. R. 127.

(*f*) *Hitchcock* v. *Humfrey*, 5 Man. & G. 559; *Nicholson* v. *Paget*, 5 C. & P. 395.

(*g*) *Heffield* v. *Meadows*, L. R. 4 C. P. 595; *Bastow* v. *Bennett*, 3 Camp. 220; *Lawrie* v. *Scholfield*, L. R. 4 C. P. 622; *Grahame* v. *G.*, 19 L. R. Ir. 249; *Browning* v. *Baldwin*, 40 L. T. 248.

(*h*) *Allan* v. *Kenning*, 9 Bing. 618; *Martin* v. *Wright*, 6 Q. B. 917; *Batson* v. *Spearman*, 9 Ad. & E. 298; *Pease* v. *Hirst*, 10 B. & C. 122; *Williams* v. *Rawlinson*, 3 Bing. 71; Rowlatt (2nd ed.), p. 69.

(*i*) *Supra*, p. 549.

(*k*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514.

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3. Contribution where there is a Common Liability (other than in Tort).

Trustees.—Where one of two or more trustees, who are *in pari delicto*, has made good a loss occasioned by a breach of trust, for which they are jointly and severally liable, he may obtain contribution to that loss from his co-trustee (*l*), or from the representative of a deceased co-trustee, even though the actual loss occurs after the death of that co-trustee (*m*).

Where the trustee who has made good the loss is also a *cestui que trust* benefiting from the breach, then the rule stated above is modified (independently of the statutory provision mentioned below) by two other rules; first, that a *cestui que trust* cannot make a trustee liable for a breach of trust which he himself has authorised or even assented to (*n*), for "*volenti non fit injuria*" (*o*); and secondly, where a *cestui que trust* actively participates in the commission of a breach of trust, the trustee is entitled to be recouped out of the interest of the *cestui que trust* in the trust funds any loss he may sustain by reason of his having to make good such breach of trust (*p*). A trustee, therefore, who is a *cestui que trust* can only claim contribution from his co-trustee when the amount he has expended in making good the breach of trust exceeds the value of his interest in the trust funds (*q*).

By section 62 of the Trustee Act, 1925, replacing section 45 of the Act of 1893, where a trustee commits a breach of trust at the instigation or request or with the written consent of a beneficiary, the Court may (notwithstanding that the beneficiary may be a married woman restrained from anticipation) make an order impounding the whole or any part of the interest of the beneficiary by way of indemnity. It would appear that where the beneficiary against whom indemnity is claimed is a married woman, a stronger

(*l*) *Baynard* v. *Woolley*, 20 B. 583; and see *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685.

(*m*) *Jackson* v. *Dickinson*, [1903] 1 Ch. 947; *Re Harrison*, [1891] 2 Ch. 349; and see *Matthews* v. *Ruggles-Brise*, [1911] 1 Ch. 194.

(*n*) *Walker* v. *Symonds*, 3 Swans. p. 64; *Fletcher* v. *Collis*, [1905] 2 Ch. 24, 32, 36.

(*o*) *Per* Lord Langdale, in *Fyler* v. *F.*, 3 B. 560

(*p*) *Trafford* v. *Boehm*, 3 Atk. 444; *Lincoln* v. *Wright*, 4 B. 432; *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104; *Fletcher* v. *Collis*, [1905] 2 Ch. p. 82.

(*q*) *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685, 710; cf. *Lingard* v. *Bromley*, 1 V. & B. 114; *Butler* v. *Carter*, 5 Eq. 276, 281.

case is required to be made out by the trustee claiming indemnity than where the beneficiary is a man. "All the cases," said Fry, L.J., delivering the judgment of the Court of Appeal in *Sawyer* v. *S.* (*r*), "in which the separate estate of a married woman has been held to be affected by a breach of trust, are, so far as we are aware, cases in which she has been an actual actor in the transaction. . . . In no case, so far as we know, has her separate estate been charged on the mere ground of her having acquiesced in or approved of the breach of trust."

In certain cases a trustee can throw the whole liability for a breach of trust on the other trustee. Mere inaction, however, is not enough (*s*). The Court requires special circumstances. Thus where a trustee derives a direct benefit he will be made to indemnify his co-trustee (*t*), and so too if he is a solicitor and the other trustee acts under his advice or control (*u*), though the mere fact that one of the trustees is a solicitor is not a sufficient reason for the Court ordering him to indemnify the others (*x*).

Companies.—In the same way a director who has to make good a loss arising out of a transaction which is *ultra vires* or unauthorised can claim contribution from his co-directors (*y*).

By section 84, sub-section 4 of the Companies (Consolidation) Act, 1908, re-enacting section 5 of the Directors' Liability Act, 1890, a director who becomes liable to make any payment under the section for misrepresentations in the prospectus may recover contribution from any other persons who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraud. The statute states, in effect, that "with reference to this particular class of tort and to this class of persons, namely, co-promoters and co-directors, who have issued a prospectus, the ordinary rule that there shall be no contribution between tortfeasors shall not apply, but the rights of the parties shall be treated as though it were a question of contract and not of tort" (*z*). But a claim for contribution cannot be made against the estate of a

(*r*) 28 Ch. D. p. 605; and see Wolst. and Cherry, vol. 2, p. 448.
(*s*) *Bahin* v. *Hughes*, 31 Ch. D. 390; *Bacon* v. *Camphausen*, 58 L. T. 851.
(*t*) See *Butler* v. *B.*, 7 Ch. D. 116.
(*u*) *Lockhart* v. *Reilly*, 1 De G. & J. 464; *Thompson* v. *Finch*, 8 De G. M. & G. 560; *Re Turner*, [1897] 1 Ch. 536; *Re Linsley*, [1904] 2 Ch. 785.
(*x*) *Head* v. *Gould*, [1898] 2 Ch. 250.
(*y*) *Ashurst* v. *Mason*, 20 Eq. 225; *Ramskill* v. *Edwards*, 31 Ch. D. 100.
(*z*) *Per* Lord Halsbury, L.C., in *Gerson* v. *Simpson*, [1903] 2 K. B. p. 200.

deceased co-director, the maxim *actio personalis moritur cum persona* being applicable (*a*).

Mere knowledge is not enough; thus where a director was only present at a meeting which confirmed the minutes of the meeting at which the transaction was authorised he was held not to be liable to contribute (*b*).

For the purposes of the Statute of Limitations, time does not begin to run as between co-directors, until the claim of the company has been established against one of them (*c*). Where a company has illegally started business, the shareholders are liable for calls for payment of debts incurred at that time (*d*).

Partners.—The general rule is that partners are liable to contribute to one another in respect of debts and losses of the partnership. The only defences seem to be that the partnership is illegal, or that the act relied on as giving rise to the claim for contribution was a personal and not a partnership act (*e*). An innocent partner may even be exonerated (*f*). Where, however, the partners are *in pari delicto* it is doubtful if contribution would be given (*g*), but the better opinion appears to be that it is claimable, except in cases of pure tort or the violation of a statute or an illegal partnership (*h*).

Joint adventure renders the members of the adventure liable to contribution for payments of losses made by one of the members (*i*).

Co-ownership does not give rise to a right of contribution from the other co-owners for payments voluntarily made by one of them in keeping relation to the common property (*k*), *secus*, where payments are made by one of them in discharge of a common liability (*l*).

Underleases.—Where the underlessee of part of land comprised in a single head lease was forced to pay the rent for the whole land,

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(*a*) *Geipel* v. *Peach*, [1917] 2 Ch. 108. Cf. *Shepheard* v. *Bray*, [1906] 2 Ch. 235; [1907] 2 Ch. 571; Buckley (10th ed.), p. 193.
(*b*) *Ramskill* v. *Edwards*, *supra*.
(*c*) Buckley (10th ed.), p. 642. See *Robinson* v. *Harkin*, [1896] 2 Ch. 415.
(*d*) *Ex p. Longworth's Executors*, 1 De G. F. & J. 17.
(*e*) *Thomas* v. *Atherton*, 10 Ch. D. 185.
(*f*) *Campbell* v. *C.*, 7 Cl. & F. 166.
(*g*) *Att.-Gen.* v. *Wilson*, Cr. & Ph. 1.
(*h*) Lindley on Partnership (9th ed.), p. 469.
(*i*) *Lowe* v. *Dixon*, 16 Q. B. D. 455.
(*k*) *Leigh* v. *Dickeson*, 15 Q. B. D. 60.
(*l*) See *per* Cotton, L.J., in *Leigh* v. *Dickeson*, *supra*.

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it was held he had no right to contribution from the under-lessee of the other part of the land, there being no common demand (*m*).

In all the above cases, it is necessary to bear in mind the Mercantile Law Amendment Act, s. 5 (*n*).

Procedure.—A person entitled to contribution or indemnity may, instead of bringing another action, adopt, in the action against him, the procedure set out in R. S. C., Order XVI, rules 48 and 55 (*o*). Where co-defendants in an action are decreed to pay the costs, one of them cannot, by an independent proceeding, obtain contribution from the other in respect of such costs; but (*semble*) he can in the action itself (*p*).

4. Contribution between Tortfeasors.

The rule that one tortfeasor cannot recover contribution against another is an example of the general rule, *ex turpi causa non oritur actio* (*q*). Qualifications to the rule are given in the notes to *Merryweather* v. *Nixan* (*r*) and *Lampleigh* v. *Braithwaite* (*s*). In *Palmer* v. *Wick, etc., Shipping Co.* (*t*), Lord Herschell said that although it was now too late to question *Merryweather* v. *Nixan*, the rule as there stated was not founded on any principle of justice, or equity, or even public policy, which justifies its extension to the jurisprudence of other countries, and referred with approval to the judgment of Best, C.J., in *Adamson* v. *Jarvis* (*u*), that from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the applicant must be presumed to have known that he was doing an unlawful act.

In *Betts* v. *Gibbins* (*x*), Lord Denman said : " The general rule is that between wrongdoers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in

(*m*) *Johnson* v. *Wild*, 44 Ch. D. 146. See Woodfall (21st ed.), pp. 325—6.

(*n*) See *post*, p. 514.

(*o*) See *Butler* v. *B.*, 14 Ch. D. 320; *Sawyer* v. *S.*, 28 Ch. D. 601; *Eastern Shipping Co.* v. *Quah Beng Kee*, [1924] A. C. 177; and see section 39 of the Jud. Act, 1925. As to whether the procedure is applicable in an administration action, see *Wolmershausen* v. *Gullick*, [1893] 2 Ch. p. 528.

(*p*) *Dearsly* v. *Middleweek*, 18 Ch. D. 236.

(*q*) *Per* Wilmot, C.J., in *Collins* v. *Blantern*, 9 Wils. 341.

(*r*) 8 T. R. 186; 1 Smith, L. C.

(*s*) 1 Smith, L. C.

(*t*) [1894] A. C. 319, 324.

(*u*) 4 Bing. at p. 72; cf. *Halbronn* v. *International, etc., Agency*, [1903] 1 K. B. 270.

(*x*) 2 Ad. & E. 57; see pp. 74—6.

itself"; and Taunton, J., said, "The law will not imply an indemnity between wrongdoers. But the case is altered when the matter is indifferent in itself, and when it turns upon circumstances, whether the act be wrong or not." In *The Englishman* (*y*), Bruce, J., observed: "It was never decided that one wrongdoer could not sue another for contribution, but *that an implied promise to indemnify* did not arise from the mere fact of payment of the whole of the joint liabilities, by one of several wrongdoers. Where the circumstances are such as to raise a promise to indemnify, the indemnity may be enforced, except where the person seeking redress must be presumed to have known that he was doing an unlawful act. If the person knew that the act he is engaged to do is not only wrongful but unlawful, then the promise to indemnify is an unlawful contract, in contravention of public policy, and one that cannot be enforced" (*z*).

An innocent person who, by reason of fraudulent misrepresentations that the proceeding is lawful, has been induced to take part in the commission of a criminal offence, can maintain an action for damages against another participant for loss he has sustained in consequence (*a*).

5. Right of Surety to Securities of Co-Surety and Creditor.

Co-sureties.—As a general rule sureties are entitled to call upon any one of their co-sureties who may have obtained from the principal debtor a counter-security for the liability he may have undertaken, to bring into hotchpot, for the benefit of all the sureties, whatever he may receive from that source (*b*). And this rule applies even though the surety may have consented to become such, only upon the terms of having the security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for a security. Nor does it make any difference if the security is given after the others have become sureties (*c*). The right of a surety to the benefit of securities to aid him in recovering contribution extends to securities given to the creditor by a co-surety (*d*).

(*y*) [1895] P. 212, 217; and see *Smith* v. *Clinton*, 99 L. T. 840.

(*z*) See *Tinline* v. *White Cross Ins. Ass.*, [1921] 3 K. B. 327.

(*a*) *Burrows* v. *Rhodes*, [1899] 1 Q. B. 816.

(*b*) Rowlatt (2nd ed.), p. 201.

(*c*) *Steel* v. *Dixon*, 17 Ch. D. 825; *Berridge* v. *B.*, 44 Ch. D. 168; *Lake* v. *Brutton*, 8 De G. M. & G. 441; *Drysdale* v. *Piggott*, 8 De G. M. & G. 546.

(*d*) *Duncan Fox & Co.* v. *N. & S. Wales Bank*, 6 A. C. 1; Rowlatt (2nd ed.), pp. 207—8.

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So if one of several co-sureties pays off the debt and obtains from the creditor an assignment of policies of assurance effected on the life of the debtor, contribution will only be enforced against the other co-sureties in his favour, upon the terms of his bringing into account the moneys received upon the policies on the death of the debtor, credit being first given for the premiums and other moneys paid in reference to the transaction (*e*). When by means of the counter-security the surety has been repaid what he has paid on account of the principal debt, and has shared the amount thus received with his co-sureties, he will be again entitled to recover out of the counter-security the amount so handed over by him to them, whereupon their right to participate will again arise, and so on, until the whole of the payments made by the co-sureties on account of the principal debt have been refunded, or the value of the counter-security has been exhausted (*f*). Thus, if a debtor gives to one of several sureties an indemnity or counter-security, it is available not merely to the extent of the liability of the surety to whom it is given, but of the liability of all the sureties to the full extent of its value.

A surety may contract himself out of the benefit of the security obtained by a co-surety, and the question therefore may arise in each case whether there has been such a contract (*g*); and transactions might take place between the surety obtaining a security and his co-sureties, which would show that the co-sureties abandoned their right to claim any benefit from the security (*h*).

The right of a surety to the benefit of securities, either of a co-surety or of a creditor, does not depend on his having been called upon to pay anything (*i*).

Creditors.—As a general rule, a surety is entitled to the benefit of all the securities which the creditor has against the principal debtor. This right flows from the obligation of the principal to indemnify his surety (*k*). Thus, if a surety join with the principal debtor in a promissory note or bond, and the surety pays the debt, he will be entitled to have a transfer of any mortgage which the creditor may have taken for his debt. "I take it," says Lord

(*e*) *Re Arcedeckne*, 24 Ch. D. 709.
(*f*) *Berridge* v. *B.*, 44 Ch. D. 168. See the minutes of order in this case, Report, p. 178.
(*g*) *Steel* v. *Dixon*, 17 Ch. D. p. 832.
(*h*) *Re Arcedeckne*, 24 Ch. D. p. 716.
(*i*) *Dixon* v. *Steel*, [1901] 2 Ch. 602.
(*k*) *Yonge* v. *Reynell*, 9 Ha. 809; Rowlatt (2nd ed.), pp. 200—1.

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Eldon, "to be exceedingly clear, if at the time a bond is given a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee; and, as the mortgagor cannot get back his estate again without a conveyance, that security remains a valid and effectual security, notwithstanding the bond debt is paid" (*l*).

It is immaterial that the surety was not aware of the existence of the security (*m*), or whether it was taken by the creditor before *or after* the contract of the suretyship (*n*).

The surety may lose his right against the security held by the creditor, by taking from the principal debtor a security upon other property (*o*), unless he has done so without knowledge of the security held by the creditor, which was available for his own indemnity (*p*).

Where, moreover, a surety for a mortgagor pays off part of the mortgage debt, he is entitled as against the *mortgagor* to a charge on the estate for the amount he has so paid (*q*). But a surety for *part* of a debt, is not entitled to the benefit of a security given by the debtor to the creditor at a different time in a distinct transaction for another part of the debt (*r*).

Where a surety pays a sum of money, in discharge of his guarantee, leaving a balance for which he was not surety still unpaid, if the security of the creditor is not delivered up, nor anything said about it, the presumption is that the original security was intended to remain as to the balance, and it will not be treated as released (*s*).

A mortgagee making a second advance with notice of the suretyship cannot tack the two securities, as against the surety paying

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(*l*) *Copis* v. *Middleton*, T. & R. 231; see also *Hodgson* v. *Shaw*, 3 My. & K. 183; *Drew* v. *Lockett*, 32 B. 499; *Goddard* v. *Whyte*, 2 Gif. 449; *Brandon* v. *B.*, 3 De G. & J. 524; *Newton* v. *Chorlton*, 10 Ha. 646; *Nicholas* v. *Ridley*, [1904] 1 Ch. 192.

(*m*) *Mayhew* v. *Crickett*, 2 Swans. 191; *Duncan Fox & Co.* v. *N. & S. Wales Bank*, 6 A. C. 1; *Scott* v. *Knox*, 2 Jones, 778; *Leicester Banking Co.* v. *Hawkins*, 16 T. L. R. 317; Rowlatt (2nd ed.), p. 201.

(*n*) *Pledge* v. *Buss*, 663; *Scott* v. *Knox*, *supra*; *Pearl* v. *Deacon*, 24 B. 186; *Coates* v. *C.*, 10 Jur. (N.S.) 532; *Campbell* v. *Rothwell*, 47 L. J. Q. B. 144; *Forbes* v. *Jackson*, 19 Ch. D. 615, 619.

(*o*) *Cooper* v. *Jenkins*, 32 B. 337. Cf. *Brandon* v. *B.*, 2 De G. & J. 524.

(*p*) *Lake* v. *Brutton*, 8 De G. M. & G. 440; Rowlatt (2nd ed.), p. 221.

(*q*) *Gedye* v. *Matson*, 25 B. 310; Rowlatt, p. 218; and see *Re Parker*, [1894] 3 Ch. 400.

(*r*) *Wade* v. *Coope*, 2 Si. 155; *South* v. *Bloxam*, 2 Hem. & M. 457; Rowlatt, p. 211.

(*s*) *Waugh* v. *Wren*, 11 W. R. 244.

off the sum secured by the first (*t*). It has been held that where separate debts are due upon distinct securities from the principal debtor to the creditor, the latter will not lose his right to consolidate, by the fact that a third party who has become surety for one of the debts, has paid off such debt, and that the surety therefore cannot call for an assignment of the securities for the debt he had paid off (*u*). This case, which was afterwards compromised on appeal (*x*), is contrary to the principles of the decisions on tacking in which the right of the surety to an assignment of securities for the debt he has satisfied has been upheld (*y*). Where the surety contracts with the creditor that he will be liable as a principal debtor the rights to tack and consolidate available against the debtor avail against him (*z*).

It must be borne in mind that by section 94, sub-section 3 of the Law of Property Act, 1925, the right to tack is abolished, save in regard to making further advances, as mentioned in the section, and save also that the section does not affect any priority acquired before the commencement of the Act by tacking or in respect of further advances made without notice of a subsequent incumbrance. Sub-section 1 specifies the conditions under which a prior mortgagee, may have a right to make further advances to rank in priority to subsequent mortgages. It should also be pointed out that as a surety who pays off part of the debt thereby acquires in equity a charge on the property which the debtor may have mortgaged to the creditor to secure the debt, it would seem necessary for the surety to register such a charge under the Land Charges Act, 1925.

A surety who pays off the debt secured is entitled to all the equities of the creditor not only against the principal debtor, but also against all persons claiming under him. Hence a surety will not be deprived of his right to the security, by a further mortgage by the debtor to a person who had notice of the first mortgage, though the latter has got in the legal estate. Thus, in *Drew* v. *Lockett* (*a*), A mortgaged his estate to C, and B became A's

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(*t*) *Bowker* v. *Bull*, 1 Si. (N.S.) 29; *Forbes* v. *Jackson*, 19 Ch. D. p. 622; *Pearl* v. *Deacon*, 1 De G. & J. 461; *Dixon* v. *Steel*, [1901] 2 Ch. 602; Rowlatt (2nd ed.), p. 212. Cf. *Re Toogood's Legacy Trusts*, 61 L. T. 19.

(*u*) *Farebrother* v. *Wodehouse*, 23 B. 18, followed with reluctance by Byrne, J., in *Nicholas* v. *Ridley*, [1904] 1 Ch. 192. See Rowlatt, pp. 212—214; Coote (9th ed.), pp. 1247—8.

(*x*) 26 L. J. Ch. 240. (*y*) See cases cited in note (*t*), *supra*.

(*z*) *Duncan Fox & Co.* v. *N. & S. Wales Bank*, 6 A. C. 1; *Nicholas* v. *Ridley*, *supra*.

(*a*) 32 B. 499; see also *Lancaster* v. *Evors*, 10 B. 154.

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surety for the debt. Afterwards A mortgaged the estate to D, who had notice of the first mortgage. The first mortgage was afterwards paid off, partly by B the surety, but D got the transfer of the legal estate. It was held that the surety still had priority over D for the amount paid by him under the first mortgage.

Upon the same principle a surety has been held entitled to marshal securities, not only as against the principal debtor, but also as against all persons claiming under him, and this is "not by force of the contract: but that equity upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety, and therefore there is nothing hard in the act of the Court placing the surety exactly in the situation of the creditor" (*b*). Thus, in *Heyman* v. *Dubois* (*c*), A, having effected policies upon his own life with an assurance office, mortgaged them to the office as a security for successive loans. In one mortgage B became surety for repayment of the amount borrowed. A subsequently became bankrupt, and B was compelled to pay part of the debt. Upon A's death, it was held that as against A's assignee in bankruptcy, B was entitled to marshal the securities so as to obtain repayment of the amount which he had been compelled to pay out of the balance of the several policy moneys (*d*). And if the surety is unable from some disability to obtain the benefit of the creditor's securities, equity will restrain the creditor from proceeding against the surety till he has resorted to these securities (*e*).

A surety, moreover, has a right to set off against the creditor a debt due from the creditor to the debtor arising out of the same transaction in which the liability of the surety arose. Thus in *Bechervaise* v. *Lewis* (*f*), the defendant as surety joined R in a joint and several note to the plaintiff. Afterwards, without the consent of the defendant, the plaintiff received debts which he had sold to R, and to secure payment for which the note was given, and thereby became indebted to R, and rendered it impossible for the defendant, either to proceed against R or his representatives in order to indemnify himself in respect of the note. It was held that the surety, by way of equitable defence, might plead a special plea of a set-off due from the creditor, since the debt

(*b*) *Per* Eldon, C., in *Aldrich* v. *Cooper*, Vol. I., cited with approval by Selborne, C., in *Duncan Fox & Co.* v. *N. & S. Wales Bank*, *supra*.
(*c*) 13 Eq. 158. (*d*) See also *Re Westzinthus*, 5 B. & Ad. 817.
(*e*) *Wright* v. *Nutt*, 3 Bro. Ch. 326.
(*f*) L. R. 7 C. P. 372; Rowlatt (2nd ed.), p. 136.

arose out of the same transaction as the liability of the surety did. "A surety, has a right, as against the creditor, when he has paid the debt, to have for reimbursement the benefit of all securities which the creditor holds against the principal. This alone would not help the defendant here, because he has not, nor has the principal, actually paid the creditor, and in our law set-off is not regarded as an extinction of the debt between the parties. The surety, however, has another right, viz., that as soon as his obligation to pay is become absolute, he has a right in equity to be exonerated by his principal. Thus we have a creditor who is equally liable to the principal as the principal to him, and against whom the principal has a good defence in law and equity, and a surety who is entitled in equity to call upon the principal to exonerate him. In this state of things we are bound to conclude that the surety has a defence in equity against the creditor; and we are justified in doing so by the authority of the civil law alluded to in the course of the argument" (*g*).

Where, moreover, a surety pays off a mortgage debt of the principal debtor, he may set off in bankruptcy the money which thus becomes due to him as being entitled to the benefit of the securities, against money due from himself to the owner of the equity of redemption, and where the equity of redemption belongs to a joint-stock company, to which calls are due from the surety, he may set off his payment against the calls (*h*). And, as any person who is liable to pay the debt of another, whether for value or gratuitously, is, as between himself and the person primarily liable, a surety, a broker, who contracts for the purchase of goods without disclosing his principal, is entitled, upon payment of the price of the goods, to the benefit of the vendor's lien (*i*).

When a mortgagor has given a collateral security for the original debt and borrows a further sum, which is guaranteed by a surety, the latter is entitled to the surplus value of the securities, after payment of the original debt, towards payment of that debt

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(*g*) *Per* Willes, J., L. R. 7 C. P., p. 377. The passage from the Digest is—"*Verum est, quod et Neratio placebat et Pomponius ait, ipso jure eo minus fidejussorum ex omni contractu debere, quod ex compensatione reus retinere potest. Sicut enim cum totum peto a reo, male peto, ite et fidejussor non tenetur ipso jure in majorem quantitatem, quam reus condemnari potest.*" See also *Murphy* v. *Glass*, L. R. 2 P. C. 408; *Hobson* v. *Bass*, L. R. 6 Ch. 792.

(*h*) *Ex p. Barrett*, 34 L. J. Bank. 41; see Williams, Bankruptcy (13th ed.), p. 178.

(*i*) *Imperial Bank* v. *London and St. K. Dock*, 5 Ch. D. 195, at p. 200; Rowlatt (2nd ed.), p. 209.

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for which he is surety. Thus in *Praed* v. *Gardiner* (*k*), A being indebted to B, lodged several securities with him, as collateral securities for that debt. A afterwards borrowed a further sum from B, for which C became his surety. A became bankrupt, and B called upon C to pay the second debt. It was held that, the securities in the hands of B being more than sufficient to pay the first debt, C ought to have the benefit of the surplus in reduction of the second debt (*l*).

The acceptor of a bill of exchange knows that by his acceptance he does an act which will make him liable to indemnify any indorser who afterwards pays it. The indorser is a surety for the payment to the holder and on payment is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor whether he knew at the time of indorsing of such deposit or not. Thus, where the facts were as follows : in December, 1874, a partner of S. R. & Co. deposited title deeds of his own with the defendant bank, as security for an advance to the firm. In November, 1875, the plaintiffs sold to S. R. & Co. a cargo to be paid for in cash. Cash was paid only for part, and a bill of exchange for the rest was offered but declined. The plaintiffs were customers of the defendant bank to whom S. R. & Co. referred plaintiffs, and, on the manager saying that he believed the plaintiffs would not incur more than a nominal liability by putting their name on the bill, the plaintiffs consented to take the bill and it was indorsed by them and discounted for their account by the defendant bank. In January, 1876, S. R. & Co. stopped payment, and in February the bill was dishonoured. The plaintiffs claiming to be sureties to the defendant bank for the amount due on the bill, brought an action to have the benefit of the securities deposited in December, 1874, and were held to be so entitled (*m*).

The surety's right against the principal debtor being to indemnity merely, it follows that a surety who discharges an obligation at a less sum than its full amount, cannot claim from his principal the whole amount, but only what he has actually paid in discharge of the common obligation (*n*).

At one time the Court would compel a creditor to assign his

(*k*) 2 Cox, 86.

(*l*) See also *Copis* v. *Middleton*, T. & R., p. 231; *Hodgson* v. *Shaw*, 3 My. & K. 183, 195; *Dixon* v. *Steel*, [1901] 2 Ch. 602; cf. *Sawyer* v. *Goodwin*, 1 Ch. D. 351; Rowlatt, p. 210.

(*m*) *Duncan Fox & Co.* v. *N. & S. Wales Bank*, 6 A. C. 1.

(*n*) *Reed* v. *Norris*, 2 My. & C. 361, 375.

judgment to a surety who had been compelled to satisfy the debt (*o*), but later refused to do so on the ground that the judgment not being available at law for the creditor, could not be available in equity for the debtor (*p*).

And although it was at one time thought that a surety paying off the debt of the principal, secured by bond, was entitled to have from the creditor an assignment of the debt and of the bond by which it was evidenced or secured, the contrary was established in two cases decided by Eldon, C., and Brougham, C., where the whole subject was examined (*q*).

Now, however (*r*), "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, and no co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

The surety is therefore now entitled to securities which have been satisfied by his payment. The section applies to a co-debtor as well as to a surety. Thus a debtor who has paid the whole debt, recovered under a judgment against himself and his co-debtors,

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(*o*) *Parsons* v. *Briddock*, 2 Vern. 608.
(*p*) *Dowbiggin* v. *Bourne*, 2 Y. & C. Ex. 462; *Armitage* v. *Baldwin*, 5 B. 278.
(*q*) See *Copis* v. *Middleton*, T. & R. 229; *Hodgson* v. *Shaw*, 3 My. & K. 190.
(*r*) 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act), 1856, s. 5.

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has a right to an assignment of such judgment (*s*). If the judgment creditor refuses to assign, the surety may bring an action against him, and is, *prima facie*, entitled to recover as damages the value of specific assets which would have been available for execution under the judgment (*t*). The word "recover" in this section means, "bring into his own pocket" (*u*). And a trustee suing his co-trustee for an indemnity against a breach of trust is within the Act (*x*). This section "was never intended to apply to cases where there was no liability to contribute as between the persons jointly liable. It was intended to apply only in cases where the joint liability arose out of, or sprang from contract" (*y*).

The Act is applicable to a contract made before its passing, where a breach has taken place and a payment made by a surety or co-debtor under such contract after the passing of the Act (*z*).

A surety, who is executor of the principal debtor, and who, whether before or after his testator's death, has made a payment in respect of the debt, is entitled to exercise the right of retainer out of the testator's assets (*a*); and this right may be exercised even where payment has not been made, provided that the money is due (*b*).

Although under this section a surety who discharges a specialty debt becomes a specialty creditor of the principal debtor, he does not become such merely by reason of his enforcing his right to indemnity where the debt for which he is liable but which he has not discharged is a specialty debt. Thus, in *Ferguson* v. *Gibson* (*bb*), A, wife of the testator, under a power mortgaged her estate as a collateral security for the mortgage debt of her husband. He died leaving a deficient estate, his wife and daughter being executrices. The mortgage debt *not having been paid* at the date of a decree for administration, it was held that the widow executrix was entitled to retain as against the simple contract creditors only,

(*s*) *Batchellor* v. *Lawrence*, 9 C. B. (N.S.) 543; *Silk* v. *Eyre*, 9 Ir. R. Eq. 393; *Re Swan*, 4 Ir. R. Eq. 209.

(*t*) *Oddy* v. *Hallett*, 1 C. & E. 532; Rowlatt (2nd ed.), p. 204.

(*u*) See *Re Parker*, [1894] 3 Ch. 400.

(*x*) *Lockhart* v. *Reilly*, 1 De G. & J. 464; and see *Robinson* v. *Harkin*, [1896] 2 Ch. 415, 426.

(*y*) *Per* Bruce, J., in *The Englishman*, [1895] P. 212, 215. See the judgment in *Gardner* v. *Brooke*, [1897] 2 Ir. R. 6.

(*z*) *Lockhart* v. *Reilly*, 1 De G. & J. 464; *Re Cochran's Estate*, 5 Eq. 209.

(*a*) *Ex p. Boyd*, 13 W. R. 419; Rowlatt, p. 195.

(*b*) *Re Allen*, [1896] 2 Ch. 345; and see *Ferguson* v. *Gibson*, 14 Eq. 379; *Re Illidge*, 27 Ch. D. 482.

(*bb*) 14 Eq. 379, 386.

inasmuch as her right to indemnity did not amount to a specialty debt.

A co-surety who has satisfied a judgment against the debtor and his sureties has a right under the statute to stand in the place of the judgment creditor, although he has not obtained an assignment of the judgment (*c*); but execution cannot be issued without the leave of the Court (*d*). A surety to the Crown who has paid the debt of his deceased principal is entitled to the Crown's priority in the administration of his principal's estate (*e*).

6. Right of Surety paying Debt to stand in the place of the Creditor in Bankruptcy.

A surety who has paid the debt has, generally speaking, the right to stand in the place of the creditor and to prove for the whole amount (*f*), and under the Bankruptcy Act, 1914, s. 30, the liability of a bankrupt co-surety to contribution, though unascertained at the time of the bankruptcy proceedings, is a debt provable in the bankruptcy (*g*). It seems that the surety for a bankrupt principal may prove against the estate before he has paid the debt for which he is liable (*h*).

Where after proof of a debt by a creditor a surety for the whole pays *part* only to the creditor, not in discharge of the whole, the creditor may receive dividends on the full amount of his proof, provided he does not receive in the whole more than 20s. in the pound (*i*). If, however, the surety afterwards pays the creditor the whole of the debt remaining due, he will be entitled to stand in the place of the creditor as to the future dividends until, by means of those dividends, he has been fully satisfied (*k*).

If a surety, *before* the bankruptcy of the principal debtor, pays *part* of the debt, he will be entitled to prove for so much as he

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(*c*) *Re M'Myn*, 33 Ch. D. 575.

(*d*) *Kayley* v. *Hothersall*, [1925] 1 K. B. 607; and see *Dale* v. *Powell*, 105 L. T. 291—2.

(*e*) *Re Churchill*, 39 Ch. D. 175. And see *R.* v. *Robinson and Salter*, 1 H. & N. 274; *Re Bentinck*, [1897] 1 Ch. 673; Rowlatt (2nd ed.), p. 205.

(*f*) See Bankruptcy Act, 1914, s. 30; Williams, Bankruptcy (13th ed.), pp. 159—160; *Re Parker*, [1894] 3 Ch. 400; cf. *Re Moss*, [1905] 2 K. B. 307.

(*g*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; *Re Blackpool, etc., Co.*, [1901] 1 Ch. 77. A payment to a surety who has not been called upon to pay may be a fraudulent preference under the Bankruptcy Act: *Re Paine*, [1897] 1 Q. B. 122; but see *Re Warren*, [1900] 2 Q. B. 138.

(*h*) *Re Delmar*, 38 W. R. 752. See *Re Whittaker*, 39 W. R. 400.

(*i*) *Re Snell*, 4 Deac. 54; see also *Re Fothergill*, 3 Ch. D. 445.

(*k*) *Re Bulmer*, 3 De G. M. & G. 218, 238.

paid (*l*). But the right of the surety in such cases to stand in the place of the creditor as to the dividend upon the amount paid by him, may by contract be waived in favour of the creditor until he has received the full amount of his debt (*m*).

Where under the old law a surety paid the debt with interest subsequent to the bankruptcy of the debtor, he could not prove for such subsequent interest (*n*). Interest can now be proved for under the Bankruptcy Act, 1914, Sched. II., rr. 20, 21 (*o*).

Where creditors agree to accept a composition payable in instalments, some of which are guaranteed by a surety, and default is made in the payment of any one instalment, the creditors have a right to sue the debtor, or to prove in his bankruptcy, for the balance of their original debts, after deducting what they have received, either from the debtor or the surety, in respect of the composition and not merely for the amount of the unpaid instalments of the composition (*p*). But the surety, though he is entitled to prove in the debtor's bankruptcy for what he has paid in respect of the composition, has no right to put the creditors to an election whether they will carry out the arrangement *in toto* or reject it *in toto* (*q*).

Where a person is surety for a limited part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum, and the Court will order the payment to the surety of the future dividends on such sum, and will order the creditor to pay to the surety the proportion of any dividend he may have already received (*r*); and in this respect there is no difference between a bankruptcy and winding up (*s*).

The rule, however, established in *Ex p. Turner* (*t*), *viz.*, that in

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(*l*) *Ex p. Rushforth*, 10 V. 409; *Paley* v. *Field*, 12 V. 435; *Ellis* v. *Emmanuel*, 1 Ex. D. 157.

(*m*) *Midland Banking Co.* v. *Chambers*, L. R. 4 Ch. 398; *Ex p. Miles*, De G. 623; *Ex p. National Provincial Bank*, 17 Ch. D. 98; *Gee* v. *Pack*, 33 L. J. Q. B. 49; *Re Sass, Ex p. National Provincial Bank*, [1896] 2 Q. B. 12; Rowlatt, p. 303.

(*n*) *Ex p. Wilson*, 1 Rose, 137; *Ex p. Houston*, 2 G. & J. 36.

(*o*) *Re Evans*, 32 L. J. N. of C. 281. Compare *Ex p. Sanderson*, 8 De G. M. & G. 849; *Re Evans*, 66 L. J. Q. B. 499.

(*p*) *Ex p. Gilbey*, 8 Ch. D. 248; Rowlatt, p. 305.

(*q*) *Ibid.*

(*r*) *Ex p. Rushforth*, 10 V. 409; *Paley* v. *Field*, 12 V. 435; *Ex p. Brook*, 2 Rose, 334; *Bardwell* v. *Lydall*, 7 Bing. 489; *Hobson* v. *Bass*, L. R. 6 Ch. 792; *Goodwin* v. *Gray*, 22 W. R. 312; *Thornton* v. *M'Kewan*, 1 Hem. & M. 525; *Ellis* v. *Emmanuel*, 1 Ex. D. 157.

(*s*) *Gray* v. *Seckham*, L. R. 7 Ch. 680, 684.

(*t*) 3 V. 243.

similar cases in bankruptcy the sum paid by the surety is, in calculating the proportion of dividend, to be considered as expunged, does not apply to cases in winding up : there the order is made directing the surety to receive the portion of dividend due on the sum paid by him without considering the sum paid by him as having been expunged (*u*).

A surety for a limited amount of the debt may, however, agree to waive his right to prove on its payment for the benefit of the creditor, and it is now not unusual for contracts of guarantee to be expressly worded so as to do so. But although the creditor can prove and receive dividends for the whole debt, he will not be entitled to receive more than 20s. in the pound, including the sum paid by the surety (*x*).

Where, however, a person is with others a surety for the whole of a debt, with a limit on the amount of his liability, on the bankruptcy of the debtor the surety will not be entitled to the benefit of a rateable proportion of the dividends paid on the whole debt, but is bound to pay the creditor the sum due within the limit of his liability (*y*).

Proof by Surety against Co-surety.—Where the creditor, by enforcing his claims against the estate of one co-surety, has received from his estate more than the proportion due from it, that estate is entitled to the benefit of a proof by the creditor against the estate of another co-surety, and can take a dividend thereunder up to the amount of contribution due (*z*). Similarly, if one co-surety pays off the creditor and takes an assignment of the securities, he can have the benefit of the creditor's proof for the whole amount of the debt against the co-surety's estate, but can only receive a dividend up to the proportionate amount due from the bankrupt co-surety (*a*).

In *Ex p. Snowdon* (*b*), it was held a surety could not prove against his co-surety for contribution until he had paid more than his proportion of the debt. It is not sufficient that the plaintiff has paid more than his share of that portion of the debt which has become due (*c*).

(*u*) *Gray* v. *Seckham*, L. R. 7 Ch. 680, 685; Rowlatt (2nd ed.), p. 133.
(*x*) See *cases*, note (*m*), p. 517, *ante*.
(*y*) *Ellis* v. *Emmanuel*, 1 Ex. D. 157; Rowlatt, pp. 128—9.
(*z*) *Ex p. Stokes*, De G. 618; Rowlatt, p. 322.
(*a*) *Re Parker*, [1894] 3 Ch. 400.
(*b*) 17 Ch. D. 44; *Ex p. Gifford*, 6 V. 805; *per* Wright, J., in *Wolmershausen* v. *Gullick*, [1893] 2 Ch. at p. 526; *Stirling* v. *Burdett*, [1911] 2 Ch. 418; Rowlatt, pp. 237—8.
(*c*) *Stirling* v. *Burdett*, *supra*.

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The Rule in Ex p. Waring.—If a debtor deposits securities with his surety to indemnify him against liability under the suretyship, the surety does not become a trustee for the creditor, and the creditor has no right that the securities shall be applied in payment of the debt (*d*). This principle is, however, qualified by the rule in *Ex p. Waring* (*e*). The circumstances under which this rule operates may be stated as follows (*f*) : A and B are separate parties to a bill of exchange (*g*), and each is liable thereon to C, the holder of the bill. As between A and B, A is ultimately liable, and B is liable as a quasi surety for A. B holds goods or securities belonging to A (*h*) by way of indemnity against liability on the bill (*i*). A and B both become insolvent (*k*); each of their estates is being administered under the control of a court of justice (*l*), and the securities are unrealised when B's insolvency commences (*m*).

Before his insolvency A would have been entitled to a re-transfer of the securities if he had paid C in full; or if B had been compelled to pay C, then A would have become entitled to the surplus (if any) of the securities remaining after B had indemnified himself. These rights remain after A's insolvency, and exist for the benefit of A's general creditors (*n*). On the other hand B's general creditors succeed to his rights, and therefore on B's estate paying C in full, they would have been entitled to be recouped out of the proceeds of the securities, the balance (if any) going into A's estate for the benefit of his general creditors. C is merely a general creditor entitled to prove in each insolvent estate, but with no claim apart from necessities of administration to be satisfied out of the securities. If full effect had been given to the equities between the estates of A and B, B's estate would, *in so far* as C received dividends out of it, have been entitled to be recouped out of the securities, and the balance (if any) would have availed for the

(*d*) *Re Walker*, [1892] 1 Ch. 621.

(*e*) 19 V. 345; 2 Rose, 182; 2 G. & J. 404.

(*f*) See the statement of the rule in Eddis : "The rule in *Ex p. Waring*," (1876) adopted by Brett, M.R., in *Ex p. Dever, Re Suse* (No. 2), 14 Q. B. D. 611, at p. 620; Williams' Bankruptcy (13th ed.), pp. 227—9.

(*g*) *Vaughan* v. *Halliday*, L. R. 9 Ch. 561.

(*h*) *Ex p. Lambton*, L. R. 10 Ch. 405; *Ex p. Banner*, 2 Ch. D. 278; *Banner* v. *Johnston*, L. R. 5 H. L., at p. 174.

(*i*) *Levi & Co.'s Case*, 7 Eq. 449.

(*k*) *Hickie & Co.'s Case*, 4 Eq. 226; *Poyles* v. *Hargreaves*, 3 De G. M. & G. 430.

(*l*) *Powles* v. *Hargreaves*, *supra*, at p. 451.

(*m*) *Ex p. Dever, Re Suse* (No. 2), *supra*.

(*n*) *Ex p. Waring*, 19 V. p. 350.

general creditors including C in the A estate. Under the circumstances, however, neither A's estate nor B's estate could pay C in full, and so neither could at the time insist on their respective equities; further, until B's estate had been finally administered the amount ultimately paid to C in dividends, and therefore chargeable against the securities, could not be ascertained. In this deadlock in the administration, Lord Eldon, in *Ex p. Waring*, held that the securities should be applied, so far as they would go, first in discharge of C's claim—that any surplus remaining should go into A's general estate, but that if the securities were insufficient C should be at liberty to prove for the unsatisfied balance against each estate. Where, as in *Ex p. Waring*, the securities are sufficient to satisfy the bill, this rule cannot prejudice B's general creditors. Where the securities are insufficient B's general creditors invariably suffer, for C proves with them and B's estate has been deprived of all indemnity out of the securities. The rule, though open to serious criticism on principle (*o*), and probably only justifiable on the ground of convenience, is of unquestionable authority (*p*).

(*o*) See *Royal Bank of Scotland* v. *Commercial Bank*, 7 A. C. pp. 383—4 (Lord Selborne), 392 (Lord Blackburn).

(*p*) See the rule explained by Cranworth, C., and Turner, L.J., in *Powles* v. *Hargreaves*, 3 De G. M. & G., at pp. 447, 457; by Hatherley, C., in *City Bank* v. *Luckie*, L. R. 5 Ch., at p. 776; by Lord Cairns, in *Banner* v. *Johnston*, L. R. 5 H. L., at p. 174; by James, L.J., in *Vaughan* v. *Halliday*, L. R. 5 Ch., p. 567; by Cotton, L.J., in *Ex p. Dever*, 14 Q. B. D., at p. 623; by Lord Blackburn in *Royal Bank of Scotland* v. *Commercial Bank*, 7 A. C. pp. 391—2.

REES *v.* BERRINGTON.

1795. 2 V. 540. 3 R. R. 3.

Release of Surety by the Creditor giving Time to Debtor.

Obligee in a bond with a surety, without communication with the surety, takes notes from the principal, and gives farther time: the surety is discharged.

THOMAS, Daniel, and Richard Blachford carried on business as lacemen, in partnership, till the death of Thomas.

On taking the accounts a balance of £2,972 3s. 5d. appeared to be due from the partnership to Robert Pope Blachford, as administrator of Thomas; to secure which sum, and £466 13s. 4d. (agreed to be secured to Robert Pope Blachford, as Thomas's share of the debts due to the partnership) a joint and several bond, dated September 30, 1787, was executed by the surviving partners, and by James Rees as surety, with condition to be void on payment of the said sums with interest, by instalments, upon December 31, 1789, and December 31, 1790.

In the beginning of September, 1790, Robert Pope Blachford died.

Upon September 27, 1790, the whole of the money and interest secured by the bond remaining unpaid, James M'Kenzie, under the authority and on behalf of the executors of Robert Pope Blachford, came to an arrangement with Daniel and Richard Blachford concerning the money due on the bond and the interest, and, for the first instalment due on the bond, took their promissory notes, payable on April 21, July 21, and October 21, 1791, and January 21 and April 21, 1792; and, for the second instalment to become due upon the bond, took three other promissory notes, payable July 21 and October 21, 1792, and January 21, 1793.

Daniel and Richard Blachford, at different times on and before October 18, 1792, paid to the executors of Robert Pope

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Blachford, or to M'Kenzie on their behalf, the first three of the first set of notes, and the interest due upon them; and about October 20, 1792, by a new arrangement all the remaining notes were exchanged for four other notes, dated October 22, 1792, and payable on May 25, June 25, September 25, and December 25, 1793.

About December 7, 1792, a commission of bankruptcy issued against Daniel and Richard Blachford; and the executors of Robert Pope Blachford proved, under that commission, a debt of £2,327 14s. 11d., by virtue of the bond and the four notes dated October 22, 1792.

Rees was captain of an East India ship, and left England in April, 1788; returned in August, 1789; sailed again in April, 1791, and returned in July, 1792. In August, 1792, he had in his hands the sum of £3,000 received by him in India for Daniel and Richard Blachford; and no communication having taken place between him and the executors of Robert Pope Blachford, respecting their transactions with Daniel and Richard, he, in November, 1792, paid over that sum to the Blachfords.

After the bankruptcy the executors brought an action against Rees for £2,400 as remaining due on the bond; upon which he filed a bill for an injunction.

Solicitor-General and Mr. Hollist, for the plaintiff.—*Skip* v. *Huey* (*a*), *Nisbet* v. *Smith* (*b*), and many early cases, support this bill. This plaintiff could have indemnified himself by the money he had in his hands in 1792. A surety is bound as such for the debt and risk described in the instrument, in case the principal does not pay. The creditor has no right to increase the risk without consent of the surety, and therefore cannot vary the original contract, for that varies the risk. If the holder of a bill of exchange gives time to the acceptor, the indorser is discharged, because he is simply a surety. The principle is the same upon policies of insurance, in cases of deviation, however slight.

(*a*) 3 Atk. 91.
(*b*) 2 Bro. Ch. 579.

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Lord Chancellor Loughborough (*c*).—It is perfectly settled: and even where it is demonstrable that the alteration was perfectly immaterial, as in the case of an African ship that was to sail from Lancaster with so many men; in fact she took part of her men at Beaumaris.

Mr. Graham, for the defendants.—It is not received as a general principle that the obligee in a bond is bound to call for the money on the very day; it seldom happens that the obligor thinks of paying at the day, or that the obligee puts the bond directly in suit. The rule, as to the indorser of a bill of exchange, arises from the course of trade, which requires it. A surety has a right, if the bond is not put in suit, to call upon the holder of it to enforce payment. The circumstance of his remedy in this Court marks the difference between the cases. Still more different is the case of insurance from the general course of trade, that, undertaking to indemnify against any loss in one particular voyage, must be strictly adhered to. Here is nothing like a fraudulent intention to throw the burthen on the plaintiff. It is too much to say he is to be discharged, because they did suspend the action for a short time; and it is not too much to assume, either that the indulgence was with his concurrence, or that he was guilty of negligence, as he was in England a considerable part of the time, and might have called on them to put the bond in suit; and then he would have discovered that they had bound themselves not to do so. In *Nisbet* v. *Smith* (*d*) no ulterior time was given against the express directions of the surety; upon which Lord Thurlow relied. *Heath* v. *Percival* (*e*) is a stronger case. There Percival might be considered only as surety in a bond, and the time of payment was varied.

Lord Chancellor Loughborough.—Percival never could be a surety, whether that case is right or wrong. He should have taken up his bond if he went out of the trade.

(*c*) Afterwards Earl of Rosslyn.
(*d*) 2 Bro. Ch. 579.
(*e*) 1 P. W. 682.

The form of the security forces these cases into equity; but, take it out of that form and suppose, in this instance, that the plaintiff was a surety by a proper bond at law as surety, what is the consequence? Where a man is surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the security. When they are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety; but if he could establish that at law, the principle at law is, that he has an interest in the condition; and if the period is extended, that totally defeats the condition, and the consequence is, the surety is released from his engagement. Suppose a bond payable in six months, with a surety, he does not become bound to answer the payment at twelve months, where it was to be at six. The principle is a legal principle. In this Court they all appear principals, but establish the fact that he is surety; he is surety to a definite, not an indefinite engagement.

Here, upon the second instalment, the defendants have extended the time before that instalment became due; if the time is extended after it becomes due, that makes a difference at law, for then the bond has been once forfeited.

It is perfectly plain, from the nature of the engagement, that the plaintiff became security that the debt should be paid at two periods; one has elapsed. The obligee thinks fit totally to change the nature of the security and the credit; he takes notes, gives a farther time for payment, and repeats the same thing at the second instalment, which was not then due; and, doing this, he does this material injury to the surety; he has a right the day after the bond is due to come here and insist upon its being put in suit; the obligee has suspended that till the time contained in the notes runs out; therefore, he has disabled himself to do that equity to the surety which he has a right to demand. If the application was proved, it is a duty to comply with it. The defendants have put it out of their power to perform that which the nature of the relation between the surety and the person with whom he is bound requires. It is a breach of the obligation in conscience and honesty; and, it is not too much to say, of that obligation in point of law.

I cannot try the cause by inquiring what mischief it might have done; for that would go into a vast variety of speculation, upon which no sound principle could be built; but it is plain here, if the plaintiff had been informed of these transactions and the situation of the debtors, their difficulties and delay in performing the prior engagement, he never would have been so foolish as to have parted with the money in November, 1792; and the money in his hands was a full security. I do not ground much upon it, for the case would be the same if those circumstances had not come out clearly in evidence.

This produces no inconvenience to any one; for it only amounts to this, that there shall be no transaction with the principal debtor, without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. *It is the clearest and most evident equity, not to carry on any transaction without the privity of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him (f). You must let him judge whether he will give that indulgence contrary to the nature of his engagement.*

The authorities fully warrant me in this, though I should have granted the injunction, even without that strong authority before Lord Thurlow (*g*), which is rather less favourable for the surety. There, the creditor being called upon, did put the bond in suit. If he had proceeded, the consequence would have been only that he would have had the person in custody; it would have been no payment, thinking that, by leaving the debtor at large and taking a judgment against him which affected all his property, he pursued a better mode; using his discretion, and acting upon his own account, he thought it better to give stay of execution than to have confounded the affairs of the man by destroying his credit and holding him in prison; but he did it

(*f*) Cited with approval by Cotton, L.J., in *Holme* v. *Brunskill*, 3 Q. B. D. at p. 505. See also *Bolton* v. *Salmon*, [1891] 2 Ch. at p. 64; *Norwich Union F. I. Socy., Ltd.* v. *Colonial Mutual F. I. Co., Ltd.*, [1922] 2 K. B. 461; *Darwen* v. *Pearce*, [1927] 1 Ch. 176.

(*g*) *Nisbet* v. *Smith*, 2 Bro. Ch. 579.

without consulting the surety, and, therefore, Lord Thurlow held, and very rightly, that the surety was discharged.

The transaction in this case was much more mischievous; after circumstances of communication that showed great embarrassment, great difficulty, and great distress, indulgence was from time to time given, under circumstances apparently very hazardous, without any communication with this man, who had so great an interest, and who, in the interval, had given up the fund, which, probably, was the inducement to him to be the security.

NOTES.

1. Discharge of surety by fraud, concealment, etc.
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1. Discharge of Surety by Fraud, Concealment, etc.

A contract of suretyship is not one requiring *uberrima fides* on the part of the creditor in the sense in which that expression is used in contracts of marine and fire insurance (*h*). The creditor is not, as the assured is, bound to communicate every material fact which would in the ordinary course of life affect the mind of the other party in entering into the contract (*i*). At the same time, if any material fact is either misrepresented to, or its existence fraudulently concealed from, the surety, the contract is invalidated (*k*). That which is stated to the surety must fully represent the real trans-

(*h*) *North British Insurance Co.* v. *Lloyd*, 10 Exch. 523; see *per* Romer, L.J., in *Seaton* v. *Heath*, [1899] 1 Q. B. 782, 792; Rowlatt (2nd ed.), pp. 158—9.

(*i*) *Hamilton* v. *Watson*, 12 Cl. & F., p. 118; *Pledge* v. *Buss*, John. 663; *Wythes* v. *Labouchere*, 3 De G. & J. 593; *National Provincial Bank* v. *Glanusk*, [1913] 3 K. B. 335.

(*k*) *Smith* v. *Bank of Scotland*, 1 Dow. 272, 292; *Pidcock* v. *Bishop*, 3 B. & C. 605; *Railton* v. *Mathews*, 10 Cl. & F. 934; *North British Insurance Co.* v. *Lloyd*, 10 Exch. 533; *Lee* v. *Jones*, 17 C. B. (N.S.) 482; *Davies* v. *London and Prov., etc., Co.*, 8 Ch. D. 469; Rowlatt, p. 159.

action, and "whether a fact not disclosed is such that it is impliedly represented not to exist depends in every case on the nature of the transaction (*l*). In *Phillips* v. *Foxall* (*m*), a case of a continuing guarantee for the honesty of a servant, the Court held that "a representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination." Accordingly, since concealment of dishonest acts committed by the servant before the guarantee for his conduct was given would have invalidated the contract (*n*), the Court held that concealment of dishonest acts done after the guarantee discharged the surety from liability. The decision, however, was intended "to apply only to cases . . . where the master, having *the power of at once discharging the servant* for dishonesty, deliberately continues him in his service, after he becomes aware of the dishonesty and without the assent or knowledge of the surety" (*o*).

There is a material distinction between a guarantee given for the fidelity of a servant, and a guarantee given in respect of a banking account. In the former case, non-disclosure to the surety of the fact (known to the employer, but not known to the surety) that the servant had previously been guilty of dishonesty in the employment, will render the guarantee unenforceable (*p*). But a bank, taking a guarantee in respect of a customer's account, is not bound to communicate information concerning earlier dealings with the customer (*q*); the surety must be aware that the probable reason for requiring a guarantee is dissatisfaction with the customer's credit (*r*).

In *Pidcock* v. *Bishop* (*s*), it was agreed between the vendors and vendee of goods that the latter should pay, in addition to the price, 10s. per ton, to be applied in liquidation of an old debt due to one of the vendors. The payment was guaranteed by a third person,

(*l*) See *per* Blackburn, J., in *Lee* v. *Jones*, *supra*, at p. 506; see *Squire* v. *Whitton*, 1 H. L. C. 333. (*m*) L. R. 7 Q. B. 666.

(*n*) L. R. 7 Q. B., p. 674; and see *Sanderson* v. *Aston*, L. R. 8 Ex. 73; *Burgess* v. *Eve*, 13 Eq. 450; *L. G. O. Co.* v. *Holloway*, [1912] 2 K. B. 72.

(*o*) *Ibid.*, at p. 675; and see *Caxton* v. *Dew*, 68 L. J. Q. B. 381; *Lawder* v. *L.*, Ir. R. 7 C. L. 57; *Byrne* v. *Murio*, 8 L. R. Ir. 396; *Mayor etc. of Durham* v. *Fowler*, 22 Q. B. D. 394, at p. 423; and cf. *Mayor etc. of Kingston-upon-Hull* v *Harding*, [1892] 2 Q. B. 494.

(*p*) *L. G. O. Co.* v. *Holloway*, [1912] 2 K. B. 72.

(*q*) *National Provincial Bank* v. *Glanusk*, [1913] 3 K. B. 335; and see *L. G. O. Co.* v. *Holloway*, [1912] 2 K. B. 72, 82, 87.

(*r*) Rowlatt (2nd ed.), p. 159.

(*s*) 3 B. & C. 605. Cf. *Willis* v. *W.*, 17 Si. 218.

but the bargain between the parties was not communicated to him. It was held that the transaction was a fraud on the surety, and that the guarantee was consequently void. So in *Lee* v. *Jones* (*t*) a concealment by the creditor that at the time of the contract of guarantee the principal debtor was already indebted to the creditor in a considerable amount of which the surety was ignorant, was held to be evidence to go to the jury of such fraud on the surety as would discharge him from liability.

"A surety cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he has contracted, where that conduct has been caused by a fraudulent act or omission against which the surety by the contract of suretyship has guaranteed the employer" (*u*).

The mere *passive inactivity* of the person to whom the guarantee is given does not discharge the surety; there must be some positive act done to the prejudice of the surety, or such a degree of negligence as to imply connivance and amount to fraud (*x*). If the person guaranteed has a power given to him, the non-exercise of which would amount to a dereliction of his duty to the surety, then the surety might be released (*y*).

Where, however, a creditor during the negotiation for a suretyship has made a statement relating to a material fact, which he believes to be true, but which before the completion of the negotiation he discovers to be false, the sureties acting upon the faith thereof will be discharged if he do not correct that statement (*z*). It is clear, morover, especially in cases where there is no consideration moving to the surety, that "a very little said which ought not to have been said, and a very little not said which ought to have been said, would be sufficient to prevent the contract being valid" (*a*).

Everything, moreover, like pressure used by the intending creditor, will have a serious effect on the validity of the contract;

(*t*) 17 C. B. (N.S.) 482; *Blest* v. *Brown*, 3 Giff. 450. See also *Peel* v. *Tatlock*, 1 Bos. & P. 419; *Jackson* v. *Duchaire*, 3 T. R. 551; *Fishmongers' Co.* v. *Maltby*, 1 Dow. 294; *Espey* v. *Lake*, 10 Ha. 260; Rowlatt (2nd ed.), p. 160.

(*u*) *Mayor etc. of Kingston-upon-Hull* v. *Harding*, [1892] 2 Q. B. 504, *per* Bowen, L.J.

(*x*) *Black* v. *Ottoman Bank*, 6 L. T. 763; *Mayor of Durham* v. *Fowler*, 22 Q. B. D. 394.

(*y*) See *Mayor etc. of Kingston-upon-Hull* v. *Harding*, [1892] 2 Q. B. 494, 502; and see Rowlatt (2nd ed.), pp. 146, 272—3.

(*z*) *Davies* v. *London, etc., Insurance Co.*, 8 Ch. D. 469; Rowlatt, p. 157.

(*a*) *Per* Fry, J., in *Davies* v. *London, etc. Insurance Co.*, 8 Ch. D., p. 475; and see *Turner* v. *Harvey*, Jac. 169, 178; *Williams* v. *Bayley*, L. R. 1 H. L. 200, 219.

the more so where it results in maintaining a false conclusion in the mind of the person pressed (*b*).

A surety will be discharged where the consideration for the guarantee has failed (*c*).

It must be borne in mind that, though a creditor may not in every case be bound to inquire into the circumstances under which a third party becomes surety to him, he is so bound when the facts known to him are such as to lead to a suspicion of fraud (*d*). "In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge" (*e*).

2. Revocation and Determination of Suretyship by Death, etc.

The bankruptcy of the principal debtor and his discharge in the bankruptcy will not have the effect of releasing the surety (*f*).

A continuing guarantee for future indebtedness—*e.g.*, a guarantee for future advances which the person guaranteed is not bound to make—where "the consideration is fragmentary, supplied from time to time and therefore divisible" (*g*), may be determined even though under seal, at any time, by notice, as regards indebtedness which may be incurred subsequently to the notice (*h*); and it is determined, it seems (as to future advances) by the guarantor's death (*i*).

In *Coulthart* v. *Clementson* (*k*), one of two guarantors of advances by a bank died. The bank guaranteed knew of his death, and that the deceased had left a will, but had no written notice of his death. It was held that the bank had notice of the death and of a will, and that as the will gave the executor no power to continue the guarantee, the bank had constructive notice that the guarantee was withdrawn (*l*).

(*b*) *Davies* v. *London, etc., Insurance Co.*, 8 Ch. D., pp 475—6.

(*c*) *Cooper* v. *Joel*, 1 De G. F. & J. 240; *Latter* v. *White*, L. R. 6 Q. B. 474; L. R. 5 H. L. 578, 588—9.

(*d*) *Owen* v. *Homan*, 4 H. L. Ca. 997; *Hamilton* v. *Watson*, 12 Cl. & Fin. 109; *Pledge* v. *Buss*, John. 663. But see *National Prov. Bank* v. *Glanusk*, [1913] 3 K. B. 335.

(*e*) 4 H. L. Ca., p. 1035; Rowlatt (2nd ed.), pp. 158—9.

(*f*) *Ex p. Jacobs*, L. R. 10 Ch. 211.

(*g*) *Per* Lush, L.J., in *Lloyd's* v. *Harper*, 16 Ch. D., p. 319.

(*h*) 16 Ch. D. 291, 319; *Re Grace*, [1902] 1 Ch., p. 738.

(*i*) *Coulthart* v. *Clementson*, 5 Q. B. D. 42; *Ascherson* v. *Tredegar Dry Dock Co.*, [1909] 2 Ch., p. 406.

(*k*) 5 Q. B. D. 42.

(*l*) But see as to this constructive notice of the contents of the will, *per* Romer, J., in *Re Silvester*, [1895] 1 Ch. 573, 577; *per* Joyce, J., in *Re Crace*, [1902] 1 Ch. 733, 739.

Rees v. Berrington.

A provision in the guarantee that, on the death of the guarantor a special notice of it shall be necessary to determine the guarantee, will, however, bind the guarantor's estate (*m*).

Thus, in *Re Silvester* (*n*), by a guarantee bond S and five others bound themselves jointly severally and respectively, their heirs, executors, and administrators, to pay a railway company £1,000. The bond provided that they or any one of them, or their respective "representatives," might determine the liability by a month's notice in writing. S died, and his executor gave notice to the company of his death, but no notice to determine the liability. It was held that S's estate was bound for indebtedness incurred after his death. In this case, it will be observed, the terms of the guarantee made it plain that it was not to be determined until after a month's notice in writing given.

If, under the guarantor's will, the executor have the option of continuing the guarantee, then from the absence of any notice of withdrawal, the bank may, perhaps, in spite of notice of the death, properly assume that the guarantee is not to be determined (*o*).

Where the consideration for a guarantee is not "fragmentary," but is indivisible, moving from the person to whom it is given once and for all—as where an office or employment is given to a person whose integrity is guaranteed—liability under the guarantee is not determined by death of the surety; nor can it be determined by notice forthwith (*p*). Some of the observations of Joyce, J., in *Re Crace* (*q*) suggest that such a guarantee cannot be determined by notice however long, but must continue indefinitely, unless the instrument of guarantee expressly stipulates that the guarantee is to determine on death or after notice. On principle, however, it would seem that without any such stipulation a surety or his representative should be at liberty to put an end to the guarantee if sufficient notice be given to enable the person guaranteed to determine responsibilities undertaken on the faith of the guarantee (*r*).

It is clear, however, that a continuing guarantee may, under certain circumstances, be withdrawn on paying all then due under

(*m*) *Per* Bowen, J., 5 Q. B. D., p. 48.
(*n*) [1895] 1 Ch. 573.
(*o*) *Coulthart* v. *Clementson*, 5 Q. B. D. 42.
(*p*) *Calvert* v. *Gordon*, 3 Man. & Ry. 124; *Gordon* v. *Calvert*, 4 Russ. 581; *Hassell* v. *Long*, 2 M. & S. 363, 370; *Lloyd's* v. *Harper*, 16 Ch. D. 290; *Re Crace*, [1902] 1 Ch., pp. 738—9.
(*q*) [1902] 1 Ch., pp. 738—740.
(*r*) See Rowlatt (2nd ed.), pp. 82—3.

it; for instance, if a master discovers that a person whose honesty has been guaranteed has been dishonest, he must inform the surety, who has then a right to withdraw (*s*).

The death of *one* of several co-sureties under a joint and several liability does not determine the future liability of the survivors (*t*).

But if the liability is joint only, it does determine (*u*) unless the survivors agree, by their conduct or otherwise, that it shall continue (*x*).

Where a guarantee terminated on the death of a guarantor, the creditor, in the absence of express or implied contract, was held not to be obliged to appropriate to an old overdraft instead of a new account any payments made by the debtor after the determination of the guarantee (*y*). For the mere fact of suretyship does not take away from the principal debtor and the creditor their powers of appropriating payments which are not subject to any particular contract with the surety (*z*).

Statutes of Limitation.—In a contract of guarantee time begins to run in favour of the surety when the creditor's right of action arises, that is, in general, when the principal debtor makes default (*a*). But time will begin to run against the right of a surety to claim indemnity as soon as the surety is in a position to sue the principal debtor. As soon as any definite sum has become payable to the creditor, the surety is entitled in equity to obtain an order on the principal debtor to pay such sum to the creditor (*b*); and time will begin to run against the surety's right to indemnity accordingly (*c*). Time does not run against a surety's right to

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(*s*) *Burgess* v. *Eve*, 13 Eq. 450, 458—9; *Phillips* v. *Foxall*, L. R. 7 Q. B. 666; Rowlatt (2nd ed.), p. 82.

(*t*) *Beckett & Co.* v. *Addyman*, 9 Q. B. D. 783; *Ascherson* v. *Tredegar Dry Dock Co.*, [1909] 2 Ch. 401.

(*u*) *Ashby* v. *Day*, 54 L. T. 408, 410; *Offord* v. *Davies*, 12 C. B. (N.S.) 748; Rowlatt, p. 88.

(*x*) *Leaf* v. *Gibbs*, 4 C. & P. 466; *Browne* v. *Carr*, 7 Bing. 508, 51.

(*y*) *Re Sherry*, 25 Ch. D. 692; and see *Ascherson* v. *Tredegar Dry Dock Co.*, [1909] 2 Ch. 401, 406. As to the rule in *Clayton's Case*, see *Deeley* v. *Lloyds Estate*, [1093] 1 Ir. R. 245; Addison Contracts.

(*z*) *Clayton's Case*, 1 Mer. 585, 608; cf. *The Mecca*, [1897] A. C. 286; *Mutton* v. *Peat*, [1900] 2 Ch. 79; *Deeley* v. *Lloyds Bank*, [1910] 1 Ch. 648. And see *Bodenham* v. *Purchas*, 2 B. & Ald. 39; *Henniker* v. *Wigg*, 4 Q. B. 795; *Kirby* v. *Marlborough*, 2 M. & S. 18; *Williams* v. *Rawlinson*, 3 Bing. 71; *Re Browne's Estate*, [1903] 1 Ir. R. 245.

(*a*) See *Holl* v. *Hadley*, 2 Ad. & El. 758; *Parr's Banking Co., Ltd.* v. *Yates*, [1898] 2 Q. B. 460; Rowlatt (2nd ed.), p. 291.

(*b*) *Ranelaugh* v. *Hayes*, 1 Vern. 189; *Ascherson* v. *Tredegar Dry Dock Co.*, [1909] 2 Ch. 401; Rowlatt, p. 185. Cf. *Bradford* v. *Gammon*, [1925] Ch. 132.

(*c*) Hewitt on Limitations, p. 16.

claim contribution until he has paid more than his share of the entire debt; for until then he has no right of action (*d*). It is not sufficient to entitle the surety to sue for contribution that he should have paid more than his share of the portion of the debt then due (*d*).

3. Discharge of Surety by a Departure from the Terms of the Contract.

If a creditor does anything either inconsistent with the contract of suretyship, or prejudicial to the right of contribution between the co-sureties, the sureties will be released wholly or *pro tanto* (*e*).

Thus, if the contract between the principal debtor and the creditor departs from that which the surety stipulated for and contemplated when he entered into his obligation, the surety will be released. Thus, in *Bonser* v. *Cox* (*f*), John Cox agreed to become a surety for Richard Cox in a *joint and several bond* to Cox & Morrell, upon having a counter-bond from Cox and Davies to indemnify him. The bond to Cox & Morrell was executed by *John Cox only*, but Cox and Davies gave him the counter-bond. It was held that John Cox was released, in consequence of Richard Cox not having executed the bond. "It cannot, upon any principle on which this Court acts, be doubted that the surety has an interest, and a most material interest, in the rights and remedies which the creditor has against the principal debtor; he is not to be held bound where the situation of circumstances, in respect to the rights and the remedies which the creditor has against the principal debtor, are different from that which was contemplated by himself and all other parties. I do not think that it is material to inquire in what way the surety contemplated benefit or protection to himself, by stipulating that a particular remedy should be held by the creditor against the principal debtor. A man may reasonably say, 'I will be surety to you for payment of such a sum, provided you have it secured by the bond of the principal debtor, but I will not be your surety upon any other terms'" (*g*).

(*d*) *Davies* v. *Humphreys*, 6 M. & W. 153; *Stirling* v. *Burdett*, [1911] 2 Ch. 418; Rowlatt (2nd ed.), pp. 237—8.

(*e*) *Re Wolmershausen*, 62 L. T. 541; and see *Mayhew* v. *Crickett*, 2 Swans. 185.

(*f*) 4 B. 379; affirmed, see p. 385.

(*g*) *Per* Langdale, M.R., *Bonser* v. *Cox*, 4 B., p. 382. See also *Whitcher* v. *Hall*, 5 B. & C. 269; *Watts* v. *Shuttleworth*, 7 H. & N. 353; *Blest* v. *Brown*, 4

Rees v. Berrington.

So where a creditor prepared a deed, containing a joint and several covenant by two co-sureties, and sent it to be executed by one of such sureties, but did not procure the execution of it by the other surety and failed to inform the surety who had executed it of this fact, the executing surety was held discharged from all liability on the covenant (*h*).

So where a person gave a promissory note as a surety, upon an agreement that the amount should be advanced to the principal debtor by *draft at three months' date*, and the creditor, without the concurrence of the surety, *paid the amount at once*, instead of giving the draft, it was held the agreement had been varied, and the surety was discharged (*i*). "If there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and if there is any alteration which it not obviously either unsubstantial, or for *the benefit of the surety* (*k*), he is to be the sole judge whether he will remain liable" (*l*).

In *Eyre* v. *Bartrop* (*m*), the plaintiff joined with his brother in the grant of a redeemable annuity, *as a surety* for the payment of the same. The annuity was secured by the demise of real property of the plaintiff's brother, and by a bond and judgment of the plaintiff and his brother. The brother afterwards, by deeds to which the plaintiff was not a party, and *without his concurrence*, entered into a new arrangement with the assignee of the annuity whereby it was agreed that the latter should not sue for the annuity for five years from the date of the deed, or until the death of the grantor's father (which should first happen), and that the annuity should be redeemable on different terms. It was held that the surety was wholly discharged, and not merely entitled to be exonerated from liability to the arrears of the annuity during the five years (*n*).

So a surety for rent to the landlord under a particular tenancy is

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De G. F. & J. 367, 376; *Montefiore* v. *Lloyd*, 15 C. B. (N.S.) 203; *Re Darwen and Pearce*, [1927] 1 Ch. 176.

(*h*) *Evans* v. *Bremridge*, 2 K. & J. 174; *Hansard* v. *Lethbridge*, 8 T. L. R. 346; *Nat. Prov. Bank* v. *Brackenbury*, 22 T. L. R. 797.

(*i*) *Bonser* v. *Cox*, 6 B. 110, affirmed 6 B. 118. Cf. *Cooper* v. *Evans*, 4 Eq. 45; *Mackintosh* v. *Wyatt*, 3 Ha. 562.

(*k*) See *Polak* v. *Everett*, 1 Q. B. D., p. 675.

(*l*) *Per* Chitty, J., in *Bolton* v. *Salmon*, [1891] 2 Ch., p. 54.

(*m*) 3 Madd. 221.

(*n*) See *Bonar* v. *Macdonald*, 3 H. L. C. 226; *Croydon Commercial, etc.* v. *Dickinson*, 2 C. P. D. 46; *Evans* v. *Whyle*, 5 Bing. 485; *Bacon* v. *Chesney*, 1 Stark. 192; *Wright* v. *Sandars*, 3 Jur. (N.S.) 504; *Hollier* v. *Eyre*, 9 Cl. & F., p. 57; *Small* v. *Currie*, 5 De G. M. & G. 141; cf. *Petty* v. *Cooke*, L. R. 6 Q. B., p. 795; Rowlatt (2nd ed.), pp. 256—7.

discharged from his liability by the determination of the tenancy without his concurrence, and the creation of a new one (*o*).

In *Holme* v. *Brunskill* (*p*), the plaintiff agreed to let a farm and a flock of sheep to G. B., who, together with two sureties, executed a bond to the plaintiff to secure at the determination of the tenancy the delivery, together with the farm and premises, of the like number, species, and quality, of good sheep as were delivered to G. B. On the withdrawal of an insufficient notice to quit, it was agreed that G. B. should surrender a field, and pay £10 less rent. On giving up the farm, the flock was found to be reduced in number, and deteriorated in quality and value, and the plaintiff sued one of the sureties on the bond. It was held that a new tenancy was not created, either by the giving of the first notice and its withdrawal, or the surrender of the field and the reduction of the rent; but that the surety was discharged (*q*). "The plaintiff," said Cotton, L.J., "attempts to substitute for the contract that the flock should be given up in good condition, *with the farm as then demised*, a contract that it should be delivered up in like condition, with a farm of different extent. In my opinion the surety ought to have been asked to decide whether he would assent to the variation. He never did so assent, and in my opinion was discharged from his liability."

If, by the act of the creditor, a security to the benefit of which the surety is entitled is partially lost, the surety is only discharged to the extent of the loss (*r*).

Not only does an alteration made without his consent release the surety from any *personal* liability, but it also releases any *property* pledged or mortgaged by him (*s*).

In *Re Ennis* (*t*), F. with two sureties, E. and B., gave a bond to secure payment of a loan. One of the provisions was that if E. or B., or either of them died, and if F. did not within a month procure a solvent person to enter into a further bond to the same effect the principal should become immediately payable. E. died, and F. B. and H. entered into a fresh bond to the same effect, but with a proviso that the giving of that bond should not release E.'s estate, or in

(*o*) *Tayleur* v. *Wildin*, L. R. 3 Ex. 303. Cf. *Holme* v. *Brunskill*, 3 Q. B. D. 495; and see Rowlatt (2nd ed.), pp. 77—8.

(*p*) *Supra*.

(*q*) Cotton and Thesiger, L.JJ.; Brett, L.J., dissenting. See also *Polak* v. *Everett*, 1 Q. B. D. 669; *Baynton* v. *Morgan*, 22 Q. B. D. 74.

(*r*) *Pearl* v. *Deacon*, 24 B. 186; 1 De G. & J. 461; *Re Wolmershausen*, 62 L. T. 541; *Taylor* v. *Bank of N. S. Wales*, 11 A. C., pp. 602—3.

(*s*) See *Bolton* v. *Salmon*, [1891] 2 Ch. 48.

(*t*) [1893] 3 Ch. 238.

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any way alter or effect the creditor's rights under the first bond. B. and H. paid the money and applied to prove against E.'s estate in an action for administration then pending. The Court of Appeal held that the new bond did not release the estate of E., and that his estate was liable to contribute one-third.

The discharge of a surety may take place, even although the new arrangement may seem favourable to the surety. Thus in *Calvert* v. *The London Dock Co.* (*u*), Streather, a contractor, undertook to perform certain works for a company; and it was agreed that three-fourths of the work, as finished, should be paid for every two months, and the remaining one-fourth upon the completion of the whole work. It was held that the sureties for the due performance of the contract were released by reason of payments exceeding three-fourths of the work done having, without their consent, been made by the company to the contractor before the completion of the whole work.

"Once concede the rule," said Blackburn, J., in *Polak* v. *Everett* (*x*), "that where the creditor wilfully interferes with the rights of the surety, and alters the equitable rights which he had acquired, *alters them, even though it may be for the surety's benefit, without the surety's assent*, the surety is discharged, and it seems to me the principle must equally apply if he alters the surety's privilege of coming upon a security, being a security for the whole undivided debt, although of less value, as if he had altered a security of equal value with the whole debt." And where the contract has been altered so as to *strengthen* the security without the surety's knowledge, the surety has been held released (*y*).

But where a surety enters into a bond for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them, without the surety's consent, has been held not to release the surety as to the other (*a*).

A surety to a debt secured by documents which he knew to be acceptances *only* with the drawers' name in blank, is not discharged by reason of their being allowed to remain incomplete until after the

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(*u*) 2 Keen, 638; *Warre* v. *Calvert*, 7 Ad. & E. 143; *Watts* v. *Shuttleworth*, 7 H. & N. 353.

(*x*) 1 Q. B. D., p. 675; and see *Wulff* v. *Jay*, L. R. 7 Q. B. 756; *Bonser* v. *Cox*, 6 B. 110; *Re Darwen and Pearce*, [1927] 1 Ch. 176, 184.

(*y*) *Gardner* v. *Walsh*, 5 E. & B. 83.

(*a*) *Harrison* v. *Seymour*, L. R. 1 C. P. 518; *Skillett* v. *Fletcher*, L. R. 2 C. P. 469; Rowlatt (2nd ed.), p. 256.

acceptor's death, as the drawer's name may be filled in at any time. And a surety is not discharged merely by the negligence of the creditor, unless he can show that he has received some injury in consequence of such negligence (*b*); and the surety for the payment of a bill not being a party, is not discharged, although he has received no notice of dishonour (*c*). In *Barber* v. *Mackrell* (*d*), the holder of two bills promised to renew, if M. guaranteed them. M. agreed to guarantee such bills if "renewed." The bills were not renewed in the strict sense, but were accepted by a different acceptor for the same aggregate amount. The Court of Appeal held that "renew" was not used by M. in the strict sense, and that his estate was bound.

A surety who becomes aware that the creditor is going to do something which, if done without his consent, might discharge him, is not bound to warn the creditor against doing it (*e*).

The principle in *Rees* v. *Berrington* is not confined to alterations in the situation of the surety by arrangements between *the creditor and principal debtor*. Thus in *Ellesmere, etc., Co.* v. *Cooper* (*f*), four persons executed a joint and several bond as sureties. After three had executed it, the fourth made a material alteration in the bond. The obligee accepted the bond as altered. All four were held discharged. So where there is a bond of suretyship for the fidelity of an officer, and by the act of the parties to whom the bond has been given, or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond will be avoided (*g*). And a surety whose liability is defined by one Act of Parliament may be discharged by a change in his position under a subsequent Act (*h*).

If a guarantee is given for the good conduct of a person, the course of dealing may be of the essence of the contract, and, if

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(*b*) *Carter* v. *White*, 25 Ch. D. 666, 670; and see *Black* v. *Ottoman Bank*, 15 Moo. P. C. 472, 484; *Re Duffy*, 5 L. R. Ir. 92; *Polak* v. *Everett*, 1 Q. B. D., p. 675.

(*c*) *Hitchcock* v. *Humfrey*, 5 Man. & G. 559; *Walton* v. *Mascall*, 13 M. & W. 452; Rowlatt (2nd ed.), p. 150.

(*d*) 68 L. T. 29.

(*e*) *Polak* v. *Everett*, 1 Q. B. D., p. 673.

(*f*) [1896] 1 Q. B. 75; *National Prov. Bank, etc.* v. *Brackenbury*, 22 T. L. R. 797.

(*g*) *Pybus* v. *Gibb*, 6 Ell. & B. 902; and see *Bartlett* v. *Att.-Gen.*, Parker, 277; *Arlington* v. *Merricke*, 2 Saund. 403; *The Guardians, etc.* v. *Whillier*, 6 Jur. (N.S.) 887; *Malling Union* v. *Graham*, L. R. 5 C. P. 201; Rowlatt (2nd ed.), p. 103.

(*h*) *Finch* v. *Jukes*, [1877] W. N. 211.

altered, the surety is discharged (*i*). But if the course of dealing is left to the option of the person to whom the guarantee is given, and he alters it, the surety cannot complain (*k*). And in the case of a guarantee for the fidelity of an officer (*l*), where neither the office nor its duties are substantially altered (*m*); or there has been a mere alteration in the salary or mode of remuneration (*n*), the sureties will not be discharged.

And although the amount of the debt, for which a surety is guarantee, is ascertained under an Act passed subsequently to the contract entered into by the surety, he will, nevertheless, be liable for the amount so ascertained (*o*).

The bond by which the sureties are bound may be drawn in language sufficiently extensive to continue their liability, notwithstanding there may be a material alteration of the duties of the person for whom they have become sureties (*p*).

Where, moreover, the creditor acts in his subsequent dealings with the principal debtor, with the concurrence of the surety, the latter cannot claim to be discharged upon the ground that his position is altered by those dealings (*q*).

Since the surety is entitled to have all the securities of the creditor (*r*), a creditor who takes out execution against the debtor becomes a trustee for all parties interested, and if, without the knowledge of the sureties, he withdraws the execution, he thereby discharges them (*s*). So where a creditor, by neglecting the necessary statutory formalities, lost the benefit of an execution under a warrant of attorney, the surety was held to be discharged (*t*).

(*i*) *Arlington* v. *Merricke*, 2 Saund. 403; and see *N. W. Ry. Co.* v. *Whinray*, 10 Exch. 77; *Kitson* v. *Julian*, 4 E. & B. 854; *Donegal C. C.* v. *Life & Health Assce. Asson.*, [1909] 2 Ir. R. 700.

(*k*) *Stewart* v. *M'Kean*, 10 Exch. 675; Addison on Contracts (11th ed.), p. 1086; Rowlatt (2nd ed.), pp. 115—6.

(*l*) *Sanderson* v. *Aston*, L. R. 8 Ex. 73.

(*m*) *Skillett* v. *Fletcher*, L. R. 2 C. P. 469.

(*n*) *Frank* v. *Edwards*, 8 Exch. 214; see also *Davey* v. *Phelps*, 2 Man. & G. 300; Rowlatt, pp. 103—4. Cf. *Toames Co-operative Society* v. *Foley*, [1910] 2 Ir. R. 277.

(*o*) *Webster* v. *Petre*, 4 Ex. D. 127.

(*p*) *Oswald* v. *Mayor of Berwick-upon-Tweed*, 5 H. L. Cas. 856; *Mayor of Dartmouth* v. *Silly*, 7 Ell. & Bl. 97; Rowlatt, pp. 103—4.

(*q*) *Woodcock* v. *Oxford, etc., Ry. Co.*, 1 Drew. 521, 530; and see *Hollier* v. *Eyre*, 9 Cl. & Fin. 1, 52.

(*r*) See *Dering* v. *Winchelsea*, *ante*; *Forbes* v. *Jackson*, 19 Ch. D. 615, 621.

(*s*) *Mayhew* v. *Crickett*, 2 Swans. 185, 190; *Smith* v. *Knox*, 3 Esp. 47; *Williams* v. *Price*, 1 S. & S. 581; *English* v. *Darley*, 2 Bos. & P. 61; and see *Forbes* v. *Jackson*, *supra*.

(*t*) *Watson* v. *Allcock*, 4 De G. M. & G. 242; Rowlatt (2nd ed.), pp. 283—4.

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4. Discharge of Surety by Creditor giving Time.

"It has been established for a very long time, beginning with *Rees* v. *Berrington* to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by doing so he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or for an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless * * * it is established that this discharges the surety altogether. * * * Whether that was a good or just principle originally is a matter which it is far too late to think about now * * * nothing but the Legislature can interfere to alter it" (*u*).

The principle, however, has been adversely commented upon by many Judges and will not be extended (*x*).

Although passiveness (see p. 548), or mere delay in not suing the debtor when the debt becomes due, will not discharge the surety, yet if the creditor, as in the principal case, enters in a *binding contract* (*y*) *with the principal debtor* (*z*), the effect of which will be *to give further time* to the debtor, without consulting the surety, the surety will be thereupon discharged wholly; or it would seem if time be given only in respect of part of the debt, *pro tanto* (*a*), and it is immaterial that the further time is given in consequence of the inability of the debtor to pay, or that no injury could thereby accrue to the surety, the surety being himself the fit judge of what is, or is not, for his own benefit (*b*). In *Samuell* v. *Howarth* (*c*), A. guaranteed the payment of goods to be supplied

(*u*) *Per* Blackburn, J., in *Polak* v. *Everett*, 1 Q. B. D., pp. 673, 674; *Oakeley* v. *Pasheller*, 10 Bli. (N.S.) 548, 590; *Oriental Financial Corp.* v. *Overend, Gurney & Co.*, L. R. 7 H. L., p. 360; *Clarke* v. *Birley*, 41 Ch. D., pp. 433—4; *Rouse* v. *Bradford B. Co.*, [1894] A. C., p. 590.

(*x*) See *Oriental Financial Corp.* v. *Overend*, L. R. 7 Ch., p. 147, n.; *Hulme* v. *Coles*, 2 Si. 12; *Petty* v. *Cooke*, L. R. 6 Q. B., p. 795; *Swire* v. *Redman*, 1 Q. B. D. 536; *Holme* v. *Brunskill*, 3 Q. B. D., p. 505.

(*y*) *Per* Herschell, C., *Rouse* v. *Bradford B. Co.*, [1894] A. C., p. 594.

(*z*) *Clarke* v. *Birley*, 41 Ch. D. 422.

(*a*) *Dowden* v. *Lewis*, 14 L. R. Ir. 307; cf. *Re Wolmershausen*, 62 L. T. 541; Rowlatt (2nd ed.), p. 256.

(*b*) See the principal case and *Samuell* v. *Howarth*, 3 Mer. 272; *Petty* v. *Cooke*, L. R. 6 Q. B., p. 795; *Polak* v. *Everett*, 1 Q. B. D., p. 674.

(*c*) 3 Mer. 272, *per* Eldon, L.C.

by B. to C. during a fixed period. C. accepted bills for the amount of the goods delivered, and B. permitted him to renew them when payable, without any communication to A. on the subject. It was held that, although no period of credit was specified, it could not be taken as a guarantee for an unlimited period, but as one to be restrained by the usual course of trade; and that A. was discharged from his guarantee by virtue of this rule. The rule is this, that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety, that is, if time is given by virtue of *positive contract* between the creditor and the principal,—not where the creditor is merely inactive. * * * *It has been truly stated, that the renewal of these bills might have been for the benefit of the surety;* but the law has said, that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit.

In *Rouse* v. *Bradford Banking Co.* (*d*), A. L. Smith, L.J., states the main reason for the rule thus: "The main reason is that a surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt, or himself to pay off the debt, and that when he has paid it off he is at once entitled in the creditor's name to sue the principal debtor; and if the creditor has bound himself to give time to the principal debtor, the surety cannot do either the one or the other of these things until the time so given has elapsed, and it is said that by reason of this the surety's position is altered to his detriment without his assent" (*e*).

A surety is not discharged by the creditor taking no proceedings to recover the debt until barred by the Statute of Limitations; for the surety may at any time pay off the debt, and sue the debtor in the name of the creditor, or call upon him to sue. But if the surety had required the securities to be enforced, and the creditor had refused, the surety might be discharged (*f*).

Where the holders of bills, at the *request* of the drawees, refrain from presenting the bills, and thus give them time, the drawer will be released (*g*).

(*d*) [1894] 2 Ch., p. 75.

(*e*) See *Skip* v. *Huey*, 3 Atk. 91; *Nisbet* v. *Smith*, 2 Bro. Ch. 579; *Bank of Ireland* v. *Beresford*, 6 Dow. 233; *Clarke* v. *Henty*, 3 Y. & C. Ex. 187; *Hawkshaw* v. *Parkins*, 2 Swans. 539; *Burke's Case*, 2 Bos. & P. 62; *Davies* v. *Stainbank*, 6 De G. M. & G. 679; *Bailey* v. *Edwards*, 4 B. & Sm. 761; *Ewin* v. *Lancaster*, 13 W. R. 857; *Bingham* v. *Corbitt*, 34 L. J. Q. B. 37; *Wilson* v. *Lloyd*, 16 Eq. 60.

(*f*) *Carter* v. *White*, 25 Ch. D. 666, 670.

(*g*) *Latham* v. *Chartered Bank of India*, 17 Eq. 205. See *Yates* v. *Evans*, 61 L. J. Q. B. 446; cf. *Kirkwood* v. *Carroll*, [1903] 1 K. B. 531.

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Where a contract is divisible, as for instance, where successive payments are to be made at fixed periods, if the creditor gives time as to one of such payments, he will release the surety with regard to that payment only, but not with regard to subsequent payments (*h*).

If one of two principal debtors, by an arrangement not made known to the creditor, has become merely a surety, the creditor does not, by giving time to the other debtor, release the one who has become a surety (*i*). But if he is informed that one debtor is a surety, and gives time without the surety's knowledge or consent, then the surety is discharged (*k*).

In *Rouse* v. *Bradford Banking Co.* (*l*), W. R., one of the partners in a firm, ceased to be a member. By the deed of dissolution, the debts of the firm were to be paid by the new partnership, and the new firm covenanted with W. R. to indemnify him against those debts, with a proviso that he was not to require the surviving partners to pay any of the debts so long as he was kept indemnified. Amongst the debts was an overdraft of upwards of £50,000 due to the defendant bank, in which W. R. was a shareholder. The new firm failed, after this debt had been reduced below £50,000. W. R. brought an action to establish his claim to his shares in the bank free from any lien. The defendant bank claimed by counterclaim a lien on these shares as a security for the balance of the £50,000. The plaintiff W. R. contended that after the dissolution, the terms of which the bank had notice, a transaction was entered into between the new firm and the banking company, whereby the new firm was allowed for a limited period to increase the overdraft to £53,000. Kekewich, J., held that time had been given and the surety released. The Court of Appeal dismissed the action and declared the bank entitled to a lien. The House of Lords affirmed the judgment of the Court of Appeal upon the ground that time had not been given. But it appears from their judgments that if time had been given they would have held the surety to be released, notwithstanding the proviso to the covenant for indemnity (*m*).

(*h*) *Croydon Gas Co.* v. *Dickinson*, 2 C. P. D. 46; Rowlatt (2nd ed.), pp. 255—6.

(*i*) *Swire* v. *Redman*, 1 Q. B. D. 536.

(*k*) *Pooley* v. *Harradine*, 7 E. & B. 431; *Greenhough* v. *M'Clelland*, 2 E. & E. 424, 429; *Oakley* v. *Pasheller*, 10 Bli. (N.S.) 548, 590; *Oriental, etc., Corp.* v. *Overend, Gurney & Co.*, L. R. 7 H. L., p. 360; *Maingay* v. *Lewis*, 5 Ir. R. C. L. 229.

(*l*) [1894] A. C. 586.

(*m*) And see Rowlatt (2nd ed.), p. 250. Cf. *Oakford* v. *The European, etc., Shipping Co.*, 1 Hem. & M. 182.

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Where a bond creditor, by agreement with his debtor, takes interest on his debt by anticipation, that will in effect be giving time to the debtor, since equity would restrain proceedings on the bond until the expiration of time for which the creditor had received interest (*n*).

In *Bolton* v. *Buckenham* (*o*), B., as surety, covenanted in a mortgage deed in 1857, for payment of the debt in 1858. By a deed in 1884, to which B. was not a party, the mortgagee and mortgagor agreed to consolidate various mortgages, including the one in 1857, and a fresh date was fixed for payment of all the moneys. B. was held discharged. So, again, in *Munster, etc., Bank* v. *France* (*p*), the defendant surety accepted a bill payable three months after date, which the principal debtor indorsed to his creditor the plaintiff bank. Before the bill matured, the plaintiff, without the knowledge of defendant, took a mortgage from the debtor as collateral security for the debts, with a covenant for payment three months from date of mortgage. The defendant was held discharged.

An agreement with the principal debtor to give him further time in order to discharge a surety *must be one that is binding upon the creditor*. A mere voluntary promise to give further time which cannot be enforced, as it makes no alteration in the rights or position of the parties, will not have that effect (*q*); and although the creditor enter into a *binding* contract to give further time to the debtor, yet if it be with a third party, for instance, a co-surety, and not with the debtor, the surety will not be thereby discharged (*r*).

Nor will an agreement to give time have that effect, if it is *conditional* upon the performance of an act which the debtor neglects to perform (*s*).

A surety will not be discharged by the creditor giving time, if the remedies of the surety are not diminished or affected, and especially if they are accelerated. Thus, in *Hulme* v. *Coles* (*t*), a creditor

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(*n*) *Blake* v. *White*, 1 Y. & C. Ex. 420; Rowlatt (2nd ed.), p. 253.

(*o*) [1891] 1 Q. B. 278. (*p*) 24 L. R. Ir. 82 (C. A.).

(*q*) *Philpot* v. *Briant*, 4 Bing. 717; *Brickwood* v. *Anniss*, 5 Taunt. 614; *Tucker* v. *Laing*, 2 K. & J. 745; *Clarke* v. *Wilson*, 3 M. & W. 208; *Heath* v. *Key*, 1 Y. & J. 434; *Blake* v. *White*, 1 Y. & C. Ex., p. 425; *Moss* v. *Hall*, 5 Exch. 46; *Strong* v. *Foster*, 17 C. B. 201; *Bell* v. *Banks*, 3 M. & G. 258; and *Rouse* v. *Bradford Bkg. Co.*, [1894] A. C., p. 594.

(*r*) *Clarke* v. *Birley*, 41 Ch. D. 422; *Frazer* v. *Jordan*, 8 Ell. & Bl. 303; Rowlatt (2nd ed.), p. 258.

(*s*) *Badnal* v. *Samuell*, 3 Price, 521; *Vernon* v. *Turley*, 1 M. & W. 316.

(*t*) 2 Si. 12; and see *Prendergast* v. *Devey*, 6 Madd. 124 (Madd. & G. 124); *Stevenson* v. *Roche*, 9 B. & C. 707; *Price* v. *Edmunds*, 10 B. & C. 578; *Whitfield* v. *Hodges*, 1 M. & W. 679; *Jay* v. *Warren*, 1 C. & P. 532.

took from the debtor a cognovit in an action he had brought against him, with a stay of execution until a day earlier than that on which judgment could, in the usual course of the Courts, have been obtained. It was held, that the surety was not discharged.

Upon the same principle, the acceptance of money from the debtor by the creditor, who thought at the time that it was a valid payment, will not discharge the surety upon its turning out to be a fraudulent preference, notwithstanding that it had suspended the surety's right to intervene.

Thus in *Petty* v. *Cooke* (*u*), the payee of a promissory note, made by principal and surety, accepted the amount thereof from the principal, in good faith. The principal afterwards entered into a composition deed for the benefit of his creditors. The trustees under the deed avoided the payment as a fraudulent preference, and the payee handed over the amount to them. In an action by the payee against the surety, it was held that the payment did not operate as satisfaction of the debt; and that the acceptance of the money by the payees was not an act done against the faith of the contract with the surety. "I think it impossible to read the principle laid down by Lord Eldon in *Samuell* v. *Howarth* (*x*), without thinking that it is based upon highly technical reasoning, however accurate it may be. It is clear, that a creditor who gives time to the principal debtor without reserving his right against the surety, and alters the rights of the surety, discharges him; but that time given by a creditor, which in numberless cases does not injure the surety, should discharge him, is to my mind not justice, although established by Courts of Equity. The ground, however, on which this doctrine is based, is that by giving time to the principal debtor, the creditor does an act which is against good faith, and injurious to the surety; that doctrine cannot apply to the present case, for the creditor accepted the money which he had no right to refuse, and the acceptance of which he had no means of knowing would injure the surety; *he therefore did no act injurious to the surety*, and the surety is not discharged. I think *Pritchard* v. *Hitchcock* (*y*) is precisely in point" (*z*).

The surety will not be discharged, if time be given to the

(*u*) L. R. 6 Q. B. 790; *Pritchard* v. *Hitchcock*, 6 M. & G. 151.

(*x*) 3 Mer. 272.

(*y*) 6 M. & G. 151.

(*z*) *Per* Blackburn, J., L. R. 6 Q. B., p. 795, and see also *Newington* v. *Levy*, L. R. 5 C. P. 607, 612; *Hall* v. *Levy*, L. R. 10 C. P., p. 158.

principal debtor by his consent or subsequent approval (*a*). And a subsequent promise by a surety to pay the debt, after he is aware that the creditor has given further time to the principal debtor, will revive the liability from which he was discharged by the act of the creditor (*b*).

It seems, moreover, where the creditor has obtained a decree against the surety, establishing his right against the estate of the surety, that no subsequent dealings giving time to the debtor will have the effect of releasing the surety, for the creditor, having by the decree established his right against the estate of the surety, has a right to proceed under it; and all that follows is in the nature of execution of the decree, and any *subsequent* dealing with the principal debtor does not operate to discharge the surety from a liability under which he is, *no longer as surety*, but under the decree (*c*).

Time given, but rights against surety reserved.—" As to giving time, the authorities, which are almost innumerable, have settled that upon any giving of time to a principal debtor, if there be *a reservation of rights* against the surety, the surety is not discharged " (*d*). This is explained by Lord Eldon (*e*), on the ground that " the principal cannot raise the objection upon his right to time as against the surety, as there is the contract of the principal, arising out of the contract for reserve against the surety, that the latter, if the creditor goes against him, shall not be deprived of the benefit of the contract as against the principal " * * * but " *if the contract for reserve against the surety prevents his remedy against the principal, that contract for reserve will not do* "; and the question whether or not the surety has been informed of (*f*) or consents to (*g*) the arrangement is immaterial. A necessary con-

(*a*) *Tyson* v. *Cox*, T. & R. 395; *Clark* v. *Devlin*, 3 Bos. & P. 363; *Cowper* v. *Smith*, 4 M. & W. 519; *Duffy* v. *Orr*, 5 Bli. (N.S.) 620; *The Union Bank of Manchester* v. *Beech*, 13 W. R. 922; Rowlatt (2nd ed.), p. 270.

(*b*) *Mayhew* v. *Crickett*, 2 Swans. 185, 192; cf. *Phillips* v. *Foxall*, L. R. 7 Q. B. 676, 677.

(*c*) *Jenkins* v. *Robertson*, 2 Drew. 351; *Re A Debtor*, [1913] 2 K. B. 11.

(*d*) Page-Wood, V.-C., in *Webb* v. *Hewitt*, 3 K. & J., p. 442.

(*e*) In *Boultbee* v. *Stubbs*, 18 V., at p. 26; *Ex p. Gifford*, 6 V. 805; *Nichols* v. *Norris*, 3 B. & Ad. 41; *Smith* v. *Winter*, 4 M. & W. 454; *Ex p. Carstairs*, Buck, 560; *Owen* v. *Homan*, 4 H. L. Cas. 1037, 1038; *Rouse* v. *Bradford Bkg. Co.*, [1894] A. C., p. 591.

(*f*) *Bateson* v. *Gosling*, L. R. 7 C. P., p. 13; *Re Whitehouse*, 37 Ch. D., p. 694.

(*g*) *Webb* v. *Hewitt*, 3 K. & J. 438; *Boaler* v. *Mayor*, 19 C. B. (N.S.) 76; *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C. 313.

sequence of such a reservation is a continuance of the surety's right to be indemnified by the principal debtor, and this right will not be lost unless a contract to abandon it be proved (*h*). A contract with a stranger, or even with a co-surety (*i*), which does not prevent the surety from discharging the debt and pursuing his remedy over against the principal debtor, will not discharge the surety (*k*). Parol evidence is, it seems, admissible to prove a reservation of the creditor's rights against the surety; unless the agreement to give time is contained in a written instrument (*l*). But even if the agreement to give time is in writing, the surety's consent thereto may be proved by parol (*m*).

Release, covenant not to sue.—A release, with a reservation of rights against sureties, operates as a *covenant not to sue* between the creditor and the debtor and does not release the sureties (*n*). And language importing an absolute release may be construed as a covenant not to sue the principal debtor, when that intention appears, leaving the debtor open to any claim of relief at the instance of his sureties (*o*). But if the release is absolute and in writing it cannot be modified by evidence of verbal negotiations prior to the release (*p*); where there is an absolute release, the remedy against the surety is gone, for the debt is satisfied (*q*). In the *Commercial Bank of Tasmania* v. *Jones* (*r*), a creditor released his principal debtor and accepted a third party in his stead, and the surety for the former debtor agreed that he would give a guarantee for the latter, and, until he did so, would continue his former guarantee, but he died without giving the new one. It was held that the remedy against the surety was gone, because the novation

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(*h*) *Close* v. *C.*, 4 De G. M. & G. 176; Rowlatt (2nd ed.), p. 196.

(*i*) *Clarke* v. *Birley*, 41 Ch. D. 422.

(*k*) *Moss* v. *Hall*, 5 Exch. 46; *Bingham* v. *Corbitt*, 34 L. J. Q. B. 37; Addison on Contracts (11th ed.), p. 1093.

(*l*) *Wyke* v. *Rogers*, 1 De G. M. & G. 408; *Norman* v. *Bolt*, 1 Cal. & E. 77; cf. *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317; *Ex p. Glendinning*, Buck, 517.

(*m*) Rowlatt (2nd ed.), p. 270.

(*n*) *Green* v. *Wynn*, L. R. 4 Ch. 204; *Bateson* v. *Gosling*, L. R. 7 C. P. 9; *Re Whitehouse*, 37 Ch. D. 683, p. 694; *Henton* v. *Paddison*, 68 L. T. 405.

(*o*) *Per* Lord Morris, *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C. 313, at p. 316; cf. *Boultbee* v. *Stubbs*, 18 V. 20; *Ex p. Harvey*, 4 De G. M. & G. 881; *Atkins* v. *Revell*, 1 De G. F. & J. 360.

(*p*) *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317.

(*q*) See *Nicholson* v. *Rivell*, 4 Ad. & E. 675; *Kearsley* v. *Cole*, 16 M. & W., p. 136; *Webb* v. *Hewitt*, 3 K. & J. 438; *Mayhew* v. *Boyes*, 103 L. T. 1.

(*r*) [1893] A. C. 313; cf. *Perry* v. *Nat. Prov. Bank*, [1910] 1 Ch. 464.

operated as a release of the original debt and consequently of the surety, and he had given no other guarantee.

And although the release of, or the composition with, the principal debtor is done by mistake, or for the benefit of the surety, unless there be a stipulation to the contrary (*s*), the surety will be discharged (*t*); and it seems, that one partner in a firm may release or compound with the creditor so as to bind the firm, and consequently discharge the surety (*u*).

If the surety has previously to the release paid part of the debt, and given security for the remainder, the general rule will not apply, but the creditor will, in the absence of evidence to the contrary, retain his right against the surety for the remainder (*x*).

An unqualified reservation of remedies against the surety in a covenant not to sue is to be construed as allowing the surety to retain all his remedies over against the principal debtor, for the covenant not to sue is allowed to operate only so far as the rights of the surety may not be affected; the surety therefore may pay the creditor and sue the principal for the amount. Thus in *Green* v. *Wynn* (*y*), the debtor by a mortgage deed covenanted to pay the principal and interest, and a surety covenanted to pay the interest in default. The debtor afterwards, by deed, assigned his property to a trustee on trust to sell and divide the proceeds amongst his creditors, the creditors releasing the debtor from the debts due to them respectively; but there was a proviso that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt. It was held that this deed only amounted to a covenant not to sue the debtor, and that the surety was not released, but that the surety could pay off the principal to the creditor, and recover the amount from the debtor. But where the principal debtor is released, a reservation of rights against a surety, which is inconsistent with the transaction,

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(*s*) *Davidson* v. *McGregor*, 8 M. & W. 755; *Kearsley* v. *Cole*, 16 M. & W. 128; *The Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; *Cowper* v. *Smith*, 4 M. & W. 519.

(*t*) *Ex p. Smith*, 3 Bro. Ch. 1; *Ex p. Wilson*, 11 V. 410; *English* v. *Darley*, 2 Bos. & P. 61; *Lewis* v. *Jones*, 4 B. & C. 506; *Cragoe* v. *Jones*, L. R. 8 Ex. 81; cf. *Commercial Bank of Australia* v. *John Wilson & Co.*, [1893] A. C. 181.

(*u*) *Hawkshaw* v. *Parkins*, 2 Swans. 539; Lindley, Partnership (9th ed.), p. 203.

(*x*) *Hall* v. *Hutchons*, 3 My. & K. 428; *Reade* v. *Lowndes*, 23 B. 361; *Defries* v. *Smith*, 10 W. R. 189.

(*y*) L. R. 4 Ch. 204; and see *Bateson* v. *Gosling*, L. R. 7 C. P. 9; see also *Price* v. *Barker*, 4 Ell. & Bl. 780; *Muir* v. *Crawford*, L. R. 2 H. L. Sc. 456.

is of no avail (*z*). A joint judgment debt is subject to the same rules as to release as any other joint obligation. So a release of one judgment debtor extinguishes the liability of the other, whilst a covenant not to sue one will not affect the liability of the other (*a*).

If a surety, though innocent himself, obtains through the fraud of another a release from the creditor, unless there be consideration moving from the surety, the creditor may have the release set aside (*b*).

Where a principal debtor is discharged by operation of law, as for instance, in an ordinary bankruptcy, even though obtained with the assistance of the creditor, the surety is not released (*c*). The surety can pay and prove for the amount.

How far a release, etc., of one surety by the creditor will discharge others.—A release or discharge of one surety by the creditor, even when founded on a mistake of law, operates as a discharge of the others (*d*), unless the contract with the sureties was several (*e*). But where the contract is several, a creditor does not, by releasing one surety, release the others, unless they can show that they have thereby been deprived of their remedies for contribution (*f*).

A composition made with a surety does not have the effect of releasing his co-sureties; since a creditor, who has given a discharge to one surety *for the proportion which he was liable to contribute* towards the payment of the general debt, has no right to proceed against the other sureties for more than their proportion of it, no injury is done to them by the discharge of their co-surety (*g*). "If the creditor discharges one of the co-parceners, he cannot proceed for the whole debt against the others, at most they are only bound for their proportions" (*h*). So where a creditor made a compromise with one of several sureties, by which he precluded himself

(*z*) *Webb* v. *Hewitt*, 3 K. & J. 438; *Keyes* v. *Elkins*, 5 B. & S. 240; *Hooper* v. *Marshall*, L. R. 5 C. P. 4; Rowlatt (2nd ed.), p. 261.

(*a*) *Re E. W. A.*, [1901] 2 K. B. 642; cf. *Ex p. Good*, 5 Ch. D. 46; Rowlatt, p. 261.

(*b*) *Scholefield* v. *Templer*, 4 De G. & J. 429; Rowlatt, pp. 272—3.

(*c*) Bankruptcy Act, 1914, s. 28, sub-s. 4; and see *Browne* v. *Carr*, 7 Bing. 508; *Provincial Bank* v. *Cussen*, 18 L. R. Ir. 382; *Ellis* v. *Wilmot*, L. R. 10 Ex. 10, 15; *Megrath* v. *Gray*, L. R. 9 C. P. 216; *Ex p. Jacobs*, L. R. 10 Ch. 211.

(*d*) *Cheetham* v. *Ward*, 1 B. & P. 630; *Nicholson* v. *Revill*, 4 A. & E. 675; *R.* v. *Bayley*, 1 C. & P. 435; *Cocks* v. *Nash*, 4 Mo. & Sc. 162.

(*e*) *Ward* v. *National Bank of New Zealand*, 8 A. C. 755.

(*f*) *Ward* v. *National Bank of New Zealand*, 8 A. C. 755, 765, 766; and see *Craythorne* v. *Swinburne*, 14 V. 169.

(*g*) *Ex p. Gifford*, 6 V. 805; Rowlatt (2nd ed.), p. 287.

(*h*) *Per* Lord Redesdale, in *Stirling* v. *Forrester*, 3 Bli. 591.

from receiving a dividend, the co-sureties were held discharged to the extent of the dividend which he might have received (*i*). And a release of one surety may be so qualified by the reservation of remedies against the co-sureties that it will be construed as a covenant not to sue, and it will thus be prevented from operating as a discharge of a co-surety (*k*). But where the terms of the release are absolute and in writing, verbal negotiations, prior to the release, will not be admitted for the purpose of showing that it was intended to reserve rights against the co-sureties (*l*).

A mere receipt given to one of the debtors will not amount to a release so as to discharge another joint debtor, if it appears from the surrounding circumstances that it was not intended to be so given (*m*).

Discharge of surety by the creditor agreeing with the principal debtor to give time to the surety himself.—If the holder of a security agrees with the principal debtor not to receive, over a certain period, payment from the surety, the surety is discharged. "It is one thing to lie by and wait before suing the principal, during which time the surety has a right to come in, discharge the debt and immediately sue the principal, and another thing to engage positively with the principal that time shall be given to the surety, and so tie up your own hands from doing that which would throw the surety upon the principal" (*n*).

5. Discharge of Surety by the Creditor taking another or additional Security, etc.

Where the creditor takes a second security *in satisfaction* of the first (*o*), or a different security (*p*), the surety will be discharged. But not unless it be taken in lieu of the original security. Thus, where, on B being hired as a clerk to A & Co., not for any definite period, he with C and D joined in a bond to secure his duly accounting for his receipts. C died, and his executrix gave a

(*i*) *Re Wolmershausen*, 62 L. T. 541; Rowlatt, p. 289.

(*k*) *Thompson* v. *Lack*, 3 C. B. 540, 552; *Price* v. *Barker*, 4 Ell. & B. 760; and see *Solly* v. *Forbes*, 2 Brod. & B. 38; *Payler* v. *Homersham*, 4 M. & S. 423; *North* v. *Wakefield*, 13 Q. B. 536; *Re E. W. A.*, [1901] 2 K. B. 642.

(*l*) *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317.

(*m*) *Ex p. Good*, 5 Ch. D. 46; cf. *Re E. W. A.*, [1901] 2 K. B. 642; *North* v. *Wakefield*, 13 Q. B. 536, 541; *Watters* v. *Smith*, 2 B. & Ad. 889.

(*n*) *Per* Lord Hatherley in *Oriental Financial Corp.* v. *Overend, etc.*, L. R. 7 Ch. p. 152; L. R. 7 H. L. 348, 358.

(*o*) *Clarke* v. *Henty*, 3 Y. & C. Ex. 187. See also *Boaler* v. *Mayor*, 19 C. B. (N.S.) 76.

(*p*) *Tatum* v. *Evans*, 54 L. T. 336.

written notice to A & Co. that she would no longer remain surety. A & Co. thereupon required and obtained from B the bond of another surety. D died, and also the new surety, and, four years and a half after the death of C, B died, when deficiencies were found in his accounts, subsequent to the notice. It was held that there was nothing to show that the obligees acquiesced in the wish of C's executrix to be released, and that the executrix remained liable to the extent of her testator's assets (*q*).

But the taking of a new promissory note from the principal does not discharge the surety (*r*); nor does the taking of *additional* security, unless it is given upon a contract to give time (*s*); and the surrender of the security in bankruptcy does not discharge the surety, because the law of suretyship must be *subject to a privilege given to the creditor by the law* (*t*).

In *The Commercial Bank of Australia* v. *John Wilson & Co.* (*u*), a creditor whose debt was guaranteed by several sureties, including W., agreed with three of such sureties that they should deposit £3,000 with the creditor on a suspense account, with power to the creditor to appropriate that sum in discharge *pro tanto* of the debt. It was held that, as such deposit did not operate as payment until appropriation, the creditor, not having appropriated, could prove for the whole amount in W.'s bankruptcy.

6. As to the Effect on the Surety of Laches, Failure to Perfect the Security, etc., on the Part of the Creditor.

Laches, or inaction on the part of the creditor will not, save as hereafter stated, *release* the surety, but the amount recoverable from him by the creditor will be reduced by the amount so lost (*x*). In *Eyre* v. *Everett* (*y*), although the creditor had neglected to sue

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(*q*) *Gordon* v. *Calvert*, 4 Russ. 581; 2 Si. 253; cf. *Re Crace*, [1902] 1 Ch. 733; and see *Bank of Ireland* v. *Beresford*, 6 Dow, 233; *Hodgson* v. *Nugent*, 5 T. R. 277; *Melvill* v. *Glendining*, 7 Taunt. 126; *Lawes* v. *Maughan*, 1 C. & E. 340; see *ante*, p. 530.

(*r*) *Wyke* v. *Rogers*, 1 De G. M. & G. 408.

(*s*) *Twopenny* v. *Young*, 3 B. & C. 208; *Overend & Co.* v. *Oriental, etc., Corp.*, L. R. 7 H. L., p. 361; cf. *Munster, etc., Bank* v. *France*, 24 L. R. Ir. 82; Rowlatt (2nd ed.), p. 285.

(*t*) *Rainbow* v. *Juggins*, 5 Q. B. D. 422; cf. *Provincial Bank* v. *Cussen*, 18 L. R. Ir. 382.

(*u*) [1893] A. C. 181.

(*x*) *Polak* v. *Everett*, 1 Q. B. D., p. 676.

(*y*) 2 Russ. 381, 384; *Shepherd* v. *Beecher*, 2 P. W. 288; *Wright* v. *Simpson*, 6 V. 734; *Perfect* v. *Musgrave*, 6 Price, 111; *Orme* v. *Young*, Holt, 84; *Langdale* v. *Parry*, 2 Dowl. & Ry. 337; *Price* v. *Kirkham*, 3 H. & C. 437; *Goring* v.

the obligor on a bond for five years, the surety was not released. "The surety has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, *if all that he rests upon* is the *passive* conduct of the creditor in not suing. He must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue or to give him, the surety, the means of suing."

A surety for a debt secured by a bill of exchange, to which he is not a party, accepted by the debtor, will not be discharged, by its not being presented for payment, or by notice of its dishonour not being given to the surety, inasmuch as the rule as to any notice of dishonour applies only to *parties* to bills of exchange, not to all persons who are interested in them (*z*).

But if by the contract of suretyship there be a duty cast upon the principal to exercise any power for the benefit of the surety, his default in the exercise of it may release the surety (*a*); or if by the inaction of the creditor a material stipulation in the contract is not observed; as if there be a stipulation that the creditor on default is to sue the debtor without delay (*b*). In *Mountague* v. *Tidcombe* (*c*), a man put out his son an apprentice, giving a bond to his master for his fidelity, taking, at the same time, a covenant from his master that he would, at least once a month, see his apprentice make up his cash. Upon the apprentice embezzling cash, the master brought an action on the bond; it was held, on a bill being filed by the father to be relieved against it, that the bond and covenant ought to be taken as one agreement; that the father would be liable, provided the accounts were taken monthly, but for no more than the master could prove the apprentice embezzled in the first month, when the embezzlement began.

As a surety, even a mere indorser of a bill of exchange (*d*) is entitled, on payment of the debt, to all the securities in the hands of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship (*e*); if the

Edmonds, 6 Bing. 94; *Dawson* v. *Lawes*, 23 L. J. Ch. 434; *Mayor of Durham* v. *Fowler*, 22 Q. B. D. 394; Rowlatt (2nd ed.), pp. 250—251.

(*z*) *Carter* v. *White*, 25 Ch. D. 666, 671; *Hitchcock* v. *Humfrey*, 5 Man. & G. 559; *Black* v. *Ottoman Bank*, 15 Moo. P. C., p. 484; *Re Wolmershausen*, 62 L. T. 541.

(*a*) See *per* Esher, M.R., in *Mayor of Kingston-upon-Hull* v. *Harding*, [1892] 2 Q. B., pp. 502, 503; Rowlatt (2nd ed.), pp. 148—9.

(*b*) *Bank of Ireland* v. *Beresford*, 6 Dow, 233; *Holl* v. *Hadley*, 2 A. & E. 758.

(*c*) 2 Vern. 518; Rowlatt, p. 161.

(*d*) *Duncan, Fox & Co.* v. *North and South Wales Bank*, 6 A. C. 1.

(*e*) See *Dering* v. *Winchelsea*, *ante*; *Forbes* v. *Jackson*, 19 Ch. D. 615.

creditor, who has had, or ought to have had, them in his possession or power, loses them, or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice (*f*), the surety *to the extent of such security* will be relieved (*g*). Thus, the omission of acts which were necessary to perfect an assignment or transfer may relieve the surety—as the neglect to comply with statutory formalities (*h*), to register an assignment of a ship (*i*), to insure works according to contract (*k*), to register a bill of sale given as a security, and to enter into possession on default in payment of interest, thereby enabling the trustee in bankruptcy to sell the property (*l*). So, too, may negligence on the part of the creditor in failing to present a bill of exchange for payment at maturity (*m*), or in taking notes of a bank and drafts on its London agents, shortly before it stopped payment when cash might have been obtained (*n*), or in mismanaging the sale of a collateral security, which ought to have produced enough to pay the debt (*o*).

So a surety will be released if the creditor cannot, on payment by his surety, give him the securities, in exactly the same condition as they formerly stood in his hands, and this may, of course, extend even to discharging the surety entirely from his liability. Thus, in *Pledge* v. *Buss* (*p*), a creditor holding a mortgage for a debt for which the plaintiff was surety, after the bankruptcy of the principal debtor, without notice to the surety, released the assignees and the bankrupt's estate in consideration of the conveyance to him of the equity of redemption. It was held that the surety was discharged, and that it was not enough for the creditor to allow in account the dividends released, and to give a new charge on the mortgaged premises.

If the creditor appropriate any security for the debt to another

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(*f*) *Strange* v. *Fooks*, 4 Gif. 408.

(*g*) *Capel* v. *Butler*, 2 S. & S. 457; *Ex p. Mure*, 2 Cox, 63; *Law* v. *The East India Co.*, 4 V. 824; *Williams* v. *Price*, 1 S. & S. 581; *Philips* v. *Astling*, 2 Taunt. 206; *Re Wolmershausen*, 62 L. T. 541; *Rainbow* v. *Juggins*, 5 Q. B. D. 422; cf. *Taylor* v. *Bank N. S. Wales*, 11 A. C. 596.

(*h*) *Watson* v. *Allcock*, 4 De G. M. & G. 242.

(*i*) *Capel* v. *Butler*, 2 S. & S. 457, and see *Straton* v. *Rastall*, 2 T. R. 366.

(*k*) *Watts* v. *Shuttleworth*, 7 H. & N. 353.

(*l*) *Wulff* v. *Jay*, L. R. 7 Q. B. 756.

(*m*) *Latham* v. *Chartered Bank of India*, 17 Eq. 205.

(*n*) *Lichfield Union* v. *Greene*, 1 H. & N. 884.

(*o*) *Mutual Loan Association* v. *Sudlow*, 5 C. B. (N.S.) 449.

(*p*) Johns. 663, and see *Campbell* v. *Rothwell*, 47 L. J. Q. B. 144; *Re Wolmershausen*, 62 L. T. 541.

purpose, the surety will, to the extent of the value of the security, be discharged. Thus in *Pearl* v. *Deacon* (*q*), the plaintiff was surety upon a promissory note to the defendants for a sum lent by them to their tenant, and the defendants also took a mortgage of the tenant's furniture for the same debt. They afterwards, under a distress, took the same furniture for arrears of rent. It was held that as regarded the plaintiff the produce of the furniture was first applicable to the promissory note, and as against him, could not be applied in payment of the rent (*r*). But where the transaction must be taken to have been contemplated by the contract, the surety is not discharged (*s*).

Thus, in *Rainbow* v. *Juggins* (*t*) the defendant was surety to the plaintiff, for P, who had deposited with the plaintiff a policy of insurance on his life as collateral security : P became bankrupt and the plaintiff surrendered the policy, which had previously lapsed through failure in payment of the premiums, and proved for the whole debt. It was held that the defendant remained liable upon the ground that the defendant's position had not been altered, the policy by its lapse having no legal value, and also upon the ground that, assuming it had some value, the plaintiff was entitled to exercise the option given by the Bankruptcy Act of surrendering the security and proving for the whole debt.

In *Mayor, etc. of Kingston-upon-Hull* v. *Harding* (*u*), the defendants guaranteed the plaintiffs that contractors should well and truly execute certain work. The plaintiffs had a right by the contract to superintend the work, also a right to retain part of the payment until a certificate was given by their engineer. The work was badly done, but its defects were fraudulently concealed from the engineer. He gave his certificate and the money was paid. It was held that the mere non-exercise by the plaintiffs of their right of superintendence did not discharge the defendants, nor were they discharged by the giving of the certificate or the payment of the retention money, inasmuch as the mere giving of the certificate was not shown to have altered the position of the defendants for the worse, and both that and the payment had been

(*q*) 24 B. 186, affirmed 1 De G. & J. 461.

(*r*) See also *Kinnaird* v. *Webster*, 10 Ch. D. 139, 144; *Campbell* v. *Rothwell*, 47 L. J. Q. B. 144; *Duncan, Fox & Co.* v. *N. & S. Wales Bank*, 6 A. C., p. 11; *Re Sherry*, 25 Ch. D. 702; *Taylor* v. *Bank N. S. Wales*, 11 A. C., pp. 602—3.

(*s*) *Coates* v. *C.*, 33 B. 249, 252; *Petty* v. *Cooke*, L. R. 6 Q. B. 790; *Taylor* v. *Bank N. S. Wales*, *supra*.

(*t*) 5 Q. B. D. 422.

(*u*) [1892] 2 Q. B. 494.

procured by a dishonest execution of work against which the defendants had guaranteed the plaintiffs.

A surety will not be discharged where a security becomes lost or worthless, unless it became so by the act of the creditor (*x*).

There is an equity that a security given by co-sureties must not be wasted, but a fair dealing by the creditor with the surety's security under which the creditor sets off the surety's share of the debt due to him against the proceeds of the security does not preclude a resort to the other sureties for their respective shares of the debt (*y*).

7. Relief of Surety.

Since the Judicature Act, 1873, the distinctions which used to exist between the relief given at law and in equity have disappeared.

Where the debt for which a person is surety has become due he may compel the principal to discharge him from his liability (*z*). It is not necessary for the surety to wait until he has sustained actual loss. "Although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable . . . this Court will decree the principal to discharge it, it being unreasonable that a man should always have such a cloud hanging over him" (*a*). This right is not confined to cases where the creditor has a right to sue the debtor and refuses to exercise that right (*b*).

In *Wooldridge* v. *Norris* (*c*), a surety on a bond to secure a debt was secured by another bond of indemnity entered into by the principal debtor's father, who had died, having devised certain property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who had no funds in hand, and were unable under the will to raise the money by sale of the testator's estate, except under a decree of the Court. Held that the surety, though he had not

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(*x*) *Hardwick* v. *Wright*, 35 B. 133; *Rainbow* v. *Juggins*, 5 Q. B. D. 422; Rowlatt (2nd ed.), pp. 285—6.

(*y*) *Margretts* v. *Gregory*, 10 W. R. 630.

(*z*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch., p. 527; *Ascherson* v. *Tredegar Dry Dock, etc., Co.*, [1909] 2 Ch. 401; and see *supra*, p. 531.

(*a*) *Per* the Lord Keeper, in *Ranelaugh* v. *Hayes*, 1 Vern. 189; *Nisbet* v. *Smith*, 2 Bro. Ch. 579; see *Hobbs* v. *Wayet*, 36 Ch. D., p. 259; Rowlatt (2nd ed.), pp. 184—5.

(*b*) See *Mathews* v. *Saurin*, 31 L. R. Ir. 181; *Ascherson* v. *Tredegar Dry Dock Co.*, *supra*; disapproving of limitation suggested in *Padwick* v. *Hawkes*, 9 Ha. 627, 628.

(*c*) 6 Eq. 410.

paid anything, was entitled to a decree against the executors for administration, payment of the debt, and indemnity (*d*).

If judgment has been obtained by the creditor against a surety for the entire debt, the surety may commence an action against his co-sureties and, if he makes the creditor a defendant thereto, may obtain an order upon the co-surety to pay his proportion to the creditor; if the creditor is not a defendant, he may obtain a prospective order directing the co-surety, upon payment by him, the plaintiff, of his share, to indemnify him against further liability (*e*).

In *Burgess* v. *Eve* (*f*), Malins, V.-C., expressed an opinion that a guarantor of fidelity might file a bill for delivery up of his guarantee, after notice that the person whose fidelity he had guaranteed was not to be trusted.

If the principal debtor has a set-off against the creditor, arising out of the same transaction, the surety may plead such set-off in an action against him by the creditor (*g*).

The surety has a right at any time to apply to the creditor and pay him off, and then on giving a proper indemnity for costs to sue the principal in the creditor's name (*h*). Or, it would seem, on taking an assignment of the debt, under section 136 of the L. P. Act, 1925, he might sue in his own name.

In *Bradford* v. *Gammon* (*i*) a partnership agreement relating to an estate to be developed and resold by the partners, provided that on the death of a partner his interest should be purchased by the survivors, who should indemnify his representatives from the partnership liabilities. At the death of a partner, the banking account of the firm (which had been guaranteed by each partner) was largely overdrawn. It was held by Eve, J., that although (which he did not decide) the deceased's representatives might possibly be entitled to pay off the bank and then sue the surviving partners for indemnity, they could not insist on the surviving partners themselves paying off the bank.

A judgment or award against a principal does not in the absence of agreement bind the surety unless he is a party, and the principal

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(*d*) See also *Green* v. *Wynn*, L. R. 4 Ch., p. 207; *Hobbs* v. *Wayet*, *supra*.

(*e*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514. Cf. *Stirling* v. *Burdett*, [1911] 2 Ch. 418.

(*f*) 13 Eq., p. 459. See Rowlatt (2nd ed.), pp. 81—3.

(*g*) *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372.

(*h*) *Swire* v. *Redman*, 1 Q. B. D., p. 541; see Annual Practice (1928), p. 2163. Cf. *Re Beavan*, [1913] 2 Ch. 295, 600.

(*i*) [1925] Ch. 132; *sed quære*.

on being sued cannot bring him in on a third party notice (*k*). But the surety when sued may call on the principal to indemnify him (*l*). And where one of two or more co-sureties is being sued alone for the debt, *semble*, he may apply for leave to serve his co-sureties with notice (*m*).

(*k*) R. S. C., Order XVI, r. 48; *Re Kitchin*, 17 Ch. D. 668, 670.

(*l*) *Kitchin*, *supra*; and see *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; cf. *Dering* v. *Winchelsea*, and notes, *ante*.

(*m*) R. S. C., Order XVI, r. 48.

TRUSTEES.

ROBINSON *v.* PETT.

1734. 3 P. W. 132 (*a*).

No Allowance to an Executor or Trustee for his Care and Trouble.

The Court never allows an executor or trustee for his time and trouble, especially where there is an express legacy for his pains; neither will it alter the case, that the executor renounces and yet is assisting in the executorship; nor even though it appears that the executor has deserved more, and benefited the trust, to the prejudice of his own affairs.

The question was whether an executor who had renounced, but had yet been assisting in the trust, according to the request of the testator, should have any additional consideration, when he had an express legacy for such his assistance.

On a bill brought by the plaintiffs, the grandchildren, against the executors, for an account of the personal estate, the defendant Pett was allowed his £100 legacy; but he likewise insisted to have £400 more for his extraordinary pains, trouble, and expense of time in and about the affairs of the testator. * * *

This cause was first heard before the M.R., Sir Joseph Jekyll, who declared it to be a rule so settled, *that a trustee or executor in trust should not have any allowance for his care and trouble, unless there were some particular words in the will for that purpose* (*b*), that he could not break into it, and that there was the less occasion to do so in the present case, as the testator had here given the defendant an express legacy of £100 for his care and trouble. * * *

From this decree there was an appeal to the Lord Chancellor. * * *

Lord Chancellor Talbot.—It is an established rule, *that a trustee, executor, or administrator, shall have no allowance for*

(*a*) Page 249 in 6th edition.
(*b*) See *Ellison* v. *Airey*, 1 Ves. Sen. 115; *Willis* v. *Kibble*, 1 B. 560.

his care and trouble; the reason of which seems to be, *for that, on these pretences, if allowed, the trust estate might be loaded, and rendered of little value*; besides the great difficulty there might be in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust or not.

The defendant's renouncing the executorship is not material, because he is still at liberty, whenever he pleases, to accept the executorship; otherwise, if both the executors had renounced, and the ordinary had thereupon granted administration. And if this were to make any difference, it would be an art practised by executors to get themselves out of this rule, which I take to be a reasonable one, and to have long prevailed. But further, in the present case, the testator has by his will expressly directed what should be the defendant's recompense for his trouble, in case of his refusing the executorship; *viz.*, that he still should have the £100 legacy, to which I can make no addition. However, it being a hard case, let the defndant take back the deposit (*c*).

NOTES.

1. Generally.
2. Persons in a fiduciary position shall make no profit by their trust, p. 558.
   Agents, employment of, p. 558.
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4. Accidental profit, Escheat and Executors Act, 1830, p. 573.

1. Generally.

The rule that a trustee, executor, or administrator shall have no allowance for his care and trouble proceeds upon the principle that

(*c*) Reg. Lib. B. 1732, fol. 322, 1733, fol. 333, by which it appears the M.R. directed generally, that all parties should have just allowances, and on appeal by the defendant Pett, this decree was affirmed, but the particular gravamen is not stated.

Robinson v. Pett.

a trustee shall not profit by his trust. "The reason of the rule," observes Lord Cottenham, "is well stated in *Robinson* v. *Pett*. The reason seems to be that on these pretences, if allowed, the trust estate might be loaded and rendered of little value" (*d*).

It is more generally put on the ground that a trustee may not put himself in a position in which his interest and duty are in conflict (*e*), and it is extended to all persons in a fiduciary position, though they may not be strictly "trustees."

In *Bray* v. *Ford* (*f*), a governor of a college who was a solicitor was held not to be justified in charging the college profit costs for his professional services. Herschell, C., said: "It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has therefore been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger even though the trustee were paid for his services" (*g*).

The principle has, however, no application to remuneration paid to the trustee by a third person for work done by him independently of his position as trustee (*h*).

Thus, it would seem that where the qualifying shares of a

(*d*) *Moore* v. *Frowd*, 3 My. & C. 50; and see *New* v. *Jones*, 1 Hall & T. 632, n.; *Hamilton* v. *Wright*, 9 Cl. & Fin. 111; *Re Imperial Land Co. of Marseilles*, 4 Ch. D. 566, 580.

(*e*) See *Burge* v. *Brutton*, 2 Ha. 373; *Re Corsellis*, 34 Ch. D. 675. See statement of the principle, *per* Cotton, L.J., at p. 681. See also *Keech* v. *Sandford*, *post*.

(*f*) [1896] A. C. 44.

(*g*) [1896] A. C. pp. 51—2; see *Williams* v. *Barton*, [1927] 2 Ch. 9.

(*h*) *Re Lewis*, 103 L. T. 495; *Re Dover Coalfields, etc., Ltd.*, [1908] 1 Ch. 65. Cf. *Bath* v. *Standard Land Co., Ltd.*, [1912] 1 Ch. 618.

director are held by him as a trustee, he is nevertheless entitled to his fees as director (*i*).

2. Persons in a Fiduciary Position shall make no profit by their Trust.

Agents, Employment of.—Although trustees and executors will not, in the absence of direction, be allowed remuneration for their own trouble and loss of time, they may employ agents whose expenses will be allowed out of the estate. This rule has received statutory recognition in the Trustee Act, 1925, s. 23. Thus a trustee may employ a bailiff to manage an estate and receive the rents (*k*), even although a recompense may have been given to him by the creator of the trust for his trouble (*l*). So an executor may, when it is reasonable (*m*), employ a solicitor in the management of the testator's affairs, and that although he be himself a solicitor (*n*); and he may employ an accountant if the nature of the accounts require it (*o*), or an agent to collect debts at a commission. (See note "Delegation of Trusts," p. 589.)

Allowances.—So trustees and executors will be allowed all costs, charges, and expenses properly incurred by them in the execution of their trust (*p*), whether they be provided for in the instrument creating the trusts or not (*q*), even though remuneration for their trouble has been allowed them by the author of the trusts (*r*), and even although in the case of trustees they have been wrongfully appointed, provided they acted *bona fide* (*s*). Thus they will be allowed the expenses of travelling properly incurred (*t*), fees for counsel (*u*), the costs of a solicitor for his trouble and attendance

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(*i*) *Re Dover Coalfields, etc., Ltd., supra*; but see *Williams* v. *Barton*, *supra*.

(*k*) *Bonithon* v. *Hockmore*, 1 Vern. 316; *Stewart* v. *Hoare*, 2 Bro. Ch. 663.

(*l*) *Wilkinson* v. *W.*, 2 S. & S. 237; *Re Westbrooke*, 2 Ph. 631.

(*m*) *Harbin* v. *Darby*, 28 B. 325.

(*n*) *Macnamara* v. *Jones*, Dick. 587; *Stanes* v. *Parker*, 9 B. 389.

(*o*) *Henderson* v. *M'Iver*, 3 Madd. 275; *New* v. *Jones*, 1 Hall & T. 632, n.; 1 M. & G. 668, n.; *Weiss* v. *Dill*, 3 My. & K. 26; and see *Hopkinson* v. *Roe*, 1 B. 180; *Day* v. *Croft*, 2 B. 488.

(*p*) Seton (7th ed.), pp. 1126—9; and see *Re Beddoe*, [1893] 1 Ch. 547. Cf. *Re England's Settlement Trusts*, [1918] 1 Ch. 24.

(*q*) *Hide* v. *Haywood*, 2 Atk. 126; *Worrall* v. *Harford*, 8 V. 8; *Dawson* v. *Clarke*, 18 V. 254; *Att.-Gen.* v. *Mayor of Norwich*, 2 My. & C. 424; *Morrison* v. *M.*, 7 De G. M. & G. 214.

(*r*) *Wilkinson* v. *W.*, 2 S. & S. 237, and see *Webb* v. *Earl of Shaftesbury*, 7 V. 480; 6 R. R. 154.

(*s*) *Travis* v. *Illingworth*, [1868] W. N., at p. 206.

(*t*) *Ex p. Lovegrove*, 3 D. & C. 763.

(*u*) Cary, 14; *Poole* v. *Pass*, 1 B. 600.

in transacting and conducting the affairs of the testator (*x*), costs of a law suit, not being confined, when defendants, to their costs as between party and party paid to them by the plaintiff (*y*) : and although an executor or trustee as defendant may be ordered to pay costs to the plaintiff he will be entitled (unless he has forfeited his right by *laches* or misconduct) to recover from the trust estate not only the costs thus incurred, but also the costs which he has paid to his own solicitor (*z*).

Professional Charges, etc.—Although the trustees or executors may by the direction of the author of the trusts have carried on a trade, they will be allowed nothing as a compensation for their personal trouble or loss of time (*a*) save under very special circumstances (*b*).

An executor and surviving partner carrying on the business of his deceased partner is not entitled, without express stipulation, to any allowance for his time and labour (*c*). So an executor or trustee will not, except under an authority contained in the instrument creating the trust (*d*) or a contract with his *cestui que trust*, be entitled to make a profit out of his trust by his professional business.

Thus a broker (*e*) or a factor acting as executor is not entitled to make any profit (*f*), nor is a commission agent (*g*), nor is an executor and trustee acting as auctioneer in the sale of the trust property (*h*), nor can a solicitor or his firm charge his *cestui que trust* save for expenses and costs out of pocket (*i*).

This rule was applied to the case of an assignee of a bankrupt

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(*x*) *Macnamara* v. *Jones*, Dick. 587.

(*y*) *Amand* v. *Bradburne*, 2 Ch. Ca. 138; *Fearns* v. *Young*, 10 V. 184; *Re Price*, 31 Ch. D. 485.

(*z*) *Per* Lord Kingsdown in *Lovatt* v. *Fraser*, L. R. 1 H. L. Sc. 37; and see *Courtney* v. *Rumley*, 6 Ir. R. Eq. 99. See as to costs of improper litigation, *Brown* v. *Burdett*, 40 Ch. D. 244; *Re Scowby*, [1897] 1 Ch. 741; *Re Beddoe*, [1893] 1 Ch. 547; *Re England's Settlement Trusts*, [1918] 1 Ch. 24. See also R. S. C. (1883), Ord. 65, r. 1.

(*a*) *Brocksopp* v. *Barnes*, 5 Madd. 90; *Barrett* v. *Hartley*, 2 Eq. 789.

(*b*) *Forster* v. *Ridley*, 4 De. G. J. & S. 452.

(*c*) *Burden* v. *B.*, 1 V. & B. 170; 12 R. R. 210; *Stocken* v. *Dawson*, 6 B. 371.

(*d*) *Douglas* v. *Archbutt*, 2 De G. & J. 148.

(*e*) *Arnold* v. *Garner*, 2 Ph. 231.

(*f*) *Scattergood* v. *Harrison*, Mos. 128.

(*g*) *Sheriff* v. *Axe*, 4 Russ. 33.

(*h*) *Kirkman* v. *Booth*, 11 B. 273.

(*i*) See *Re Barber*, 31 Ch. D. 665; 34 Ch. D. 77; *Re Pooley*, 40 Ch. D. 1; *New* v. *Jones*, 1 Hall & T. 632 (n.); *Bainbrigge* v. *Blair*, 8 B. 588; *Todd* v. *Wilson*, 9 B. 486; *Pollard* v. *Doyle*, 1 Dr. & Sm. 319; *Collins* v. *Carey*, 2 B. 129. See *Re Corsellis*, 34 Ch. D. 675.

who had acted as solicitor to the fiat (*k*), and will be applied, although the business was done by a trustee's partner who himself was not a trustee (*l*), and if a trustee being a solicitor take a security for professional charges connected with the trust it may be set aside even against a purchaser for value if with notice (*m*).

Only such proportion of a town agent's costs will be allowed as he is entitled to (*n*), and not the proportion belonging to the country solicitor (where he is a trustee), or by agreement to be paid to him (*o*).

It seems, however, that where by an agreement between solicitors in partnership, one of them, being a trustee, is not to participate in the profits or to derive any benefit from business done for the trust, he may employ his partner as solicitor to the trust, and pay him the ordinary charges (*p*), and under special circumstances an inquiry may be directed to give some ascertained remuneration or compensation to a trustee for his loss of time and trouble (*q*).

Although a solicitor made party to a cause as trustee, who either acts for himself or employs his partner to do so, will be allowed his costs out of pocket only (*r*), it was held by Lord Cottenham in *Cradock* v. *Piper* (*s*), affirming Shadwell, V.-C. (*t*), that the circumstance of a solicitor being a trustee will not prevent him from receiving his usual costs, where he acts as solicitor in a suit for any of the *cestuis que trust*, or where he acts for himself and his co-trustees jointly, provided the costs are not increased by his being one of the parties for whom such joint appearance is made.

Cradock v. *Piper* has been disapproved of (*u*), but in *Re Corsellis* (*x*), the Court of Appeal held that it has been acted on so

(*k*) *Ex p. Newton*, 3 De G. & Sm. 584.

(*l*) *Christophers* v. *White*, 10 B. 532.

(*m*) *Gomley* v. *Wood*, 3 Jo. & Lat. 678.

(*n*) *Burge* v. *Brutton*, 2 Ha. 373.

(*o*) *Re Corsellis*, 33 Ch. D. 160; 34 Ch. D. 675.

(*p*) *Clack* v. *Carlon*, 30 L. J. Ch. 639; 7 Jur. (N.S.) 441. And see *Re Doody*, [1893] 1 Ch. 129.

(*q*) *Marshall* v. *Holloway*, 2 Swans. 432; *Bainbrigge* v. *Blair*, 8 B. 595; *Re Freeman's Settlement Trusts*, 37 Cr. D. 148; and see Lewin, Trusts (13th ed.) pp. 458—9.

(*r*) *Lyon* v. *Baker*, 5 De G. & Sm. 622; *Pollard* v. *Doyle*, 1 Dr. & Sm. 319.

(*s*) 1 Hall & T. 617 and 628; 1 Mac. & G. 664.

(*t*) 17 Si. 41. And see *Fraser* v. *Palmer*, 4 Y. & C. Ex. 517.

(*u*) *Bainbrigge* v. *Blair*, 8 B. 588; *Manson* v. *Baillie*, 2 Macq. 80; *Re Doody*, [1893] 1 Ch., pp. 141—2.

(*x*) 34 Ch. D. 675; and see *Re Barber*, 31 Ch. D. 665; 34 Ch. D. 77; *Re Pooley*, 40 Ch. D. 1.

long that it must be considered a binding authority, and that it is applicable whether the proceedings against the trustee are hostile or friendly, such as an application in Chambers for maintenance of an infant. Where, however, the solicitor trustee or his firm act for the receiver appointed in an action for the administration of the trust, the solicitor trustee must account for any profit costs received by himself or his firm for so acting (*y*). The rule in *Cradock* v. *Piper* does not apply to the case of a solicitor trustee who acts for himself and co-trustee in the administration of the trust estate out of Court (*z*).

Where a solicitor trustee is a defendant as trustee, and is held entitled to his costs, the course of the Court is to direct them to be taxed as between solicitor and client (*a*).

Where an action is brought against a solicitor in his private capacity, not as trustee, and he defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary (*b*).

In *Re Sharpe* (*c*), after taxation and payment of costs in an administration action, part of these costs was handed by the solicitors to one of the executors, who was a solicitor, in pursuance of an agreement between him and the solicitors. North, J., held that the sum paid to the executor could not be recovered in a summons in the administration, but expressed the opinion that there could be no answer to a separate action for the same and gave leave to take proceedings for that purpose.

In *Vipont* v. *Butler* (*d*), on similar facts, Chitty, J., held that if the solicitor had been solicitor on the record he would have been entitled to the profit costs on the rule in *Cradock* v. *Piper* (*e*), but that as he was not solicitor on the record he was not entitled, as this was a profit obtained from his office of trustee.

A solicitor trustee is not obliged to account for any profits which he may have made professionally by his charges against a mortgagor

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(*y*) *Re Corsellis*, *supra*.

(*z*) *Lincoln* v. *Windsor*, 9 Ha. 158; *Broughton* v. *B.*, 2 Sm. & Gif. 422; 5 De G. M. & G. 160; cf. *De Doody*, [1893] 1 Ch. 129.

(*a*) *York* v. *Brown*, 1 Coll. 260.

(*b*) *The London Scottish Benefit Society* v. *Chorley*, 12 Q. B. D. 452; 13 Q. B. D. 872; *H. Tolputt & Co., Ltd.* v. *Mole*, [1911] 1 K. B. 836.

(*c*) [1891] 2 Ch. 360.

(*d*) [1893] W. N. 64.

(*e*) 1 Mac. & G. 664, *ante*.

upon the security of whose property he advanced moneys belonging to the trust (*f*).

A general release where the *cestui que trust* has been assisted by an independent solicitor may prevent a *cestui que trust* from insisting upon his right to have a settled account opened against a solicitor trustee, although he may have charged for professional services (*g*). *Secus*, if he had not such assistance (*h*).

Commission to Agents and Sub-Agents.—An agent for sale or purchase cannot take a commission from the other party (*i*), and if when employed to purchase he sells his own goods to his principal and makes a profit, his principal will be entitled to it; and the agent's partner will also be liable if he have notice of the agency (*k*). A sub-agent who is aware that his principal is only an agent stands in a fiduciary relation to the ultimate principal, and must account to him for any commission received from a third person (*l*).

Subject to the exceptions mentioned *infra*, agents are not permitted to receive a commission *without the knowledge of their principals*, in cases of contract (*m*); see as to the case of a solicitor receiving commission on premiums paid on policies (*n*); or on the sale of shares (*o*), or of a ship (*p*); and as to directors (*q*). A member of an official commission or committee employed by the

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(*f*) *Whitney* v. *Smith*, L. R. 4 Ch. 513.

(*g*) *Stanes* v. *Parker*, 9 B. 385; *Re Sherwood*, 3 B. 338, 341.

(*h*) *Todd* v. *Wilson*, 9 B. 486; and see *Barrett* v. *Hartley*, 2 Eq. 789.

(*i*) *Williamson* v. *Barbour*, 9 Ch. D. 529; *Boston Deep Sea Co.* v. *Ansell*, 39 Ch. D. 339; *Lister* v. *Stubbs*, 45 Ch. D. 1; *Archer's Case*, [1892] 1 Ch. 332; *Hippisley* v. *Knee Brothers*, [1905] 1 K. B. 1; *Nitedals* v. *Bruster*, [1906] 2 Ch. 671; cf. *Stubbs* v. *Slater*, [1910] 1 Ch. 632; and see the Prevention of Corruption Act, 1906.

(*k*) See note to *Fox* v. *Mackreth*, *post*, and see *Turnbull* v. *Garden*, 38 L. J. Ch. 331, 334; *Kimber* v. *Barber*, L. R. 8 Ch. 56; *Morison* v. *Thompson*, L. R. 9 Q. B. 480; *Ladywell Mining Co.* v. *Brookes*, 35 Ch. D. 400; *Norreys* v. *Hodgson*, 13 T. L. R. 421.

(*l*) *Powell & Thomas* v. *Evan Jones & Co.*, [1905] 1 K. B. 11. Cf. *Bath* v. *Standard Land Co., Ltd.*, [1911] 1 Ch. 618.

(*m*) *Harrington* v. *Victoria Graving Dock*, 3 Q. B. D. 549; *R.* v. *Justices of Gt. Yarmouth*, 8 Q. B. D., p. 528; *Lister* v. *Stubbs*, 45 Ch. D. 1; *Erlanger* v. *The New Sombrero Phosphate Co.*, 3 A. C. 1218; *Bagnall* v. *Carlton*, 6 Ch. D. 371; *Salomon* v. *Salomon & Co.*, [1897] A. C. 22; *Lagunas Nitrate, etc.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392.

(*n*) *Copp* v. *Lynch*, 26 Sol. J. 348; *Jordy* v. *Vanderpump*, 64 Sol. J. 324; and see *Norreys* v. *Hodgson*, 13 T. L. R. 421.

(*o*) *Re Stapleford Colliery Co.*, 49 L. J. Ch. 253; and see *Re Stapleford Colliery Co.* (*Barrow's Case*), 14 Ch. D. 432; 49 L. J. Ch. 498.

(*p*) *Morison* v. *Thompson*, L. R. 9 Q. B. 480.

(*q*) *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918; *Gluckstein* v. *Barnes*, [1900] A. C. 240; *Burland* v. *Earle*, [1902] A. C. 83.

public may not make a profit by means of his membership, as, for instance, by taking out a patent founded on the results of their official investigation conducted at the public cost (*r*).

A general order of the Court of Madras authorised the registrar of the Court to institute proceedings in certain cases on behalf of infants, and it appeared that the registrar was entitled to receive fees upon proceedings in such suits, as well as a commission upon the amount of moneys paid into Court; the Judicial Committee of the Privy Council held that such general order was void, it being against public policy to allow an officer of the Court to institute suits in the conduct of which he might have a direct personal interest (*s*).

In *Att.-Gen.* v. *Edmunds* (*t*), it was held by Giffard, V.-C., that the clerk of patents was liable to account for any profit made on the purchase of stamps purchased with public moneys, but not on the purchase of stamps made with his own money. So in *Shallcross* v. *Oldham* (*u*), where the master of a ship having authority to employ the vessel or freight to the best advantage, but not to purchase a cargo on the owner's account, being unable to procure remunerative freight loaded the ship with a cargo of his own; Wood, V.-C., held that he was liable to account to the owners for all profit made by the sale of the cargo, and not merely for the proper freight.

In the absence of agreement express or implied, a part owner or partner in ships who acts as ship's husband is not entitled to charge the usual commission (*x*). But an exception has been allowed when the managing owner of a ship acts as broker to the ship, according to the custom of shipowners or otherwise (*y*).

In *Waters* v. *Earl of Shaftesbury* (*z*), the agent of a landowner contracted with the Land Drainage Company, under their Act (*a*), to execute the drainage works as agent and surveyor of the company (the landowner finding money for the purpose, and being paid an agreed amount by the company) : it was held that notwithstanding the apparent terms of the contract it might be shown that the

(*r*) *Patterson* v. *Gas Light & Coke Co.*, 2 Ch. D. 812; 3 A. C. 239.
(*s*) *Kerakoose* v. *Serle*, 4 Moo. P. C. 459.
(*t*) 6 Eq. 381.
(*u*) 2 John. & H. 609; and see *Gardner* v. *M'Cutcheon*, 4 B. 534.
(*x*) *Miller* v. *Mackay*, 31 B. 77.
(*y*) *Smith* v. *Lay*, 3 K. & J. 105.
(*z*) L. R. 2 Ch. 231.
(*a*) 12 & 13 Vict. c. 91.

agent was not the real contractor, and was not entitled to any profit on the contract.

It is not illegal for a member of the legislature who is also a landowner to make an agreement with respect to opposing a bill in Parliament (*b*). But a member of a body not of a governing or legislative character may not make a bargain for his own advantage, contrary to his duty (*c*).

Profits made in Trade, etc.—If a trustee or executor improperly keeps in his possession trust money which ought to have been invested or paid over to the person entitled to it, although it be not shown that he made a profit by so doing and although it be not claimed (*d*), he will be charged interest at a rate which may be varied at the discretion of the Court (*e*). Even if the trustee has not retained or made profit out of, but merely erroneously applied trust funds, he is charged with interest (*f*).

In general a trustee or executor is not charged with more than £4 per cent. upon the balances in his hands (*g*). But if it can be made to appear that he has actually made a greater rate of interest than £4 per cent. he will be compelled to account according to the rate made (*h*). Where, however, he has employed the moneys in his trade, or has been guilty of misconduct, he is chargeable at the option of the *cestui que trust* either with the profits made or with £5 per cent. interest, such interest, *semble* (*i*), to be compound interest (*k*). A trustee who has used the trust money in his business is not exempted from liability to account for interest at 5 per cent., although he acted for the benefit of the *cestuis que trust* and was able by using the money in his business to pay a

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(*b*) *Lord Howden* v. *Simpson*, 1 Ry. Cas. 347; S. C. 10 Ad. & E. 793 and 807, S. C. 9 Cl. & Fin. 61. See also *Lord Petre* v. *The Eastern Counties Ry.*, 1 Ry. Cas. 462. See, however, *Vauxhall Bridge Co.* v. *Earl Spencer*, 2 Madd. 356, Jac. 64; *Earl of Shrewsbury* v. *North Staffordshire Ry.*, 1 Eq. 593; *Lindsey* v. *G. N. Ry.*, 10 Ha. 664; *Hawkes* v. *E. Co. Ry. Co.*, 5 H. L. Cas. 331; 1 De G. M. & G. 737; 3 De G. & Sm. 743.

(*c*) *Bowes* v. *City of Toronto*, 11 Moo. P. C. 463.

(*d*) *Pearse* v. *Green*, 1 J. & W. 135; *Johnson* v. *Prendergast*, 28 B. 480; *Blogg* v. *Johnson*, L. R. 2 Ch. 229.

(*e*) *Tebbs* v. *Carpenter*, 1 Madd. 290, 306; *Blogg* v. *Johnson*, L. R. 2 Ch. 228.

(*f*) *Re Hulkes*, 33 Ch. D. 552; *Re Sharpe*, [1892] 1 Ch., p. 169.

(*g*) *Court* v. *Robarts*, 6 Cl. & Fin. 65; *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 843; *Penny* v. *Avison*, 3 Jur. (N.S.) 62; *Stafford* v. *Fiddon*, 23 B. 586; *Johnson* v. *Prendergast*, 28 B. 480; *Re Emmet's Estate*, 17 Ch. D. 142.

(*h*) *Forbes* v. *Ross*, 2 Cox, 116; *Re Emmet's Estate*, 17 Ch. D. 142; *Re Davis*, [1902] 2 Ch. 314.

(*i*) *Burdick* v. *Garrick*, L. R. 5 Ch. 233, 241—2.

(*k*) *Re Davis*, *supra*; Seton (7th ed.), p. 1124.

higher interest than would then have been obtained from investment in authorised securities (*l*).

If a trustee or executor employ the trust funds in a trade or adventure of his own, whether he keeps them separate from or mixes them with his own private moneys, and notwithstanding the difficulties which in the latter case may arise in taking the accounts, the *cestui que trust* may insist upon having at his option the profits made by or interest on the amount of the trust funds so employed (*m*).

Should serious difficulty arise in tracing and apportioning the profits derived by a trustee or executor from the employment of trust funds together with his own, in any trade or speculation, it may be a reason for preferring a fixed rate of interest to an account of the profits; and it seems the Court would allow interest at £5 per cent. per annum, with yearly rests, that is, with compound interest (*n*), and the same interest will be charged if the trustee or executor who is a trader pays the trust fund into his own account at his bankers (*o*), unless he can show that he has not had the benefit thereof in his trade (*p*).

As the business of a solicitor is not a trade in which compound interest is made on the money employed therein, compound interest will not be charged on trust moneys paid by a solicitor into the account of his firm, but only interest at £5 per cent. (*q*).

Where, however, a testator directs an accumulation to be made, and the executors keep the money in their hands, contrary to the express direction of the will, they will be charged with compound interest (*r*).

If a person is merely a constructive trustee, from having

(*l*) *Re Davis*, *supra*.

(*m*) *Docker* v. *Somes*, 2 My. & K. 655; see also *Piety* v. *Stace*, 4 V. 620; *Palmer* v. *Mitchell*, 2 My. & K. 672, n.; *Wedderburn* v. *W.*, 2 Keen, 41; 4 My. & C. 41; 22 B. 84, 100, 124; *Fosbrooke* v. *Balguy*, 1 My. & K. 226; *Willett* v. *Blanford*, 1 Ha. 253; *Portlock* v. *Gardner*, 1 Ha. 603; *Parker* v. *Bloxam*, 20 B. 295; *Townend* v. *T.*, 1 Gif. 201; *Cummins* v. *C.*, 8 Ir. R. Eq. 723; *Robinson* v. *R.*, 1 De G. M. & G. 257; *Re Davis*, [1902] 2 Ch. 314; Seton (7th ed.), pp. 1123—4.

(*n*) *Jones* v. *Foxall*, 15 B. 392; *Heighington* v. *Grant*, 5 My. & C. 258, 2 Ph. 600; *Walrond* v. *W.*, 29 B. 586; *Saltmarsh* v. *Barrett* (*No.* 2), 31 B. 349.

(*o*) *Williams* v. *Powell*, 15 B. 461, 468; *Sutton* v. *Sharp*, 1 Russ. 146; *Rocke* v. *Hart*, 11 V. 61; Seton, p. 1123. Cf. *Browne* v. *Southouse*, 3 Bro. Ch. 107.

(*p*) *Williams* v. *Powell*, 15 B. 461, 469.

(*q*) *Burdick* v. *Garrick*, L. R. 5 Ch. 233.

(*r*) *Raphael* v. *Boehm*, 11 V. 92, 13 V. 407, 590; *Knott* v. *Cottee*, 16 B. 77; *Re Barclay*, [1899] 1 Ch. 674. As to the rate of interest, see *Re Davy*, [1908] 1 Ch. 61 (C. A.).

employed the money of another in trade or business, and does not expressly fill any fiduciary character, although he must account for the profits of the money he employed, he will, if there is a profit, have an allowance made to him for his loss of time, skill, and trouble (*s*), *secus*, if no profit (*t*).

Partnership.—Partners stand for certain purposes in a fiduciary relation to each other (*u*), and where on the termination of a partnership, as by bankruptcy (*x*), death (*y*), or effluxion of time (*z*), the continuing or surviving partner, instead of winding up the business, retains the assets of his former partner, he will be decreed to account for the profits derived from them (*a*), but proper allowances will be made to him out of the profits for his management of the business (*b*). If no profits have been made, the surviving partner will not be entitled to any allowance (*c*), neither will he be so entitled if he is also the executor of the deceased (*d*). When the articles of partnership contain a clear absolute contract for the purchase of the share of the deceased partner by the surviving partner, who is appointed executor by the deceased, then that contract, provided it is carried into effect in all material particulars, determines conclusively the rights and liabilities of the surviving partner (*e*). In that case, accordingly, the surviving partner, although he is an executor, is under no liability to account, but if a surviving partner has merely an option to purchase, then, unless that option is strictly exercised, his liability to account is unaffected (*f*).

(*s*) *Brown* v. *Litton*, 1 P. W. 140, 142; 10 Mod. 20; see also *Brown* v. *De Tastet*, Jac. 284; *Burden* v. *B.*, 1 V. & B. 170; *Yates* v. *Finn*, 13 Ch. D. 839.

(*t*) *Re Aldridge*, [1894] 2 Ch. 97.

(*u*) *Bentley* v. *Craven*, 18 B. 75; *Parsons* v. *Hayward*, 31 B. 199; *Knox* v. *Gye*, L. R. 5 H. L. 656; *Friend* v. *Young*, [1897] 2 Ch. 421, see Partnership Act, 1890, s. 29; Pollock, Partnership (10th ed.), p. 140.

(*x*) *Crawshay* v. *Collins*, 15 V. 218, 10 R. R. 61; 1 J. & W. 267.

(*y*) *Brown* v. *De Tastet*, Jac. 284, 23 R. R. 59; *Wedderburn* v. *W.*, 2 Keen, 722, 4 My. & C. 41; *Flockton* v. *Bunning*, L. R. 8 Ch. 323, n.

(*z*) *Crawshay* v. *Collins*, 15 V. 227.

(*a*) See Partnership Act, 1890, s. 42, sub-s. 1, and s. 43.

(*b*) *Featherstonehaugh* v. *Fenwick*, 17 V. 298; *Cooke* v. *Collingridge*, Jac. 607; *Brown* v. *De Tastet*, Jac. 284; 23 R. R. 55; *Mellersh* v. *Keen*, 27 B. 242; *Vyse* v. *Foster*, L. R. 7 H. L. 318, 329; *Harris* v. *Sleep*, [1897] 2 Ch. 80; *Smith* v. *Nelson*, 92 L. T. 313.

(*c*) *Re Aldridge*, [1894] 2 Ch. 97.

(*d*) *Burden* v. *B.*, 1 V. & B. 170; 12 R. R. 210; *Stocken* v. *Dawson*, 6 B. 371.

(*e*) *Vyse* v. *Foster*, L. R. 8 Ch. 309; L. R. 7 H. L., *per* Cairns, C., at p. 329; *Hordern* v. *H.*, [1910] A. C. 465; *Dinham* v. *Bradford*, L. R. 5 Ch. 519.

(*f*) *Vyse* v. *Foster*, L. R. 7 H. L., p. 329; Partnership Act, 1890, s. 42, sub-s. 2.

Robinson v. Pett.

Where profits made after the decease of a partner are in no way attributable to the assets of the deceased, then, though no account has been taken as on the death of the deceased partner, there will be no liability to account in respect of such profits (*g*). But it is for the surviving partners to prove that the assets of the deceased have not contributed to produce the profits earned since the death (*h*).

It frequently happens that, though the articles of partnership contain no provisions for the acquisition of the share of a deceased partner by the survivors, and though the will of the deceased contains no provision authorising his executors or trustees to leave his share of the partnership assets in the partnership, yet the executor or trustee either leaves the deceased's share in the hands of the surviving partners, or leaves in their hands capital forming part of the deceased's estate. The liability of the executor or trustee in cases of this character is clear; whether he is or is not a member of the firm, he will be liable to account for the assets or capital, together with, at the option of the beneficiaries, either the share of the profits attributable to the assets or capital of the deceased, or interest thereon, at 5 per cent. compound interest (*i*). He is not, however, liable to account for all the profits made by the firm with the assets or moneys (*k*).

If an executor or trustee without authority lends trust money to third persons who are partners, and who receive it, then, though they may know that it is trust money and that the loan was made without authority, still the partners are only liable for interest and are not accountable to the *cestuis que trust* for profits (*l*). Where, however, an executor or trustee, X, joins with other persons, Y and Z, in employing trust moneys or properties in carrying on business in partnership, then if Y and Z have notice of the breach of trust involved in that employment of the assets or capital, they will be liable, as constructive trustees, to account with X, the executor or

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(*g*) *Simpson* v. *Chapman*, 4 De G. M. & G. 154; *Wedderburn* v. *W.*, 2 Keen, 722; 4 My. & Cr. 41; *Featherstone* v. *Turner*, 25 B. 382; *Manley* v. *Sartori*, [1927] 1 Ch., pp. 164—165.

(*h*) [1927] 1 Ch., pp. 165—6.

(*i*) *Jones* v. *Foxall*, 15 B. 388; *Vyse* v. *Foster*, L. R. 8 Ch. 333, 334; and see *Smith* v. *Nelson*, 92 L. T. 313.

(*k*) *Vyse* v. *Foster*, *supra*.

(*l*) *Stroud* v. *Gwyer*, 28 B. 130, approved in *Vyse* v. *Foster*, L. R. 8 Ch., *per* James, L.J., at p. 334. See also *Macdonald* v. *Richardson*, 1 Gif. 81; *Townend* v. *T.*, 1 Gif. 210; and cf. *Simpson* v. *Chapman*, 4 De G. M. & G. 154; *Butler* v. *B.*, 7 Ch. D. 116; *Re Gurney*, [1893] 1 Ch. 590.

trustee to the beneficiaries or *cestuis que trust*, for the profits (*m*). On the other hand, if they had no notice of the trusts they would be under no liability to the *cestuis que trust* or beneficiaries.

If one of the partners has notice of the breach of trust, but the others have not, then unless it be within a partner's implied authority in a business of the character carried on, that he should so act as to make himself a constructive trustee, the other partners will not be liable (*n*).

Miscellaneous Cases.—A person standing in a fiduciary relation towards another will not be allowed to benefit by his trust by obtaining a renewal of a lease, or by selling to or purchasing from his *cestui que trust* (*o*). And the principle is applicable to receivers (*p*) and committees of lunatics' estates (*q*). The disability of a solicitor in dealings with his client may remain after that relation has ceased (*r*).

A fair *bona fide* compromise by executors of a debt due from one of themselves will stand good (*s*).

A trustee may not make a profit by selling the office of trustee (*t*), and will not be allowed to have the sporting over the trust estate, nor to appoint gamekeepers to preserve the game for his own amusement (*u*). So trustees of an advowson must exercise the right of presentation upon the nomination of the *cestui que trust* (*x*).

Chairmen, directors, secretaries and promoters of companies stand in a fiduciary relation to the company (*y*). But directors of

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(*m*) *Flockton* v. *Bunning*, L. R. 8 Ch. 323, n., 326; Lindley, Partnership (9th ed.), pp. 714—5; Pollock (10th ed.), pp. 136—7; Partnership Act, 1890, s. 42, sub-s. 1.

(*n*) See Partnership Act, 1890, s. 11; and *Marsh* v. *Keating*, 2 Cl. & F. 250, 289; 37 R. R. 75, 106; *Jacobs* v. *Morris*, [1902] 1 Ch. 816 (C. A.); *Blyth* v. *Fladgate*, [1891] 1 Ch. 337; *Rhodes* v. *Moules*, [1895] 1 Ch. 236; *Cleather* v. *Twisden*, 28 Ch. D. 340; *Mara* v. *Browne*, [1896] 1 Ch. 199; *Tendring Hundred Waterworks Co.* v. *Jones*, [1903] 2 Ch. 615; Lindley, Partnership (9th ed.), pp. 230—1.

(*o*) See *Keech* v. *Sandford*, and *Fox* v. *Mackreth*, *post*.

(*p*) *Re Ormsby*, 1 Ball & B. 189.

(*q*) *Anon.*, 10 V. 103.

(*r*) *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500, see p. 517, and *Carter* v. *Palmer*, 8 Cl. & Fin. 657.

(*s*) *Re Houghton*, [1904] 1 Ch. 622; the Trustee Act, 1925, s. 15; Wolst. & Cherry, vol. ii, p. 368.

(*t*) *Sugden* v. *Crosland*, 3 Sm. & G. 192.

(*u*) *Webb* v. *Earl of Shaftesbury*, 7 V. 488; *Hutchinson* v. *Morritt*, 3 Y. & C. Ex. 547.

(*x*) *Sherrard* v. *Harborough*, Amb. 165; *Hawkins* v. *Chappel*, 1 Atk. 621; *Martin* v. *M.*, 12 Si. 579.

(*y*) See notes to *Fox* v. *Mackreth*, *post*.

a company do not stand in a fiduciary relation to persons dealing with the company merely because the company itself holds such a relation towards those persons. Thus, in *Bath* v. *Standard Land Co.* (*z*), where the defendant company undertook for a remuneration to manage the estates of the plaintiff, it was held that the company could properly charge the plaintiff with sums paid to directors who acted, respectively, as solicitor, estate agent, and auctioneer in the management of the estate, at a personal profit to themselves.

In *Mayor, etc. of Salford* v. *Lever* (*a*), it was decided that, where an agent, bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies: he may recover from the agent the amount of the bribe received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract, without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether he sues the agent or the third person first.

Trustees who are bankers cannot, in their capacity of trustees, borrow money from themselves as bankers at compound interest, although they habitually lend money on those terms to other customers (*b*).

Where trustees hold shares belonging to the trust, and they are appointed directors of the company in respect of such holding, and there is no provision in the will enabling them to retain their remuneration as such directors for their own benefit, they must account, it seems, for such remuneration to the trust, and the remuneration is to be treated as capital and will go to the remaindermen as an accretion to their shares (*c*).

3. Exceptions to the General Rule.

By General Law.—There have been some exceptions to the above rule in respect of allowing commissions to trustees and guardians managing the estates of West Indian proprietors (*d*),

(*z*) [1911] 1 Ch. 618 (C. A.); and see *Re Dover Coalfield, etc., Ltd.*, [1908] 1 Ch. 65; *Re Lewis*, 103 L. T. 495.

(*a*) [1891] 1 Q. B. 168. (*b*) *Crosskill* v. *Bower*, 32 B. 86.

(*c*) *Re Francis*, 74 L. J. Ch. 198; but see *Re Dover Coalfield, etc., Ltd.*, [1908] 1 Ch. 65; *Re Lewis*, 103 L. T. 495; Underhill on Trusts (8th ed.), pp. 330—1.

(*d*) *Chambers* v. *Goldwin*, 5 V. 834, 9 V. 254, 257, 267, 273; *Denton* v. *Davy*, 1 Moo. P. C. 15, and see *Henekell* v. *Daly*, *ibid*, 51.

and to a trustee not acting, but ready and willing to act when called upon by his co-trustee under the Jamaica Act, 24 Geo. 2, c. 19, s. 8 (*e*), and see as to the rights of mortgagees, *Leith* v. *Irvine*, and as to consignees and mortgagees of West Indian produce, *Chambers* v. *Davidson*.

So, an executor appointed in the East Indies was formerly entitled in passing his accounts in the Courts of equity in this country to the commission of £5 per cent. upon the receipts or payments according to the practice in the East Indies (*f*).

But an Indian executor would not have been entitled to commission if he had a legacy for his trouble (*g*); he would be permitted, however, to renounce the legacy in order to claim the commission, unless he allowed a long time to elapse before so renouncing (*h*).

But no commission will now be allowed to an Indian executor unless expressly given to him by the testator (*i*).

A small indirect benefit to a trustee from the application of trust property has been held not sufficient to make the transaction improper (*k*).

By Provision in Will, etc.—The testator or settlor may authorise the trustee to make professional charges (*l*); or for business not of a strictly professional nature (*m*). Where, however, the solicitor trustee witnesses the will, the direction that he may charge will be void under the Wills Act (*n*).

A testator may direct generally compensation to be made to an executor or trustee, for his care and trouble; or he may himself fix it at a particular sum or a salary (*o*). And where the testator gave such a direction but did not fix the amount, a reference has been directed to settle a proper allowance (*p*).

(*e*) *Grant* v. *Campbell*, 1 Moo. P. C. 43; and see *Leith* v. *Irvine*, 1 My. & K. 277; *Chambers* v. *Davidson*, L. R. 1 P. C. 296.

(*f*) *Chatham* v. *Lord Audley*, 4 V. 72.

(*g*) *Freeman* v. *Fairlie*, 3 Mer. 24. (*h*) *Ibid.*, 24, 28.

(*i*) See note to *Matthews* v. *Bagshaw*, 14 B. 126.

(*k*) See *Butler* v. *B.*, 5 Ch. D. 554, 7 Ch. D. 116; *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685; *Stroud* v. *Gwyer*, 28 B. 130; *Vyse* v. *Foster*, L. R. 8 Ch. 309, L. R. 7 H. L. 318; *Hordern* v. *H.*, [1910] A. C. 465.

(*l*) See *Re Bedingfield*, 57 L. T. 332; *Re Barber*, 31 Ch. D. 665; *Re Pooley*, 40 Ch. D. 1.

(*m*) *Re Ames*, 25 Ch. D. 72; cf. *Re Fish*, [1893] 2 Ch. 413; *Clarkson* v. *Robinson*, [1900] 2 Ch. 722; *Re Chalinder & Herington*, [1907] 1 Ch. 58.

(*n*) Cf. *Re Barber*, *Re Pooley*, *Re Fish*, *supra*.

(*o*) *Webb* v. *Earl of Shaftesbury*, 7 V. 480, 6 R. R. 154.

(*p*) *Ellison* v. *Airey*, 1 Ves. Sen. 115; *Willis* v. *Kibble*, 1 B. 559; *Jackson* v. *Hamilton*, 3 Jo. & Lat. 702.

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An annuity given to an executor for his trouble until a general settlement of the testator's affairs does not cease upon the mere institution of a suit (*q*), it not being shown that the trouble of the executors has ceased. A trustee's annuity ceases upon the determination of all active duties by the payment of the whole of the trust fund to a person absolutely entitled, without a devolution of the office of trustee upon any other person (*r*).

If an executor do not act, even if he be rendered incapable of so doing by act of God, he is not entitled to a legacy given to him for his trouble in the executorship (*s*).

By Agreement.—Trustees or executors may at the time of accepting the trusts, contract with their *cestui que trust* to receive some compensation, or to make professional charges for acting (*t*), but such contract, unless perfectly fair and without any undue pressure, would not be enforced (*u*).

And even if a trustee makes a valid contract with his *cestui que trust* for compensation for the trouble incident to the trust, it will not be allowed if the trustee, in consequence of his death or otherwise, fail to complete his contract (*x*).

Nor will a contract by a trustee with his *cestui que trust* for professional charges be enforced unless, in distinct terms, it takes the trustee out of the general rule (*y*), or, by clear implication, he be authorised to make professional charges (*z*).

As a rule, a power to charge will only give a solicitor executor charges for strictly professional work (*a*), or such charges and remuneration as if he, not being himself a trustee or executor, were employed by the trustee or executor (*b*). But the direction may be sufficient to include costs and charges for other business (*c*), and even profits made on sales by the trustees selling as traders to

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(*q*) *Baker* v. *Martin*, 8 Si. 25.

(*r*) *Hull* v. *Christian*, 17 Eq. 546.

(*s*) *Hanbury* v. *Spooner*, 5 B. 630; *Re Hawkin's Trusts*, 33 B. 570; *Slaney* v. *Watney*, 2 Eq. 418.

(*t*) *Re Sherwood*, 3 B. 338; *Barrett* v. *Hartley*, 12 Jur. (N.S.) 426; *Re Wyche*, 11 B. 209.

(*u*) *Ayliffe* v. *Murray*, 2 Atk. 58.

(*x*) *Gould* v. *Fleetwood*, Mich. 1732, at the Rolls, 3 P. W. 251, n. (*a*), 2 Eq. C. Abr. 453, pl. 8.

(*y*) *Moore* v. *Frowd*, 3 My. & C. 45, see also *Matthison* v. *Clarke*, 3 Dr. 3; *Broughton* v. *B.*, 5 De G. M. & G. 160.

(*z*) *Douglas* v. *Archbutt*, 2 De G. & J. 148.

(*a*) *Harbin* v. *Darby*, 28 B. 325.

(*b*) *Re Chapple*, 27 Ch. D. 584, 51 L. T. 748.

(*c*) *Re Ames*, 25 Ch. D. 72; and see *Clarkson* v. *Robinson*, [1900] 2 Ch. 722; *Re Chalinder & Herington*, [1907] 1 Ch. 58; *Re Bennett*, [1893] 2 Ch. 413.

themselves as trustees (*d*). Powers of this nature ought only to be inserted in instruments upon express instructions given for the purpose by the client himself, and then it ought to be seen that he understands their effect (*e*).

In *Re Bennett* (*f*), there was a legacy of £200 and wide power to charge; the Court of Appeal allowed not only professional charges, but remuneration for what was not properly solicitor's work.

A trustee may contract with the Court that he will not undertake the trust without proper compensation; and a reference will be made to chambers to ascertain and settle what would be a reasonable allowance both for his past and future services (*g*).

By the Bankruptcy Act, 1914 :

Section 83, sub-section 1 : " Where a trustee or manager receives remuneration for his services as such, no payment shall be allowed in his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself."

Sub-section 2 : " Where the trustee is a solicitor, he may contract that the remuneration for his services as trustee shall include all professional charges."

Trustee Receiver.—In *Re Bignell* (*h*), it was held by the Court of Appeal that, although the Court does not usually appoint a trustee to be receiver except on the terms of his having no remuneration, there is no inflexible rule that he shall not receive remuneration, and that the fact of the judgment not mentioning remuneration did not amount to a decision that there should not be any; that the Judge therefore had a discretion, and that no ground was shown to induce the Court of Appeal to interfere with his exercise of it (*i*).

In *Harris* v. *Sleep* (*k*) a receiver and manager, appointed to act

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(*d*) *Re Sykes*, [1909] 2 Ch. 241.

(*e*) See *per* Kay, J., in *Re Chapple*, 27 Ch. D. 587; and *per* Farwell, L.J., in *Re Sykes*, [1909] 2 Ch. 241, at p. 250.

(*f*) [1893] 2 Ch. 413.

(*g*) *Marshall* v. *Holloway*, 2 Swans. 432; *Brocksopp* v. *Barnes*, 5 Madd. 90; *Morison* v. *M.*, 4 My. & C. 215; *Newport* v. *Bury*, 23 B. 30, and see *Re Bignell*, [1892] 1 Ch. 59.

(*h*) [1892] 1 Ch. 59. See *per* Lord Eldon, *Sykes* v. *Hastings*, 11 V. 364.

(*i*) In the following cases a trustee has been appointed at a salary : *Marshall* v. *Holloway*, 2 Swans. 432; *Morison* v. *M.*, 4 My. & C. 215, 224; *Newport* v. *Bury*, 23 B. 30; *Sutton* v. *Jones*, 15 V. 584; *Nicholson* v. *Tutin*, 3 K. & J. 159; *Sykes* v. *Hastings*, 11 V. 363; *Re Freeman's T.*, 37 Ch. D. 149.

(*k*) [1897] 2 Ch. 80 (C. A.).

without salary, did manual work as a workman which proved beneficial to the business. The Court allowed him remuneration for such work.

4. Accidental Profit, Escheat, and Executors Act, 1830.

A trustee might formerly from accidental circumstances profit by his trust, as where the *cestui que trust* died without heirs before the Intestates Act, 1884; for in that case the lord could not claim by escheat, and, subject to the right of creditors, the trustee might retain possession by virtue of his legal title because no other person could show a title against him in equity (*l*). And the same was the case where, before the Intestates Estates Act, 1884, land was devised to trustees upon trust to convert into money for purposes which either failed or never took effect, and the testator died without heirs (*m*).

In cases before the Act abolishing forfeiture for treason and felony (*n*), in the event of the attainder of the *cestui que trust* for felony, it seems to have been the opinion of Lord Keeper Henley and Sir Thos. Clark, M.R., that if he were pardoned by the Crown, he might enforce the trust (*o*). Lord Mansfield, however, observed that he could find no clear and certain rule to go by; and yet he thought equity would follow the law throughout (*p*). It seems, however, doubtful whether the heir of a person executed for felony could sue the trustee (*q*).

Under the law before 1 Will. 4, c. 40, if there were nothing in a will to exclude the executors from beneficial interest, they were at law entitled to retain residue undisposed of by the will (*r*). But in equity it was always a question of intention (*s*).

(*l*) *Burgess* v. *Wheate*, 1 Eden, 177; *Att.-Gen.* v. *Sands*, Hard. 496; Tudor's L. C. Real Property, p. 219 (4th ed.); *Davall* v. *New River Co.*, 3 De G. & Sm. 394; *Cox* v. *Parker*, 22 B. 168. Cf. *Re Lashmar*, [1891] 1 Ch. 258.

(*m*) *Taylor* v. *Haygarth*, 14 Si. 8; cf. *Re Bond*, [1901] 1 Ch. 15; *Talbot* v. *Jevers*, [1917] 2 Ch. 363; *Walker* v. *Denne*, 2 V. 185; *Cradock* v. *Owen*, 2 Sm. & Gif. 241.

(*n*) 33 & 34 Vict. c. 23.

(*o*) See 1 Eden, 210, 255.

(*p*) 1 Eden, 236.

(*q*) See Br. Ab., tit. " Feff. al Us.," 34.

(*r*) See *Att.-Gen.* v. *Hooker*, 2 P. W. 340; *Urquhart* v. *King*, 7 V. 225.

(*s*) *Middleton* v. *Spicer*, 1 Bro. Ch. 201; *Cradock* v. *Owen*, 2 Sm. & G. 241; *Russell* v. *Clowes*, 2 Coll. 648; *Dacre* v. *Patrickson*, 1 Dr. & Sm. 182; *Kilford* v. *Blaney*, 31 Ch. D. 56; *Re Glukman*, [1908] 1 Ch. 552 (C. A.), in H. of L. *sub nom. Att.-Gen.* v. *Jefferys*, [1908] A. C. 411. For a recent case where the executor was held entitled to take beneficially, see *Re Howell*, [1915] 1 Ch. 241; and for cases where the contrary was held, see *Re Chapman*, [1922] 1 Ch. 287; [1922] 2 Ch. 479; *Re Jones*, [1925] Ch. 340.

The statute threw on the executor the burden of proving that the testator intended him to take beneficially (*t*).

Section 49 of the A. E. Act, 1925 (taking the place of section 1 of 1 Will. 4, c. 40), provides : " Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications :—

. . . . . .

" (b) The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part of this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially."

By section 33 of the A. E. Act, 1925, on the death of a person intestate as to any real or personal estate, the same is to be held by his personal representative, as to the real estate upon trust for sale, and as to the personal estate for conversion into money; and, after discharging liabilities, the net residuary estate of an intestate is to be distributed in the manner mentioned in section 46. The Intestates Estates Act, 1884, is repealed by the A. E. Act, 1925, and by section 46, sub-section 1 (vi) of such last-mentioned Act it is provided (in effect) that in default of any person taking an absolute interest under the provisions thereinbefore mentioned, the residuary estate is to belong to the Crown, or to the Duchy of Lancaster or Duke of Cornwall (as the case may be) as *bona vacantia*; but the Crown (or the Duchy or Duke) may, out of property so devolving " provide, in accordance with the existing practice, for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision."

By the Judicial Trustees Act, 1896, which gave power to the Court to appoint a judicial trustee, it is provided by section 1, sub-section 5 that there may be paid to a judicial trustee out of the trust property such remuneration, not exceeding the prescribed limits, as the Court may assign in each case (*u*). The Public Trustee Act, 1906, which establishes the office of public trustee,

(*t*) *Per* Lord Hatherley, *Williams* v. *Arkle*, p. 630.
(*u*) Jud. Trustee Rules, 1897, 1899, and 1910.

provides by section 9, sub-section 1, that there shall be charged in respect of the duties of the public trustee such fees, whether by way of percentage or otherwise, as the Treasury with the sanction of the Lord Chancellor may fix (*x*); and by sub-section 5 the incidence of the fees as between capital and income are to be determined by the public trustee.

The Trustee Act, 1925, s. 42, provides that where the Court appoints a corporation, other than the public trustee, to be a trustee either solely or jointly with another person, the Court may authorise the corporation to charge such remuneration for its services as trustee as the Court may think fit.

In *Re Bagnall's Trusts*, *Flynn* v. *Dalgleish* (*y*) a policy without participation in profits was held by a trustee as security for the repayment of moneys properly lent to a tenant for life under the trusts of a settlement. The trustee by the payment of an additional annual premium converted the policy into one with participation in profits, and was held entitled to the profits or bonus which ultimately became payable. It is to be observed that the policy itself was not in settlement; the policy was merely security for the moneys lent out of the settled fund.

In *Re Dover Coalfield Extension, Ltd.* (*z*), the D. Co. having purchased shares in the K. Co., transferred certain of such shares to C., one of its directors, to qualify him to become a director of the K. Co. and to represent on that company's board the interests of the D. Co. C. executed a declaration of trust in favour of the D. Co. of the shares so transferred. It was held by the Court of Appeal that C. was not liable to account to the D. Co. for remuneration received by him as director of the K. Co. In *Williams* v. *Barton* (*a*) the defendant was a clerk to a firm of stockbrokers, B. & Co., and by the terms of his employment he was entitled to half of the fees earned on work introduced by him. Upon the recommendation of the defendant B & Co. were employed to value the securities of a testator of whose will the defendant was one of the trustees, and B. & Co. paid to the defendant a sum representing half the fees earned by them by making such valuation. It was held by Russell, J. that the defendant must account to the

(*x*) Pub. Trustee Fees Order, 1925.

(*y*) [1901] 1 Ir. R. 255, *sed quære*; see *Re Payne's Settlement*, 54 L. T. 840.

(*z*) [1908] 1 Ch. 65; and see *Bath* v. *Standard Land Co., Ltd.*, [1911] 1 Ch. 618.

(*a*) [1927] 2 Ch. 9.

trust for the sum so received by him. The learned Judge said (*b*) that *Dover Coalfield Extension, Ltd.* (*c*), was a very different case and that in that case the director was appointed to be such before he became a trustee of the shares. It would appear, however, from the report of *Dover Coalfield Extension, Ltd.*, that the appointment of C. as a director of the Kent Co. and the transfer to him of qualifying shares were parts of one transaction, the arrangement throughout being that C. should obtain and hold the shares as a trustee for the Dover Co.

(*b*) [1927] 2 Ch., p. 12. (*c*) [1908] 2 Ch. 65.

TOWNLEY *v.* SHERBORNE.

1634. Bridg. Rep. 35 (*a*).

Liability for a Co-Trustee.

How far a person is liable for the acts and receipts of a co-trustee.

Upon hearing and debating of the matter, as well on the 15th as the 18th of June last, the Court being assisted with Hutton and Jones, JJ., upon the plaintiff's bill of review, for the reviewing and reversal of a decree made in a cause, wherein Richard Mountford, deceased, executor of Thomas Challoner, was plaintiff, against the now plaintiff, and Thomas Forster, Esquire, concerning the sum of £1,700, raised out of the rents and profits of certain lands and tenements in Linsted, Ardingley, and Worth, in the county of Sussex, in trust for the said Thomas Challoner, during his minority, and which the now plaintiff, by the decree of this Court, was to pay, in case the said Forster should fail to pay the same.

* * * * * * *

Argument for Plaintiff (*b*).—That the plaintiff was decreed to pay £1,700 as raised out of the profits of the infant T. Challoner's lands, settled upon an account made up by the said T. Forster with the said infant after he came of age, to which account the plaintiff was neither party nor privy, nor ever consented, nor ought to be bound thereby. That the plaintiff is made liable to the payment of all the profits raised out of the said infant's estate, whereas he never received any profits. That although he gave some acquittances, yet the same were only for the three first half-years, and were but to balance an account, the moneys disbursed amounting to as much as the receipts. That there being three other trustees with him he ought not to be charged with more than he himself received, especially as the

(*a*) S. C. Cro. Car. 312. (*b*) Abridged from the report.

other parties trustees and who received the profits were, or were reputed to be, men of ability and responsible.

* * * * * * *

And it appeared by the confession of the now plaintiff, and by his answer to the former bill, and by the acquittances now produced, that the now plaintiff joined with the said Thomas Forster in giving acquittances for the three first half years' rents; but it did not appear that he ever received any after, or gave any more acquittances; but it doth appear by the proofs, that the said Thomas Challoner the uncle, who had the assignment from Lovell, did receive the rents of the tenants, and paid the same over to the said Thomas Forster; and that, when the infant came of age, he called the same Thomas Forster and Thomas the uncle to an account; and that they did account; and that the said Thomas Forster did then deliver him a book of account, which the defendant now produced in Court; by which it did appear that for the three first half-years the rents were received by the said Thomas the uncle, and by him paid to the now plaintiff and the said Thomas Forster, for the use of the infant; but for all the subsequent time the same were received by the said Thomas Challoner the uncle, and by him paid to the said Thomas Forster alone, who (as was not now denied) was at the time of such receipts generally taken to be of great ability, and responsible, as it also appeared by the proofs; that the said infant, after he came of age, had declared the said Thomas Forster to be his debtor, and did by his will, read in Court, give the said sum of £1,700 to the said Mountford as a debt owing by the said Thomas Forster solely, not mentioning the now plaintiff. Upon all which this Court was fully satisfied that the now plaintiff received no penny of profits after the three first half-years; but whether he ought to be charged with all that the said Thomas Forster received, being a co-trustee with him, in respect the said Thomas Forster is now declined in his estate (as is conceived) this Court somewhat doubted.

* * * * * * *

Whereupon his Lordship, after long and mature deliberation on the case, and serious advice with all the said Judges, did this

day, in open Court, declare the resolution of his Lordship and the said Judges: That where lands or leases were conveyed to two or more upon trust, and one of them receives all, or the most part of the profits, and after dieth or decayeth in his estate, his co-trustees shall not be charged, or be compelled in this Court to answer for the receipts of him so dying or decayed, unless some purchase, fraud, or evil dealing appear to have been in them to prejudice their trust; for they being by law joint tenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by. And, it being the case of most men in these days, that their personal estates do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part of their real estate, to make up the same, either by the sale or perception of the profits; and if such of these friends, who carry themselves without fraud, should be chargeable out of their own estates for the faults and deficiencies of their co-trustees, who were not nominated by them, few men would undertake any such trust.

And if two executors be, and one of them waste all, or any part of the estate, the devastavit shall, by law, charge him only, and not his co-executor; and, in that case *equitas sequitur legem*, there having been many precedents resolved in this Court, that one executor shall not answer nor be charged for the act or default of his companion.

And it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, *it falling out many times that some of the trustees live far from the lands*, and are put in trust out of other respects than to be troubled with the receipt of the profits.

But his Lordship and the said Judges were of opinion, that if two trustees were, and one of them, without warrant of the party that trusteth him, or of a Court of equity, assigneth his estate, and the assignee doth receive the profits, and become non-solvent, he that made the assignment shall answer it for him, but the other original trustee shall answer for no more than what he receiveth himself, because the assign cometh not in by him, or his assent or appointment. And that in case, if the original

trustee, that did not make the assignment, receive the whole profits and become non-solvent, neither the assignor nor the assignee shall be answerable for them.

And if an obligation be made to two in trust, and one of them release the whole debt, as by law he may, this shall not charge his companion for any part. And albeit, in all presumption, this case hath often happened, yet no precedent hath been produced to his Lordship or the Judges, that in any such case the co-trustee hath been charged for the act or fault of his companion. And, therefore, it is to be presumed that the current and clear opinion hath gone, that he is not to be charged (it having not, till of late, been brought in question) in a case that, by all likelihood, hath frequently happened.

But his Lordship and the said Judges did resolve that if, upon the proofs or circumstances, the Court be satisfied that there be *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he may be charged, though he received nothing.

And his Lordship and the said Judges did declare, that in this particular case they did not find any material proof against Mr. Townley, to make his case worse than the general case aforesaid, but rather better (except only for the three half-years' rent, which he joined in acquittance with Mr. Forster); for the receipt of the profits alone by Mr. Forster is no breach of trust in Mr. Townley; and Mr. Challoner, when he came of full age, took Mr. Forster for his debtor.

And therefore it was ordered and decreed, that so much of the said decree as chargeth Mr. Townley with any more of the profits than the three half-years, for which he joined in acquittance, shall be reversed; but as for those three half-years' profits, if the same were not disbursed or employed for the use of Mr. Challoner, then for so much thereof as hath not been so disbursed or employed, the said complainant Mr. Townley ought to be answerable, and the defendant may call the plaintiff before Mr. Page, one of the Masters of this Court, to audit the account touching these three half-years, if any difference be thereabouts. And lastly, it is ordered that the recognisances given on the plaintiff's part, to perform the order of this Court, be discharged.

BRICE *v.* STOKES.

1805. 11 V. 319; 8 R. R. 164.

Liability of Trustee for the Receipts of his Co-Trustee.

A trustee charged, though he did not receive the money, where he joined in the receipt: the sale unnecessary; and permitted his co-trustee to keep and deal with the money contrary to the trust.

But not charged in respect of the interest of one of the *cestuis que trust*, having notice of the breach of trust, and acquiescing.

Distinction between trustees and executors, in favour of the former, where one who has not received the money has joined in the receipt, approved.

By the decree in this cause an account was directed of the money arising by sale of part of the testator's estates, come to the hands of Henry Mooring, John Fielder, and John Sparrow, the trustees, or their executors, etc.; and an inquiry, in what manner the purchase-money was paid, the receipts signed, and in what manner and by whom the interest was paid during the lives of Mooring and Fielder, and in whose hands the principal remained.

The Master's report stated the will of John Taylor, devising and bequeathing to his executors, Sparrow, Mooring, and Fielder, their heirs, executors, etc., all his freehold and leasehold estates, upon trust to pay the rents and profits to the testator's niece, Elizabeth Sparrow, while unmarried, and after her marriage, upon trust for her, her heirs, executors, etc.; and he gave full power to his said trustees and executors, and the survivors, etc., to sell and dispose of all or any part of the said estates; and directed the moneys arising from such sale or sales to be put out by his said trustees, or the survivors, etc., upon government or real security; and such moneys and the interest, and proceeds thereof, in the meantime, to be applied upon the trusts before directed as to the estates, and the rents, etc.; and he declared that the trustees, and the survivor, etc., should have full power

and authority to make such settlement of all or such of the estates as should be unsold, and the money produced by the sale, as the said trustees should judge fit, on the marriage of Elizabeth Sparrow, to the use of her and her issue, and under such restrictions as his said trustees, or the survivors of them, should think fit and proper; and he directed, that his said trustees and executors should not be answerable or accountable for any loss which might happen of all or any part of his real and personal estate, so as such loss be not through their wilful neglect or default; and that one of them should not be answerable for the others or other of them, or for the acts, receipts, payments, or defaults of the other or others of them, but each of them for himself and for his own acts, receipts, and defaults only.

The report also stated the marriage of Elizabeth Sparrow with Thomas Brice, the plaintiff, in 1783, upon which occasion a settlement was made to the separate use of Mrs. Brice for life, with remainders to her husband surviving her, for his life, and to the issue. She died leaving no issue in September, 1784. That settlement also contained a power, similar to that in the will, to the trustees to sell, with the consent of Mrs. Brice, if living, the receipt of the trustees or the survivor to be a discharge to the purchaser, and forthwith, and with all convenient speed, to invest the money in their names, upon government or real securities, etc.; with a declaration, that the trustees, their heirs, etc., should not be chargeable with, or accountable for, any more of the said trust moneys and premises, than he or they should actually receive, nor with or for any loss which should happen, of the same moneys and premises, or any part thereof, so as such loss happened without his or their wilful default; nor the one for the other of them, but each of them only for his own acts, deeds, receipts, disbursements, and defaults.

The report further stated that, by indentures dated November 27, 1784, it was witnessed, that Mooring and Fielder, in consideration of the sum of £1,260 to them paid (who with the approbation of Thomas Brice) by Robert Lillington, conveyed part of the freehold estate to him and his heirs; for which sum of £1,260, the said consideration-money, Mooring and Fielder respectively signed a receipt on the back of the deed. No part of

that sum was laid out; but some money, by way of interest on part of it, was paid by Fielder to Brice. Fielder died insolvent in April, 1794, and Mooring died in October following.

The Master certified that, though the evidence appeared exceedingly contradictory, yet, as the receipt for the £1,260, the consideration-money, written on the back of the conveyance, was signed both by Mooring and Fielder, and witnessed by four witnesses as to the signatures by them, it must be presumed that they received such consideration-money; therefore the defendant Stokes, as executor of Mooring, and Braxton, the surviving administrator, with the will annexed of Fielder, ought to be charged with the consideration-money and interest.

Exceptions were taken by the defendant Stokes to the Master's report, for charging the defendant, as executor of Mooring with the sum of £1,260, as having been received by him with Fielder, and interest.

The examination of the plaintiff Brice stated, that he was ignorant of the treaty for the sale, except that, for the purchaser's satisfaction he joined in the conveyance. Mooring resided at Christchurch, twelve miles from Lymington, where the plaintiff and Fielder resided, the latter being an attorney. The plaintiff never received any money from Mooring, but received various sums from Fielder, by way of interest for part of the trust estate. On account of Mooring's residing at a distance, the plaintiff never applied to him for any interest during the life of Fielder, but always applied to Fielder, who lived near him.

The evidence as to the fact of the payment was contradictory. Mooring's widow stated that she was present at the execution of the conveyance, but did not see the money paid to any one. Fielder told Mooring it was necessary for him to execute the conveyance and sign the receipt, to which Mooring objected, alleging that Fielder never consulted him in the management of the trust: but Fielder pressed him, saying it was only a matter of form, for he should receive the purchase-money, and place it in the stocks for the benefit of the children; and at length Mooring, after much hesitation, executed.

There was also evidence, that among Mooring's papers was found an account, in the handwriting of Fielder, showing that

the whole of the money was received by Fielder, and the greater part invested in securities; and that, by an account discovered among Fielder's papers, it appeared that he received the money, deducted £400 for legacies, retaining £860, for which he paid interest to the plaintiff.

Mr. Romilly and Mr. Hart, in support of the exceptions * * * It was indispensably necessary for the trustee to join for conformity. The distinction between the cases of an executor and a trustee, though much discussed, has never been overruled. As it is not necessary for the executor to join, his act in joining makes him liable; but as it is necessary for a trustee to join, the mere circumstance that he joins in the receipt, in order to make a title, is not sufficient to charge him, unless you go farther, and show that he actually received the money.

Mr. Richards and Mr. Bell, for the report.—This is not the ordinary case, but the case of a trustee voluntarily joining in this sale, for the mere purpose of converting real estate into personal, the personal estate being equal to all the charges, and no purpose to be answered. * * * There is no evidence that can weigh against the signature of the receipt. The paper writing by Fielder charges him, admitting that he received the money; but it does not discharge Mooring. To counteract the evidence from the receipt, he must produce the most satisfactory evidence that he joined for conformity only, and is, therefore, within the indulgence allowed to trustees * * *

Lord Chancellor Eldon.—It does not appear for what purpose this sale was made, except for the mere purpose of converting real estate into personal. If the sale was made for a purpose not authorised by the settlement, Brice, the husband, being an executing party, could not complain of that sale. The money must, upon this evidence, be taken to have been paid to Fielder.

At law, where trustees join in a receipt, prima facie, *all are to be considered as having received the money. But it is competent to a trustee, and if he means to exonerate himself from that inference, it is necessary for him to show that the money*

acknowledged to have been received by all was in fact received by one, and the other joined only for conformity.

In the case of executors, it has been said, and well said, to be otherwise (*a*). *An executor, as it is not necessary for him to join, interfering in the transaction unnecessarily, the inference is just the other way; he is to be considered as assuming a power over the fund, and therefore answerable for the application, as far as it is connected with the particular transaction in which he joins.* Upon considering the cases paring down the rule of late, I repeat what I have said upon a former occasion (*b*), that it is much safer for executors to abide by a general rule of that sort than to lay down a rule, trying the application of it by looking to particular circumstances in particular cases, which will raise very different inferences in different minds.

In this case it was absolutely necessary that all the trustees should join in the receipt; for the law empowering the sale is the settlement, which, in principle and terms, requires that the purchaser should not be discharged but upon the joint receipt of all. The money was not, in a strict sense, received by both trustees; for the weight of evidence is, that Mooring let Fielder, a professional man, circumvent him a little in taking into his own hands the money, probably upon some confidence that he would lay it out either in the funds, or such other security as it might be invested in, consistently with the settlement, *viz.*, a good real security. It is a clear fact now that it remained with Fielder until his death in 1794.

Two questions arise: 1st, whether Brice the husband can complain with respect to his interest in the produce of this sale as against Mooring? 2ndly, whether those who are to take after him can complain?

It is clear, upon settled cases, that, if there are two trustees, and a transaction takes place, in which the fund is taken out of the state in which it ought to have remained, and is not placed in the state in which it ought to be, but is kept in hands that ought not to retain it, if any particular *cestui que trust* has acted

(*a*) *Chambers* v. *Minchin*, 7 V. 198, 6 R. R. 111.

(*b*) See *Shipbrook* v. *Hinchinbrook*, 11 V. 252, 16 V. 477, 8 R. R. 138; *Langford* v. *Gascoyne*, 11 V. 333, 8 R. R. 170.

in authorising that as much as the trustee who has not the money in his hands, and continues to permit it to be so treated, in a question between that *cestui que trust* and that trustee, the latter cannot be called upon by the former. There is very satisfactory evidence that Brice must be considered as having for ten years permitted this money to remain with Fielder alone, and therefore cannot complain, as against Mooring, that it was not laid out by Fielder with Mooring. Upon the evidence, Brice received the interest from Fielder alone, having no communication with Mooring until shortly before or after the death of Fielder, and made no demand upon Mooring. He ought to be taken upon the account to know that, as late as 1786, this was cash in the hands of Fielder, charged in account as one of the executors having that money. There is not one item in respect of which he debits himself that does not expressly name the security upon which the money was out, except the sum of £860; and then it is no longer interest at £4 per cent. but £5 per cent., charging himself with a larger interest, after he received it, than he gave credit for before he received it. Afterwards, from 1787, he proceeds dealing with Fielder only, receiving the interest of that particular sum until 1794. The result of the evidence is that, with Brice's permission, this money was suffered to remain with Fielder upon his personal security: that if Mooring knew as much as Brice, so Brice knew as much as Mooring, and cannot complain that this was a misapplication, permitting it with respect to his own interest.

Mooring also placed so much confidence in Fielder that, though the money got into the hands of Fielder alone, it is very difficult to say, as against those who come after Brice, that Mooring is not to be answerable. This is a sale under a power, but without necessity. This is an act that never could have been done by the mere exercise of the judgment of one of the trustees, enabling him to determine that it was necessary. There was no necessity in respect of which the other should join. But, though a trustee is safe, if he does no more than authorise the receipt and retainer of the money, as far as the act is within the due execution of the power, yet, if it is proved that a trustee, under a duty to say his co-trustee shall not retain the money beyond the

time during which the transaction requires retained, and says, with his knowledge, and therefore with his consent, the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that, for ten years together, the question turns upon this: not whether the receipt of the money was right, but whether the use of it, subsequent to that receipt, was right, after the knowledge of the trustee that it had got into a course of abuse. Of that, it seems, Mooring was distinctly informed, the paper connected with the marriage settlement stating upon the face of it a breach of trust. Though not very intelligible, it shows that an account of the securities taken by Fielder for £1,260 was put into the hands of Mooring. That gave him information that Fielder was lending some of the money upon notes, some upon bonds; and, as soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it.

The conclusion is, that Brice cannot call upon Mooring as to the interest; but as to the principal, Mooring is answerable, but he is not to be charged with more than was actually misapplied (*c*).

NOTES.

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2. Persons in the position of trustees quoad liability, p. 592.
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3. As to getting in outstanding property, etc., p. 596.
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5. Investment of trust property, p. 613.
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(*c*) See *Shipbrook* v. *Hinchinbrook*, 11 V. 252; 16 V. 477; 8 R. R. 138; *Langford* v. *Gascoyne*, 11 V. 333; 8 R. R. 170.

Townley v. Sherborne—Brice v. Stokes.

1. General Rules as to Duties of Trustees.

The confidence reposed in a trustee is of a strictly personal character, and the duties connected with the trust must, subject as hereinafter appears, be performed by him personally (*d*). If he allows or appoints his co-trustees or others to act for him, and by or through their acts or defaults any loss arises to the trust estate, then (if there is no special provision in the trust deed and the case does not fall within section 23 of the Trustee Act, 1925), he will incur liability, unless he can show that he has acted within the limitations adopted by the Courts (*e*), or that his case is within the statutory provisions for the relief of trustees (*f*).

In *Speight* v. *Gaunt* (*g*), Lord Blackburn observed that "the authorities cited by the Master of the Rolls (*h*) I think show that as a general rule a trustee sufficiently discharges his duty if he takes, in managing trust affairs, all those precautions which an ordinary prudent man of business would take in managing his own." Lord Herschell laid down the same principle in *Rae* v. *Meek* (*i*), saying he thought it established by *Knox* v. *Mackinnon* (*k*) and *Whiteley* v. *Learoyd* (*l*).

Lindley, L.J., however, in *Whiteley* v. *Learoyd* (*m*), defined the duty rather more strictly. "The duty of a trustee," he said, "is not to take such care only as a prudent man would take if he had himself only to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide."

The affairs of the trust business must be conducted in accordance with the terms of the trust (*n*). "A trustee has a discretion,"

(*d*) See, however, section 23 of the Trustee Act, 1925.

(*e*) See judgment, Jessel, M.R., *Speight* v. *Gaunt*, *infra*, adopted *Re Brogden*, 38 Ch. D. p. 555; and compare, as to the liabilities of persons in a fiduciary position, though not strictly trustees, *O'Brien* v. *Mitchelstown, etc., Society*, [1903] 1 Ir. R. 282.

(*f*) The Trustee Act, 1888, ss. 1 and 8; the Trustee Act, 1925, ss. 30 and 62. And see Notes, *infra*.

(*g*) 9 A. C. 1, 19.

(*h*) Jessel, M.R., the authorities referred to being *Ex p. Belchier*, Amb. 218; *Bacon* v. *B.*, 5 V. 331, followed in *Re De Clifford*, [1900] 1 Ch. 707; *Joy* v. *Campbell*, 1 Sch. & L. 328, 341; *Clough* v. *Bond*, 3 My. & C. 490, 491.

(*i*) 14 A. C., at p. 569; cf. *Shepherd* v. *Harris*, [1905] 2 Ch. 310.

(*k*) 13 A. C. 753.

(*l*) 33 Ch. D. 347.

(*m*) 33 Ch. D., at p. 355.

(*n*) *Re Brogden*, 38 Ch. D 546, 554.

observed Fry, L.J. (*o*), " as to the mode, and often as to the time in which he shall carry his duty into effect. But his discretion is never an absolute one; it is always limited by the duty, the dominant duty, the guiding duty, of recovering, securing, and applying the trust fund. And no trustee can claim any right of discretion which does not agree with that paramount obligation."

Delegation of Trusts. (see " Custody," etc., *infra*).—1. As a general rule (apart from statute), a trustee may not delegate his trust, unless there is a moral necessity, arising from the usages of mankind, to employ an agent, or the terms of the trust instrument expressly authorises delegation (*p*). The exception of moral necessity includes *what is usual in the regular course of business in administering the property* (*q*).

2. But even if delegation be lawful, yet if there is unreasonable delay in requiring an account from the co-trustee, co-executor, or agent to whom the trust is delegated, liability may arise (*r*).

3. To authorise delegation to an agent, a proper selection must be made, *e.g.*, trustees must not employ a professional man to do work for which his professional practice does not qualify him, for instance, a solicitor must not be employed to select a valuer (*s*).

Delegation of trusts as here used includes not only the entrusting of property to another, but also the case of a trustee acting on the opinion of another without exercising his own judgment (*t*).

In *Speight* v. *Gaunt* (*u*), a broker, employed by a trustee to buy securities of municipal corporations, gave the trustee a bought note which purported to be subject to the rules of the London Stock Exchange, and obtained on February 24 the purchase-money from the trustee, on the representation that it was payable on the next day (February 25), which was settling day on the London Stock Exchange. The broker never purchased the securities, misappropriated the money, and became insolvent on March 28 or 29. There was some evidence that the form of the note would have

(*o*) 38 Ch. D. 571.

(*p*) See *Re Mackay*, [1911] 1 Ch. 300.

(*q*) *Ex p. Belchier*, Amb. 218; *Speight* v. *Gaunt*, 9 A. C. 1, 19; *Re Gasquoine*, [1894] 1 Ch. 470; *Re Weall*, *infra*, p. 660; *Lowe* v. *Shields*, [1902] 1 Ir. R. 320; *O'Brien* v. *Mitchelstown, etc., Society*, [1903] 1 Ir. R. 282.

(*r*) See *Re Sheppard*, [1911] 1 Ch. 50.

(*s*) *Fry* v. *Tapson*, 28 Ch. D. 268; *Re Weall*, 42 Ch. D. 674; *Jobson* v. *Palmer*, [1893] 1 Ch. 71; *Whiteley* v. *Learoyd*, 12 A. C. 727.

(*t*) Cf. *Wynne* v. *Tempest*, 13 T. L. R. 360.

(*u*) 22 Ch. D. 737; 9 A. C. 1; *Re Munton*, [1927] 1 Ch. 262.

suggested suspicion to experts, but it was held not sufficient to cause suspicion in an ordinary man of business; there was also evidence to show that some of the securities were only to be obtained from the corporations direct. It was held by the House of Lords (Lord Selborne, L.C., and Lords Blackburn and Watson, *dubitante* Lord Fitzgerald) that the trustee was not liable.

Lord Selborne, in that case, p. 5, after referring to the statutory indemnity in Lord Cranworth's Act, proceeds, "Neither the statute, however, nor the doctrine of *Ex p. Belchier* (*x*), authorises a trustee to delegate, at his own mere will and pleasure, the execution of his trust, and the care and custody of the trust moneys to strangers, in any case in which (to use Lord Hardwicke's words) there is no 'moral necessity from the usage of mankind' for the employment of such an agency. The cases of *Rowland* v. *Witherden* (*y*), *Bostock* v. *Floyer* (*z*), and many others, show that trustees, bound to invest trust moneys in authorised securities, are *prima facie* answerable for the proper care and custody of such moneys, until they are actually so invested; and will not be exonerated from liability if, in the meantime, they leave them in other hands, though the hands of professional advisers or agents, to whose assistance for many purposes connected with the trust, they may properly have recourse."

Lord Selborne referred to the omission to take active steps between February 24 and March 28 or 29 to obtain from Cooke (the broker) the transfers or documents of title which he ought to have received. But on this point he held that Cooke was during the whole of the interval irretrievably insolvent, so that nothing could by any diligence have been recovered from him, and that a trustee is not to be held liable for a want of diligence which does not result in loss (*a*). Lord Selborne pointed out that the case would have been different if the broker had entered into contracts with the corporations for direct loans to them and had reported to the respondent that he had done so. There would in such case be no moral necessity or sufficient practical reason for payment of the money to the agent (*b*). The rule in *Speight* v. *Gaunt* applies to

(*x*) Amb. 218.
(*y*) 3 Mac. & G. 568, 574.
(*z*) 35 B. 603, 606; 1 Eq. 26.
(*a*) See the cases cited by North, J., in *Re Brogden*, 38 Ch. D., at pp. 557, 558; *Re Greenwood*, 105 L. T. 509.
(*b*) 9 A. C., at p. 11; and see *per* Lord Blackburn, p. 27.

a case where a co-trustee is employed and paid as broker under a clause in the will creating the trust (*c*).

In *Re Gasquoine* (*d*), two executors, *bona fide* and without cause for suspicion, and in accordance with the usual course of business, and in order to realise the estate, entrusted to a third executor, who was a stockbroker, certain registered bonds for sale by him as a stockbroker; they also enabled him to unregister the bonds so as to be *in his absolute control*. The unregistering of such bonds was in accordance with the usual practice, but another mode of realisation might have been adopted which, though very unusual, would have been safer. The co-executors did not require an account from time to time, but the stockbroker co-executor from time to time paid moneys into the joint account as proceeds of sale, and they had consequently no suspicion. It was held by the Court of Appeal that the co-executors were not liable on either of these grounds for the default of the stockbroker co-executor in misappropriating part of the proceeds of sale.

In *Re City Equitable Fire Insurance Co.* (*e*), it was laid down by Romer, J., and approved by Warrington and Sargant, L.JJ., in the Court of Appeal, that if an act or omission amounts to a breach of a person's duty and therefore to negligence, he nevertheless is not guilty of wilful neglect or default unless he *knows* that he is committing, and intends to commit, a breach of his duty, or is recklessly careless whether his act or omission is or is not a breach of duty. In *Re Munton* (*f*), Astbury, J., took the view that since the decision in *Re City Equitable Fire Insurance Co.*, a trustee is not guilty of wilful default unless he is conscious that his act or omission is a breach of duty or recklessly careless on the point.

It is to be observed that the Trustee Act, 1925, s. 23, contains a new provision authorising, in wide terms, trustees and personal representatives, instead of acting personally, to employ and pay an agent, and relieving trustees and personal representatives from responsibility " for the default of any such agent if employed in good faith " (*g*). The terms of this enactment are very wide; but it seems clear that it would not authorise a delegation of any discretion. A trustee, moreover, will not be entitled, it is thought,

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(*c*) *Shepherd* v. *Harris*, [1905] 2 Ch. 310.
(*d*) [1894] 1 Ch. 470; and see *Re Munton*, [1927] 1 Ch. 262.
(*e*) [1925] Ch. 407, 434, 525.
(*f*) [1927] 1 Ch. 262.
(*g*) See the section set out, *post*, p. 612.

in spite of this enactment, to employ an agent to do acts, ordinarily done by a trustee himself, where there is no moral necessity or other sufficient reason for such employment (*h*).

A further new provision of importance is contained in section 25 of the Trustee Act, 1925, which enables a trustee who is intending to remain out of the United Kingdom for a period exceeding one month to delegate to any person by power of attorney the exercise during his absence of any powers or discretions vested in him as such trustee. The power of attorney is not to come into operation unless or until the donor is out of the United Kingdom, and the power is revoked by his return. By sub-section 2 the donor of a power of attorney given under the section is to be liable for the acts or defaults of the donee " in the same manner as if they were the acts or defaults of the donor."

2. Persons in the Position of Trustees quoad Liability.

The liability of the trustees for breach of trust arises though the trust be created by the voluntary gift of the trustees themselves (*i*) : though they get no benefit from the breach : and in some cases, though the trust be of land and created without writing (*k*) : or if a person acts as trustee though not legally appointed, so becoming a trustee *de son tort* (*l*). So an executor *de son tort* becomes liable as executor to the extent of the assets he receives (*m*).

Proof of a will implies acceptance of all the trusts thereby vested in the executors as trustees (*n*) ; an executor of an executor who has accepted the executorship of the later testator cannot renounce the executorship of the earlier testator : *Brooke* v. *Haymes* (*o*). Nor can an executor renounce after he has in any way acted or inter-

(*h*) See the judgment of Parker, J., in *Re Mackay*, [1911] 1 Ch. 300, in which case the testator's will contained provisions for employment of agents and for indemnity.

(*i*) *Drosier* v. *Brereton*, 15 B. 221 ; Underhill on Trusts (8th ed.), pp. 470, 477.

(*k*) *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*l*) *Rackham* v. *Siddall*, 16 Si. 297 ; 1 Mac. & G. 607 ; *Derbishire* v. *Home*, 3 De G. M. & G. 80 ; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58 ; *Aveline* v. *Melhuish*, 2 De G. J. & S. 288 ; *Ex p. Norris*, L. R. 4 Ch. 280 ; *Stone* v. *S.*, L. R. 5 Ch. 74 ; *Lyell* v. *Kennedy*, 14 A. C., at pp. 459, 463 ; *Re Biss*, [1903] 2 Ch. 40 ; Underhill on Trusts (8th ed.), p. 515.

(*m*) Williams on Exors. (11th ed.), p. 177 *et seq.* ; *Nothard* v. *Procter*, 1 Ch. D. 6 ; *Blackett* v. *B.*, 19 W. R. 559 ; *Steer* v. *S.*, 2 Dr. & Sm. 311 ; *Dowdeswell* v. *D.*, 9 Ch. D. 294 ; *Parkin* v. *Seddons*, 16 Eq. 34 ; *Re Goods of Moore*, [1892] P. 145.

(*n*) *Mucklow* v. *Fuller*, Jac. 198 ; *Booth* v. *B.*, 1 B., 195 ; *Styles* v. *Guy*, 1 Mac. & G. 431 ; Williams on Exors. (11th ed.), pp. 1032, 1416-7.

(*o*) 6 Eq. 25.

meddled with the estate. In *Re Stevens* (*p*), it was held that a letter to an insurance company signed by three persons named as executors, asking the company to pay certain policy moneys (forming part of the testator's estate) to a mortgagee of the policy was such an intermeddling as prevented any of them from renouncing. In the same case it was held that delay in proving and recovering the money, which caused a loss of interest, was not sufficient to charge executors with wilful default (*q*).

Although trustees cannot take active steps to dispute their beneficiaries' title, liability may be incurred, if, before accepting a trust it is not ascertained that the title to the property is clear, for persons accepting a trust cannot dispute the title of their *cestuis que trust* though such title be doubtful (*r*); though they are not bound to hand over the property to them after receiving notice of a superior title in another (*s*).

It is the duty of a trustee when he accepts a trust to make himself acquainted with the trust property and its state, and to get it in if improperly invested, and if he performs his duty in this respect he is not liable for breaches by former trustees (*t*).

To be liable as trustee, a person must be affected with notice that there is a trust (*u*), and in *Hallows* v. *Lloyd* (*v*) it was held that new trustees are not fixed with notice through retiring trustees of incumbrances affecting the trust estate of which no notice appears among the trust documents, and the existence of which, though known to the retiring trustees, is not disclosed to the new trustees.

But a trustee who knows that there is a trust will be liable as such though he does not know who are his *cestuis que trust* (*x*);

(*p*) [1897] 1 Ch. 422.

(*q*) As to "wilful default," see *Re Equitable Fire Insurance Co.*, [1925] Ch. 407.

(*r*) *Shields* v. *Atkins*, 3 Atk. 560; *Pomfret* v. *Windsor*, 2 Ves. Sen. 476; *Kennedy* v. *Daly*, 1 Sch. & L. 381; *Att.-Gen.* v. *Munro*, 2 De G. & Sm. 163; *Stone* v. *Godfrey*, 5 De G. M. & G. 76; *Langley* v. *Fisher*, 9 B. 90; *Newsome* v. *Flowers*, 30 B. 461; *Frith* v. *Cartland*, 2 Hem. & M. 417; *Tennant* v. *Trenchard*, L. R. 4 Ch. 537.

(*s*) *Neale* v. *Davies*, 5 De G. M. & G. 258; Underhill on Trusts (8th ed.), pp. 322—3.

(*t*) *Townley* v. *Bird*, 2 Con. & Law. 405; *James* v. *Frearson*, 1 Y. & C. Ch. 370; *Ex p. Graves*, 25 L. J. Bank. 53; *Youde* v. *Cloud*, 18 Eq. 634; *Re Chapman*, [1896] 2 Ch. 763.

(*u*) *Youde* v. *Cloud*, 18 Eq. 634, 642; *Re Champion*, [1893] 1 Ch. 101.

(*v*) 39 Ch. D. 686, but see and cf. *Re Wasdale*, [1899] 1 Ch. 163, as to the priority of incumbrancers in such a case; and see vol. i, *ante*, p. 124.

(*x*) *Ex p. Norris*, L. R. 4 Ch. 280; *Lyell* v. *Kennedy*, 14 A. C. 437.

and if, in honest mistake as to the meaning of the trust instrument, he pays moneys to the persons who are not entitled, he may be responsible, even though he acts under professional advice (*y*).

Agents, Solicitors: when Constructive Trustees.—If a trustee employs an agent, as for instance a solicitor, so long as the acts done by the person so employed are confined to mere agency on behalf of the trustee, the agent cannot be made accountable for the trustee's breaches of trust (*z*). So bankers are not liable as constructive trustees in respect of trust moneys received and paid out by them for trustees, unless they are privy to a misapplication of those moneys (*a*). But where the agent obtains possession of the trust funds, and his acts are not in strict conformity with his duty as agent, he ceases to be a mere agent, and will be liable as a trustee (*b*).

In *Barnes* v. *Addy* (*c*), a solicitor advised against the appointment of a sole trustee, but prepared a deed of appointment and an indemnity for the trustee. Another solicitor acted for the beneficiaries. Neither had knowledge of a fraudulent design. The funds were misappropriated. It was held that neither solicitor was liable, and Selborne, C., said that " responsibility [of a trustee] may no doubt be extended in equity to others who are not properly trustees if they are found making themselves trustees *de son tort* or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers—transactions of which a Court of Equity may disapprove—*unless these agents receive and become chargeable for part of the trust property, or*

(*y*) See, *e.g.*, *Doyle* v. *Blake*, 2 Sch. & Lef. 243; *Boulton* v. *Beard*, 3 De G. M. & G. 608; *National Trustees Co., etc.* v. *General Finance Co., etc.*, [1905] A. C. 373; *Re Hulkes*, 33 Ch. D. 552. See, however, *Re Allsop*, [1914] 1 Ch. 1; *Re Claridge's Patent Asphalte Co., Ltd.*, [1921] 1 Ch. 543.

(*z*) *Morgan* v. *Stephens*, 3 Gif., at p. 235; *Myler* v. *Fitzpatrick*, 6 Madd. 360; *Keane* v. *Robarts*, 4 Madd. 332; *Maw* v. *Pearson*, 28 B. 196; *Marshall* v. *Sladden*, 7 Ha. 428.

(*a*) *Gray* v. *Johnston*, L. R. 3 H. L. 1; *Keane* v. *Roberts*, 4 Madd. 332; and see *Thomson* v. *Clydesdale Bank, Ltd.*, [1893] A. C. 282; *Coleman* v. *Bucks and Oxon Bank*, [1897] 2 Ch. 243; *Pannell* v. *Hurley*, 2 Coll. 241; *Bodenham* v. *Hoskyns*, 2 De G. M. & G. 903; *Brit. Amer. Elevator Co.* v. *Bank of Brit. N. A.*, [1919] A. C. 658; Underhill on Trusts (8th ed.), p. 526.

(*b*) *Morgan* v. *Stephens*, 3 Gif. 226; *Att.-Gen.* v. *Leicester Corporation*, 7 B. 176; *Hardy* v. *Caley*, 33 B. 365; *Portlock* v. *Gardner*, 1 Ha. 606; *Lee* v. *Sankey*, 15 Eq. 204, 211; Underhill on Trusts (8th ed.), pp. 517—8.

(*c*) L. R. 9 Ch. 244.

unless they assist with knowledge in a dishonest and fraudulent design of the trustees."

This passage has been frequently adopted (*d*). The result appears to be that if an agent or solicitor joins with a trustee in committing a fraud he is liable as a principal (*e*); but that apart from any question of fraud or the like, " he is not liable as constructive trustee " because he acts in what is called an honest breach of trust as agent or solicitor for the trustee " unless he has the trust property vested in him, or so far under his control that he can require it should be vested in him " (*f*).

Nor does the fact that one member of a firm of solicitors takes the trust money make any other member a constructive trustee, unless it be part of the recognised business of the firm to take money on similar terms (*g*). In *Blyth* v. *Fladgate* (*h*), both members of the firm were held liable, but the property in question was in the custody of the firm, and sold by the order of the firm, and the proceeds were paid to the credit of the firm.

Where a solicitor advises a breach of trust for his own benefit, not merely is he liable to the *cestui que trust*, but he will be dealt with under the jurisdiction of the Court over its officers (*i*).

A solicitor-trustee, to whom the management of the trust has been left as the acting trustee, is liable to indemnify his co-trustee against the costs of an action caused by his negligent conduct of the trust business, even where no actual loss has been thereby occasioned to the trust estate (*k*).

(*d*) *Per* Smith, L.J., *Mara* v. *Browne*, [1896] 1 Ch. 209; *per* Baggallay, L.J., *Re Spence*, 51 L. J. Ch. 277; *per* Brett, L.J., *Wilson* v. *Lord Bury*, 5 Q. B. D., at p. 532; *per* Stirling, J., *Re Blundell*, 40 Ch. D. 370; *per* Kay, L.J., *Soar* v. *Ashwell*, [1893] 2 Q. B., at p. 405.

(*e*) *Cullen* v. *Thompson*, Paterson, Sc. Ap. 1447; 4 Macq. H. of L. Sc. Ap. 424, 433; *Re Barney*, [1892] 2 Ch. 265.

(*f*) [1892] 2 Ch., at p. 273; *Mara* v. *Browne*, [1896] 1 Ch. 199 (C. A.); *Brinsden* v. *Williams*, [1894] 3 Ch. 185.

(*g*) *Rhodes* v. *Moules*, [1899] 1 Ch. 236; *Cleather* v. *Twisden*, 28 Ch. D. 340; *Wynne* v. *Tempest*, [1897] 1 Ch. 110; Partnership Act, 1890, ss. 11, 13; Lindley on Partnership (9th ed.), p. 218 *et seq.*

(*h*) [1891] 1 Ch. 337; and see *Midgley* v. *M.*, [1893] 3 Ch. 282; *Lee* v. *Sankey*, 15 Eq. 204; *Rhodes* v. *Moules*, [1895] 1 Ch. 236.

(*i*) *Godwin* v. *Gosnell*, 2 Coll. 457; *Re Chandler*, 22 B. 233; *Re Holl*, 2 Jur. (N.S.) 633; *Re a Solicitor*, [1894] 1 Q. B. 254; *Harris* v. *Rees*, 16 W. R. 91; *Keane* v. *Robarts*, 4 Madd. 332; *Tyler* v. *T.*, 3 B. 550; *Lockhart* v. *Reilly*, 25 L. J. Ch. 697; *S. C.*, 1 De G. & J. 464; *Thompson* v. *Finch*, 8 De G. M. & G. 560; *Bahin* v. *Hughes*, 31 Ch. D., at p. 395; *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685.

(*k*) *Re Linsley*, [1904] 2 Ch. 785, 788; cf. *Re Turner*, [1897] 1 Ch. 536.

3. As to getting in Outstanding Property.

Outstanding Property.—Executors ought not to allow money to remain on personal security without great reason. If they do they will be charged with any loss (*l*), unless they can show that proceedings would have been useless (*m*). The usual rule is that executors must convert within twelve months, and if they delay longer the onus is on them to show reasonable ground for the delay (*n*). And a direction to convert with all convenient speed is no more than the ordinary duty implied in the office of executor (*o*).

In *Sculthorpe* v. *Tipper* (*p*), where the loss took place two years after the testator's death, the trustees were held liable, although one of them did not attain twenty-one until seventeen months after the death of the testator (*q*).

So a trustee is liable for his default in allowing time to elapse so that the debt is statute-barred (*r*) : for neglecting to enforce payment from a receiver (*s*) : for neglecting to realise when ordered by the Court to do so (*t*) : for leaving money outstanding upon personal security when it was held to be their duty to commence compulsory proceedings (*u*), even against a co-executor (*x*), and in particular when the debt was payable by instalments (*y*).

Though as a rule the executors may retain for a year, the nature

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(*l*) See *Re Gasquoine*, [1894] 1 Ch., at p. 476.

(*m*) See *Clack* v. *Holland*, 19 B. 271; *Re Brogden*, 38 Ch. D., at pp. 557, 558; *Re Roberts*, 76 L. T. 483; *Re Greenwood*, 105 L. T. 509.

(*n*) *Hiddingh* v. *Denyssen*, 12 A. C. 624; *Hughes* v. *Empson*, 22 B. 183; *Prendergast* v. *Lushington*, 5 Ha. 171, 176; *Selby* v. *Bowie*, 4 Gif. 300; 11 W. R. 606; *Marsden* v. *Kent*, 5 Ch. D. 598; *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605; *Sculthorpe* v. *Tipper*, 13 Eq. 232; *Gainsborough* v. *Watcombe*, 54 L. J. Ch. 991; *Re Chapman*, [1896] 2 Ch. 763; *Lowson* v. *Copeland*, 2 Bro. Ch. 156; *Wiles* v. *Gresham*, 2 Dr. 258; 5 De G. M. & G. 770; *Re Brogden*, p. 598, *infra*; *Fry* v. *F.*, 27 B. 144; *Devaynes* v. *Robinson*, 24 B. 86.

(*o*) *Buxton* v. *B.*, 1 My. & C. 80.

(*p*) 13 Eq. 232.

(*q*) See also *Bate* v. *Hooper*, 5 De G. M. & G. 338; *Wilkinson* v. *Duncan*, 23 B. 469.

(*r*) *Stone* v. *S.*, L. R. 5 Ch. 74.

(*s*) *Tebbs* v. *Carpenter*, 1 Madd. 291; 16 R. R. 224.

(*t*) *Davenport* v. *Stafford*, 14 B. 319, 338.

(*u*) *Lowson* v. *Copeland*, 2 Bro. Ch. 156; *Bailey* v. *Gould*, 4 Y. & C. Ex 221; *Powell* v. *Evans*, 5 V. 839; *Fenwick* v. *Greenwell*, 10 B. 412; *Bullock* v. *Wheatley*, 1 Coll. 130; *Ticker* v. *Smith*, 3 Sm. & G. 42, 46; *Re Brogden*, 38 Ch. D. 546; *Re Greenwood*, 105 L. T. 509.

(*x*) *Styles* v. *Guy*, 1 Mac. & G. 422; *Egbert* v. *Butter*, 21 B. 560; *Candler* v. *Tillett*, 22 B. 257; *Lowe* v. *Shields*, [1902] 1 Ir. R. 320.

(*y*) *Caffrey* v. *Darby*, 6 V. 488.

of the property must be considered. Where, for instance, there is live stock, which cannot be kept save at great expense, they should sell without delay (*z*). And although trustees ought not to keep up unnecessarily the housekeeping expenses of a testator, they will be allowed a reasonable time for breaking up his domestic establishment (*a*). Even before the statutory power conferred by Lord Cranworth's Act (*b*), it was held that trustees in the exercise of a reasonable discretion might release or compound a debt (*c*), and also give time for payment (*d*).

But where trustees consented to a composition with a bankrupt debtor for £2,000 on bond to the trust, it was held that they were liable to make good the full amount of the debt if it should appear that the whole might have been recovered, and that they could not be exonerated without an inquiry as to what might have been recovered (*e*).

Powers were given by Lord Cranworth's Act to executors and trustees to compound and compromise, etc., and such powers were enlarged by the Conveyancing Act, 1881, s. 37 and by the Trustee Act, 1893, s. 21. But all these enactments have been repealed, and by section 15 of the Trustee Act, 1925, it is provided (*inter alia*) that a personal representative, or two or more trustees acting together, or (under certain conditions) a sole trustee, may (1) allow any claim on any evidence that he or they think sufficient; (2) accept any composition; (3) allow any time of payment; and (4) compromise, abandon, or otherwise settle any claim relating to the estate or trust, and may for any such purpose execute releases, etc., "*without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.*"

Upon the construction of similar words to those set out above in italics which occur in section 21, sub-section 2 of the Trustee Act, 1893, it was held by Eve, J., that the discretion the trustees were called upon to exercise was an active discretion, and that mere supineness on their part left them outside the section altogether. The trustees of a will, therefore, having delayed for

(*z*) *Hughes* v. *Empson*, 22 B., at p. 183.
(*a*) *Field* v. *Beckett*, 29 B. 576.
(*b*) 23 & 24 Vict. c. 145, s. 30.
(*c*) *Blue* v. *Marshall*, 3 P. W. 381; *Ratcliffe* v. *Winch*, 17 B. 216; *Forshaw* v. *Higginson*, 8 De G. M. & G. 827.
(*d*) See *Re Owens*, 47 L. T. 61.
(*e*) See *Wiles* v. *Gresham*, 5 De G. M. & G. 770, affirming *S. C.*, 2 Drew. 258.

six years to call in a debt, after which time the debt became irrecoverable by the debtor's insolvency, were held liable for the loss occasioned (*f*).

In *Re Brogden* (*g*), there were directions exonerating the executors or trustees from recovering money from the partners of the testator for five years from his death. The testator died in 1869. The partners ultimately became insolvent in 1880, before the money had been recovered, and a claim was made against the executors for their delay. North, J., discussed the application to the case of the rule as stated in *Speight* v. *Gaunt* (*h*), "that a trustee discharges his duty if he takes the precautions an ordinary prudent man of business would take in managing his own," and explained that this must be read with the qualification that the trust business ought to be done in accordance with the terms of the trust, that as a trustee investing in securities unauthorised by the trust would be liable, so "a trustee who neglects to call in a sum of money which ought to be called in at once under the terms of the trust will be liable for any loss which may arise from his omitting to do so, however safe and prudent it might have been to leave such moneys outstanding if they had been his own," and held that the trustees were liable for the delay; this judgment was affirmed by the Court of Appeal. Fry, L.J., said: "It has been urged upon us that if a trustee does as much for his *cestui que trust* as he does for himself he has performed his duty. I cannot accept for one moment that view of the duty of trustees. A trustee undoubtedly has a discretion as to the mode and manner, and very often as to the time, in which and at which he shall carry his duty into effect. But his discretion is never an absolute one; it is always limited by the duty, the dominant duty, the guiding duty, of recovering, securing, and duly applying the trust fund. And no trustee can claim any right of discretion which does not agree with that paramount obligation."

So, in *Hiddingh* v. *De Villiers Denyssen* (*i*), Lord Hobhouse said, "It was vigorously contended at the bar by Sir Horace Davey that the true test of an executor's reasonable discretion is to see what a reasonable owner might do. But an *executor's discretion is limited by the duty of bringing the assets into a proper state of*

(*f*) *Re Greenwood*, 105 L. T. 509; and cf. *Re Owens*, 47 L. T. 61, 64.
(*g*) (1888), 38 Ch. D. 546.
(*h*) 22 Ch. D. 727; 9 A. C. 1.
(*i*) 12 A. C. 624, at p. 632; and see *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605.

investment within a reasonable time * * * The onus lies on the executors of proving that they acted *bona fide* and exercised a reasonable discretion. * * * We know nothing as to the confidence the testator had in the investments. But their nature was such as to demand conversion; the executors made no efforts to realise between December, 1881, and July, 1883; the state of the market was such as to create alarm, and the length of time was excessive." The executors were accordingly held liable.

Notwithstanding these decisions, the result of the cases as a whole appears to be that (independently of the protection given by statute) executors may exercise a discretion in retaining beyond the year *unauthorised* investments, although there is no express power of postponement; but in such a case, the onus would be on them to show that the discretion was reasonably exercised.

It is important to bear in mind that by section 4 of the Trustee Act, 1925, it is provided that "A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by the general law."

It has been held that it is not necessarily a breach of trust for an executor to take a new bond in lieu of an old one, instead of calling up the money due thereon (*k*); and that mere refusal by a personal representative to sue for the recovery of outstanding assets will not, in the absence of special circumstances, justify a residuary legatee or next-of-kin in suing the personal representative and the alleged debtor (*l*).

In the case of *Re Owens* (*m*), decided in 1882, but commenced in 1880 (while Lord Cranworth's Act was in force) the testator had died in March, 1878. W then owed money on promissory notes to the testator. Demand of payment was made, but ultimately further time was given. On February 10, 1880, W filed a liquidation petition. The Court of Appeal held that executors had a fair discretion whether they would or would not immediately sue a debtor of the testator for the amount due to the estate; and their not doing so, although loss occurred by the delay, if they exercised a reasonable discretion in considering what was proper, was not necessarily wilful neglect or default for which they were liable.

(*k*) *Charlton* v. *Earl of Durham*, L. R. 4 Ch. 433.
(*l*) *Yeatman* v. *Y.*, 7 Ch. D. 210.
(*m*) 47 L. T. 61; cf. *Re Greenwood*, 105 L. T. 509, *supra*, p. 597.

Townley v. Sherborne—Brice v. Stokes.

In *Buxton* v. *B.* (*n*), where the testator directed his executors to sell his residuary estate (which included certain Mexican bonds), "with all convenient speed," and the trustees, although acting with diligence and good faith, did not sell until seventeen months after the death, it was held that the trustees were not liable. In *Marsden* v. *Kent* (*o*), the testator bequeathed his personal estate upon trust to divide the same between four persons, all of whom were *sui juris*. The estate included three American realty bonds, which were of the value of about £153 each at the time of the testator's death, but had fallen to £54 at the end of the twelve months. One legatee pressed for a sale, the other three said nothing. The trustees, exercising an honest discretion, in hopes of a rise retained the bonds beyond the year. They sold two within fifteen months of the death at £54 each; the other was not sold, and had fallen much further in value. It was held that the trustees were not liable. James, L.J., said, "The executors were entitled to wait twelve months before they converted them. At that time the market had fallen. * * * The executors, in the honest exercise of their discretion, thought it more prudent to wait for a rise, and we think they ought not to suffer because it turns out that they committed an error of judgment. We think we ought to follow *Buxton* v. *B.*"

And in *Re Chapman* (cited *infra*), Rigby, L.J., said: "As far as I know the Court has never laid down that, even with regard to risky securities, such as Turkish Bonds for instance, or to shares in an unlimited company, there is an absolute unvarying obligation on executors and trustees to call them in within the twelve months, regardless of the opinion the executors or trustees may have as to the prudence or the advisability of doing so. Of the cases cited by Lindley, L.J., I may mention those of *Buxton* v. *B.* and *Marsden* v. *Kent*, as showing that there is no such rule, and that the Court has never been so unreasonable as to say to a trustee: There is a fixed binding rule; you have not acted upon it; you have acted as you thought for the benefit of the estate, but what you have done has turned out unfortunately, and you must bear the loss. There is no such rule."

Where the question is as to property which at the death consists of securities of an authorised nature, such as mortgages of real estate, but the subject of them at the death or afterwards has

(*n*) 1 My. & C. 80; and see *Re Chapman*, [1896] 2 Ch. 763, 776.
(*o*) 5 Ch. D. 598.

depreciated so as not to leave the margin which would be required on a trustee's investment, the authorities seem to treat the case as standing on a different footing (*p*).

It has been said that as the Court, in the administration of an estate, would not permit a *real security* to be called in without an inquiry as to its expediency (*q*), so an executor is not obliged to call in a mortgage if the security be good, and the money be not wanted to pay debts (*r*).

In *Ames* v. *Parkinson* (*s*), it was held and treated as a rule, that if a trustee has reason for supposing that a security is not good, his duty will be to call the money in at once. But this case was examined and distinguished by the Court of Appeal in *Re Chapman* (*t*), where it was held that the trustees of a will authorising investments in real securities were not bound by any absolute rule to call them in without exercising their judgment, even though some of the securities were of a risky nature, and owing to agricultural depression they had become apparently insufficient to answer the mortgage debts; and further, they were not liable for a subsequent fall in value, it appearing that they had acted in an honest and reasonable belief that they were doing what was for the best. In that case part of the estate of a testator who died in 1880 consisted of mortgages of real estate. The amounts secured were less than two-thirds of the original purchase-money, but the property had depreciated so that at the death there was not a margin of one-third. The property was not realised in 1895 when the action was commenced; and Kekewich, J., held that section 4 of the Trustee Act, 1893, Amendment Act, 1894 (*u*), expressly authorising retainer, was not retrospective and that the trustees were liable. His judgment was reversed by the Court of Appeal on grounds applicable under the general law before the last-mentioned Act.

Lindley, L.J., in an elaborate judgment, said :—

"No doubt, speaking generally, it is the duty of executors to get in debts due to their testator, but it was no part of the duty

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(*p*) See *Robinson* v. *R.*, 1 De G. M. & G. 247, at p. 262; *Re Chapman*, [1896] 2 Ch. 782; and see *Rawsthorne* v. *Rowley*, [1909] 1 Ch. 409, n.; *Shaw* v. *Cates*, *ibid.*

(*q*) *Howe* v. *Earl of Dartmouth*, 7 V. 150; *ante*, vol. i.

(*r*) *Orr* v. *Newton*, 2 Cox, 276, cited with approval in *Re Chapman*; *Angerstein* v. *Martin*, T. & R. 239.

(*s*) 7 B. 384; *Harrison* v. *Thoxton*, 4 Jur. (N.S.) 550.

(*t*) [1896] 2 Ch. 763; *Re Grindey*, [1898] 2 Ch. 593; cf. *Shaw* v. *Cates*, [1909] 1 Ch., at p. 409; *Re Schneider*, 22 T. L. R. 223.

(*u*) 57 Vict. c. 10.

of the executors as such to realise mortgage securities of their testator not wanted for the above-mentioned purposes (*x*); and the executors were not, as executors, guilty of any devastavit in not realising such securities. * * * A trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not *per se* proof of such wrong. We have to deal here with *authorised* investments, and this must never be lost sight of; everything turns upon it. Bearing this point in mind, and bearing also in mind that we have to deal with honest trustees placed in great difficulties by the constant fall in value in land, what is it that they have done wrong? * * * There is no rule of law which compels the Court to hold that an honest trustee is liable to make good loss sustained by *retaining an authorised* security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties. Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere errors of judgment * * * though the result may prove that they possibly might have done better. *Whiteley* v. *Learoyd* (*y*) is a clear authority to this effect, so are *Buxton* v. *B.* (*z*), *Marsden* v. *Kent* (*a*)." * * *

An absolute discretion to postpone, protects executors who retain beyond the year, though some of the property consists of shares in unlimited companies (*b*).

In *Gray* v. *Siggers* (*c*), in which case the testator's residuary estate included several leasehold houses held upon short terms, Malins, V.-C., held that a power to the trustees to retain "all or any portions of my trust estate in the same state, etc.," took the case both out of the ordinary rule as to conversion, and the rule in *Howe* v. *Dartmouth* (*d*).

In *Edwards* v. *Edmunds* (*e*), a direction to convert "at their

(*x*) *I.e.*, payment of funeral and testamentary expenses, debts and legacies; see also *Orr* v. *Newton*, 2 Cox, 274.

(*y*) 33 Ch. D. 347; 12 A. C. 727.

(*z*) 1 My. & C. 80.

(*a*) 5 Ch. D. 598.

(*b*) See *per* C. A. in *Re Norrington*, 13 Ch. D. 654, distinguishing *Sculthorpe* v. *Tipper*, 13 Eq. 232; and see *Re Oddy*, 104 L. T. 128. See also the old cases of *Padden* v. *Richardson*, 7 De G. M. & G. 563, 572; *Horton* v. *Brocklehurst*, 29 B. 511; cf. *Re Schneider*, 22 T. L. R. 223.

(*c*) 15 Ch. D. 74.

(*d*) See note to *Howe* v. *Dartmouth*, vol. i; see also *Re Bates*, [1907] 1 Ch. 22; *Re Wilson*, [1907] 1 Ch. 394; *Re Elford*, [1910] 1 Ch. 814.

(*e*) 34 L. T. 522.

or his sole discretion, and at such time or times after the testator's decease as they or he should think proper," was held by Hall, V.-C., to authorise the retainer of 100 shares with unlimited liability, but not the acceptance of new shares, which, at a time when the shares stood well, the company offered to all the shareholders in proportion to their holding.

No liability was held to be incurred by executors in not requiring payment of the surplus capital of a testator, lent to his partners, where it appeared that the executors could not have insisted on payment without putting an end to the business, and that this would have been clearly contrary to the intentions of the testator as appearing in the will (*f*).

An executor or trustee is not liable for not taking proceedings to recover a debt if he can show either that proceedings would have been ineffectual, or that there is reasonable ground for believing that they would have been ineffectual (*g*).

In *Re Brogden* (*h*), it was laid down, that it is the duty of trustees to press for payment of funds due to them especially if payment has been deferred for a specified time, and that the only excuse for not taking action would be a well-founded belief that such action would be fruitless; but this would seem to be too sweeping a statement (*i*). In *Re Hurst* (*k*), in the event which happened of a son of the testator purchasing the business, the trustees were authorised and directed to leave the purchase-money on mortgage of the business property; they took a mortgage from the son for £50,000, payable by instalments. They did not enforce payment, and ultimately there was a loss, and Chitty, J., adopted the statement of the law in *Clack* v. *Holland* (*l*), and held that under the circumstances they had exercised an honest discretion in difficult circumstances, and were not liable.

Continuing Business of Testator.—An executor ought not, without express authority, *to carry on the trade* of the testator (*m*),

(*f*) *Rowley* v. *Adams*, 2 H. L. Cas. 725; cf. *Hiddingh* v. *Denyssen*, 12 A. C. 624.

(*g*) *Per* Romilly, M.R., in *Clack* v. *Holland*, 19 B. 271, cited with approval by Lindley, L.J., in *Re Roberts*, 76 L. T., at pp. 482—3; *Re Hurst*, 63 L. T. 665, 668; *Speight* v. *Gaunt*, 9 A. C. 1; Underhill on Trusts (8th ed.), pp. 269, 491. Cf. *Re Greenwood*, 105 L. T. 509.

(*h*) 38 Ch. D. 546.

(*i*) See Underhill on Trusts, p. 269.

(*k*) 63 L. T. 665; see *Re Roberts*, 76 L. T. 479; *Hiddingh* v. *Denyssen*, 12 A. C. 624.

(*l*) 19 B. 271.

(*m*) *Kirkman* v. *Booth*, 11 B 273.

except for the purpose of winding up the concern, but he may, and in some cases is bound to complete the contracts entered into by his testator (*n*). In *Re Crowther* (*o*), under a general power to postpone sale, carrying on a business for twenty-two years was held to be authorised.

Securing Trust Property.—It is the duty of a trustee to do what is necessary by giving notice or otherwise to secure the property. In *Dix* v. *Burford* (*p*), one of several executors, having assented to a legacy of a mortgage debt secured on copyholds, was held liable for loss, caused by his not getting admission to the copyholds by reason of which one of his co-executors obtained payment, and gave a receipt as executor; the "moment he was constituted trustee (*i.e.*, on the assent to the bequest) it became his duty, by notice or otherwise, to make it impossible for his co-trustee to receive or misapply the trust fund. * * * The ordinary trustees' indemnity clause affords no security to a trustee who neglects to take the steps necessary to secure the fund."

So in *Jacob* v. *Lucas* (*q*), the Judge intimated that the omission of trustees, assignees of a trust fund vested in other trustees, to perfect the arrangement by notice to such other trustees was a breach of trust. In *Kingdon* v. *Castleman* (*r*), according to the report in the W. N., the Court recognised that omission to give notice to an insurance office of an assignment of a policy of assurance was a breach of trust, though from the other reports it appears the decision was grounded on other reasons.

A trustee has been held liable for neglect to register in the Irish Registry (*s*). It is necessary also for trustees on a settlement of land to make the inquiries for the deeds that would be required on a purchase (*t*).

In *Ker's Case* (*u*), Lord Cairns recognises the duty of perfecting the title. He says with reference to some stock in the City of Glasgow Bank, "It is to be observed, that the bank stock having

(*n*) *Collinson* v. *Lister*, 20 B. 356; *Re Chancellor*, 26 Ch. D. 42.

(*o*) [1895] 2 Ch. 56; *Re Elford*, [1910] 1 Ch. 814. Cf. *Re Smith*, [1896] 1 Ch. 171; and see *Dowse* v. *Gorton*, 40 Ch. D. 536; [1891] A. C. 190; Underhill on Trusts (8th ed.), p. 243.

(*p*) 19 B. 409.

(*q*) 1 B. 436, 442.

(*r*) [1877] W. N. 15; 46 L. J. Ch. 448; 36 L. T. 141.

(*s*) *Macnamara* v. *Carey*, 1 Ir. R. Eq. 9; *Lester* v. *L.*, 6 Ir. R. Ch. 513.

(*t*) *Lloyds Bank* v. *Jones*, 29 Ch. D. 221; and see *Walker* v. *Linom*, [1907] 2 Ch. 105.

(*u*) 4 A. C. 598.

been included in the marriage settlement, it would become the duty of the trustees and of their legal agent to provide in some way for the perfecting of the title by the trustees to the stock, and for preventing any improper dealing with it by the original owner."

As regards life policies, it was long since held that a trustee is bound to keep up a policy if he should have funds in hand for that purpose (*y*), but not if he neither has nor can procure funds, and it would have been useless to sue the covenantor (*z*). But even if the trustee has not the funds to pay the premiums, he should endeavour to obtain the surrender value of the policy (*a*). If he either advances or borrows money for payment of premiums he will have a lien on the policy for the amount (*b*).

By section 19 of the Trustee Act, 1925 (replacing section 18 of the Act of 1893, which itself replaced section 7 of the Act of 1888) it is provided that a trustee may insure against loss or damage by fire any building or other insurable property to any amount not exceeding three fourth parts of the full value, and pay the premiums out of the income or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income. By subsection 2, the section does not apply to any building or property which a trustee is bound to convey absolutely to any beneficiary upon being so requested. It seems that, apart from the statute, trustees and executors are not liable as for wilful default for loss caused by their failing to insure trust property (*c*); and it has been held that this rule is unaffected by the statutory provision enabling trustees to insure (*d*).

4. As to the Custody of Trust Property.

As a general rule, trustees and executors will not be liable for accidental loss without carelessness on their part. Thus, they would not be liable for robbery when the trust property is in their

(*y*) *Marriott* v. *Kinnersley*, Taml. 470; Lewin (12th ed.), p. 1165.

(*z*) *Hobday* v. *Peters*, 28 B. 603; and see *Kingdon* v. *Castleman*, 25 W. R. 345.

(*a*) See *Godwin's Settlement*, 87 L. J. Ch. 645.

(*b*) *Johnson* v. *Swire*, 3 Gif. 194; *Re Layton's Policy*, [1873] W. N. 49: *Re Leslie*, 23 Ch. D. 552; and see *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D. 234.

(*c*) *Bailey* v. *Gould*, 4 Y. & C. Ex. 221; *Fry* v. *F.*, 27 B. 144.

(*d*) *Re McEacharn*, 103 L. T. 900, 902; a case decided on section 18 of the T. A., 1893, corresponding to section 19 of the Act of 1925.

own possession, *Morley* v. *M.* (*e*), or properly in the possession of others as agents, *Jones* v. *Lewis* (*f*).

In *Eaves* v. *Hickson* (*g*), Romilly, M.R., held that if a person obtained trust property from trustees by means of a forgery, the loss fell on them and not on the *cestui que trust;* and in *Hopgood* v. *Parkin* (*h*), the same Judge extended the principle to the case of an investment by trustees on mortgage when they had employed a solicitor in the usual course to investigate the title, and he, by negligence or want of skill, had not discovered a prior incumbrance (*i*). In *Sutton* v. *Wilders* (*k*), where a trustee was held liable for loss arising from the fraud of a solicitor, Romilly, M.R., said: "He was their agent for lending the money on proper security, and he failed to perform his duty. The Court makes exception in the case of a banker who fails when the trust money is only allowed to remain in his hands for a reasonable time, because the money must be kept by the trustees somewhere till it is invested or distributed; and no place is so secure as a bank in good repute. But if a trustee entrusts the money to a servant who robs him, the trustee is liable. If he employs a solicitor who neglects his duty, the principal is liable. Here it is even more so, because the trustees did not examine anything or require any opinion on the title, or the like, but trusted implicitly to Mousley, who defrauded them."

It seems doubtful whether the doctrine laid down by Romilly, M.R., in these three cases is consistent with such cases as *Speight* v. *Gaunt* (*l*), or would be acted upon at the present day, so as to make it necessary for a trustee in such cases to apply to be excused by the Court under its statutory power (*m*). In his judgment in *Speight* v. *Gaunt*, Lindley, L.J., commented adversely on *Bostock* v. *Floyer* (*n*), and *Hopgood* v. *Parkin* (*o*) (both of which were decided by Romilly, M.R.), and, referring to the latter case, Lindley, L.J. observed (*p*), "*That case certainly goes much further*

(*e*) 2 Ch. Ca. 2.

(*f*) 2 Ves. Sen. 240. See *Job* v. *J.*, 6 Ch. D. 562; *European Assurance Society* v. *Radcliffe*, 7 Ch. D. 733; *Vibart* v. *Coles*, 24 Q. B. D. 364; *Jobson* v. *Palmer*, [1893] 1 Ch. 71; Underhill on Trusts (8th ed.), p. 275.

(*g*) 30 B. 136.

(*h*) 11 Eq. 77, 78.

(*i*) But see *Rochfort* v. *Seaton*, [1896] 1 Ir. R. 18.

(*k*) 12 Eq. 373.

(*l*) 22 Ch. D. 727; 9 A. C. 1.

(*m*) Section 61 of the T. A., 1925, replacing section 3 of Jud. T. Act, 1896.

(*n*) 1 Eq. 26.

(*o*) 11 Eq. 74.

(*p*) 22 Ch. D., at p. 761.

than I should have thought right; but in the result the case was appealed. An infant was concerned and the Court of Appeal sanctioned a compromise on behalf of the infant." A learned author in a well-known work (*q*) writes : " By a curious anomaly, it has been held that a trustee is liable if he is induced by fraud or forgery to hand trust property to the wrong person."

In *Re Weall* (*r*), Kekewich, J., says, " Consider for a moment the position of that special agent, called a trustee, as regards the employment of sub-agents. He certainly has the right to appoint them if and so far as the work of the trust reasonably requires, for instance, he may appoint a broker to make or realise investments, or a solicitor to do legal business. * * * The limit of the power of appointment is, as pointed out in the well-known case of *Speight* v. *Gaunt*,—reasonableness. * * * A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty." In *Learoyd* v. *Whiteley* (*s*), Lord Halsbury observed, " I think it is quite clear that a trustee is entitled to rely upon skilled persons in matters in which he cannot be expected to be experienced. He may perhaps rely upon a lawyer on some matters of law (*t*), and in this case I do not deny that he would be entitled to rely on a valuer upon a pure question of valuation."

Deposit in a Bank.—Depositing trust money in a bank is in effect a delegation of the custody to the bankers, and the test whether it involves liability on the trustee in case of failure of the bank is (except in cases falling within section 11 of the Trustee Act, 1925) the same as in other cases of delegation, namely, whether the deposit was reasonably made according to the ordinary course of business (*u*).

In *Johnson* v. *Newton* (*x*), a bank failed nine months after testator's death, the executors had £2,000 balance in the bank. The Master had found " that there were not any purposes of their trust which rendered it necessary for the executors to retain the balance or any part of it with the bankers." But Page-Wood, V.-C.,

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(*q*) Underhill on Trusts (8th ed.), p. 275.

(*r*) 42 Ch. D. 674; and see Underhill, pp. 308—9.

(*s*) 12 A. C. 727.

(*t*) But see *Doyle* v. *Blake*, 2 Sch. & Lef. 243.

(*u*) *Clough* v. *Bond*, 3 My. & C. 490; *Re Gasquoine*, [1894] 1 Ch. 470; see Trustee Act, 1925, ss. 11 and 30.

(*x*) 11 Ha. 160.

held that the executors were not liable; it was reasonable to keep a balance in the bank before the year had expired; and in *Swinfen* v. *S.* (*y*), the Court held it was reasonable for an executrix to leave a small sum in the bank. In *Wilks* v. *Groom* (*z*), proceedings were pending in an administration suit, and permanent investment not being proper, the money was deposited by the administratrix in a bank; and the Judge said, "Is an executor or administrator under the usual indemnity clause liable by reason of the failure of a banker when investment is improper for depositing a fund in the hands of the banker? I think clearly not." In *Fenwick* v. *Clarke* (*a*), executors after twelve months deposited money in a bank, with the view of investing it and other moneys not yet paid, on a mortgage in order to meet deferred legacies, and the bank failed two months after the deposit. The will contained the usual indemnity clause from losses excepting wilful default; and it was held that the trustees were not liable, Turner, L.J., observing that the intention to invest the money with others expected to be paid upon a fresh mortgage then being negotiated, "appears a sufficient ground for leaving the money deposited with the bank meanwhile." So trustees have been held not liable for a deposit on a sale left with the auctioneer, on the ground that it was necessary in the usual course of business that he should hold it for vendor and purchaser (*b*); nor for depositing money at a bank pending the appointment of new trustees (*c*), nor for employing a banker to remit money to a distance (*d*).

But trustees may not place money in a bank as an investment, or leave money in a bank for an unreasonable time. In *Darke* v. *Martyn* (*e*), the testator died in March, 1823. In January, 1824, and January, 1825, the executors put part of the assets in a bank on deposit notes carrying interest; the bank failed in November, 1825. The executors were held liable because there was no sufficient reason shown for the deposit.

In *Moyle* v. *M.* (*f*), the testator died in June, 1823. An administration suit was commenced in October, 1823, and the

(*y*) 29 B. 211.
(*z*) 3 Drury, 584; and see Underhill on Trusts (8th ed.), p. 317.
(*a*) 4 De G. F. & J. 243; 31 L. J. Ch. 728.
(*b*) *Edmunds* v. *Peake*, 7 B. 239; Underhill on Trusts, p. 317.
(*c*) *Adams* v. *Claxton*, 6 V. 226.
(*d*) *Knight* v. *Plymouth*, Dick. 120.
(*e*) 1 B. 525.
(*f*) 2 R. & My. 710.

executors were held liable for a deposit left in the bank in December, 1825, when the bank failed. This case was referred to by the Vice-Chancellor in *Johnson* v. *Newton* (*g*), as " a hard case upon the executors."

In *Gibbins* v. *Taylor* (*h*), the testator died in 1835, the executors converted the estate as directed by the will, but instead of investing the proceeds, placed the same, as received, in their joint names in a bank, where the balance, from time to time, not required for payment of debts, etc., remained at interest. In 1842 one of the two executors died, and the other drew out the funds : it was held that the deceased trustee's estate was liable.

In *Rehden* v. *Wesley* (*i*), there was the usual indemnity clause against losses by failure of bankers, etc. The testator died in August, 1855. The deposit was made on January 20, 1856. The bank stopped in September, 1856. The executors were held liable because " it was an investment, not a deposit."

So trustees have been held liable for money left in a bank which failed after they had been ordered to pay it into Court (*k*), or to new trustees (*l*).

In *Cann* v. *C.* (*m*), Kay, J., expressed an opinion that trustees while seeking an investment on mortgage ought not to leave money in a bank for more than six months; he decided that fourteen months was too long. And trustees may be responsible for loss if they keep larger balances than necessary (*n*).

Although the deposit in a bank may be proper, care must be taken that the account is in the *joint names* of all the trustees. And in the case of a sole trustee, that it is distinguished from his private account (*o*); the ground being that, if not so distinguished, the bank would obtain a right against it, in respect of any personal liability of his to them which would not be the case if there was a separate trust account (*p*).

(*g*) 11 Ha. 160, 169. (*h*) 22 B. 344.

(*i*) 29 B. 213.

(*k*) *Wilkinson* v. *Bewick*, 4 Jur. (N.S.) 210.

(*l*) *Lunham* v. *Blundell*, *ibid.*, at p. 83.

(*m*) 51 L. T. 770; see also *Re Earl*, 39 W. R. 108.

(*n*) *Home* v. *Pringle*, 8 Cl. & Fin. 264; *Astbury* v. *Beasley*, 17 W. R. 638.

(*o*) *Matthews* v. *Brise*, 6 B. 239; see also *Fellows* v. *Mitchell*, 1 P. W. 81; *Massey* v. *Banner*, 1 J. & W. 241; *Wren* v. *Kirton*, 11 V. 377; *Pennell* v. *Deffell*, 4 De G. M. & G. 386, 392; *G. E. Ry. Co.* v. *Turner*, L. R. 8 Ch. 149.

(*p*) See *Ex p. Kingston*, L. R. 6 Ch. 632; *Cuthbert* v. *Robarts, Lubbock & Co.*, [1909] 2 Ch. 226. Cf. *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282; *Coleman* v. *Bucks, etc., Bank*, [1897] 2 Ch. 243; *Bank of New South Wales* v. *Goulburn*, [1902] A. C. 543.

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Although a trustee may not have parted with the control over a trust fund, so as to enable another person to deal with it without his concurrence, he may still be liable if he parts with his exclusive control by associating and incorporating with himself the authority of another person (*q*).

In *Clough* v. *Bond* (*r*), the estate of J. B., the husband of a co-administratrix, was held liable for a payment into a bank in the joint names of J. B. and his wife's co-administrator without the wife's name being added, by reason of which, on the death of J. B., the co-administrator was entitled to and did draw out the whole fund (*s*).

Where there are several trustees, trust property consisting of specific articles such as plate, should, since all the trustees cannot have the custody thereof, be deposited with their bankers. If, however, one be in possession of the articles not being bearer securities or the like, he will be entitled, in the absence of special circumstances, to retain the sole custody as against the others (*t*).

When the trust fund comprised stocks or securities which were payable to bearer, passing by delivery, and on which the interest was payable upon coupons, it has been held that the trustees might, without a breach of trust, deposit such securities in a box at a banker's on account of all the trustees, one being allowed by the rest to keep the key of the box in order to obtain the coupons (*u*). So also in *Re De Pothonier* (*x*), it was held that trustees might deposit convertible bonds with bankers, in the manner usual with prudent men of business, the bankers giving a simple acknowledgment of the receipt. But where each of two trustees by arrangement retained one-half of certain bonds transferable by delivery, and one of them dealt fraudulently with the bonds held by him, Hall, V.-C., held that the other was liable (*y*).

(*q*) *Salway* v. *S.*, 2 Russ. & M. 215; affirmed Dom. Proc. *nom. White* v. *Baugh*, 2 Russ. & M. 220; 9 Bligh, 181; 3 Cl. & Fin. 44. See also *Dixon* v. *D.*, 9 Ch. D. 587.

(*r*) 3 My. & C. 490; and see Underhill on Trusts (8th ed.), p. 321.

(*s*) Adopted by the C. A. in *Re Gasquoine*, [1894] 1 Ch. 470, 475, 478; and see *Langford* v. *Gascoyne*, 11 V. 333; 8 R. R. 170; *Shipbrook* v. *Hinchinbrook*, 11 V. 252; 16 V. 477; 8 R. R. 138; *Underwood* v. *Stevens*, 1 Mer. 712; *Trutch* v. *Lamprell*, 20 B. 116; *Browne* v. *Butter*, 24 B. 159.

(*t*) *Re Sisson's Settlement*, [1903] 1 Ch. 262.

(*u*) *Mendes* v. *Guedalla*, 2 John. & H. 259; see also *Hall* v. *Franck*, 11 B. 519.

(*x*) [1900] 2 Ch. 529; and see *Cottam* v. *Eastern Counties Ry. Co.*, 1 J. & H. 243.

(*y*) *Lewis* v. *Nobbs*, 8 Ch. D. 591, 594—5.

Townley v. Sherborne—Brice v. Stokes.

As to Custody of Title-deeds.—The trustee of land should in all cases inquire for the deeds, and if entitled to hold them, should require them to be deposited with him (*z*). As between co-trustees, if one of them be in possession of the title-deeds, the other trustee is not, in the absence of special circumstances, entitled to have them removed from his co-trustee's custody and placed at a bank (*a*).

The right to the custody is not always in the trustee. Since the new property Acts (excepting where there is a trust for sale), the right to the custody of the title-deeds will usually be in the beneficial tenant for life, in whom the legal estate for the entire interest in the property will be vested. Section 98, sub-section 3 of the Settled Land Act, 1925, provides (in effect) that the trustees of a settlement will not be liable on account of any documents of title relating to the settled land (other than securities for capital money) being placed in the possession of the tenant for life or statutory owner. Provided that where, if the settlement were not disclosed, it would appear that the tenant for life had a general power of appointment over, or was absolutely entitled to the land, the trustees, before delivering to him the documents, are to require notice of the principal vesting instrument to be written on one of the documents under which the tenant for life acquired title. If the documents are already in the tenant for life's possession, the trustees *may* require such a notice to be written as above-mentioned, but in such case the trustees are not to be liable for not requiring the notice to be written.

Entrusting Funds to Agents.—A trustee, even independently of statute, is not liable if in the ordinary course of business he employs an agent to collect small debts and they are lost by the agent's insolvency. In *Re Brier* (*b*), Lord Selborne said, " I think that in this case the burden of proof is upon the respondents who seek to charge the executors with this money. The statute 22 & 23 Vict. c. 35, s. 31 (*c*), provides in effect that trustees shall not be responsible for any banker, broker, or other person with whom trust moneys have been deposited (which I understand to mean properly deposited), unless it can be shown that that loss happened

(*z*) See the Notes to *Russel* v. *R.*, *ante*.

(*a*) *Re Sisson's Settlement*, [1903] 1 Ch. 262; cf. *Davies* v. *Vernon*, 6 Q. B. 443; *Foster* v. *Crabb*, 12 C. B. 136.

(*b*) 26 Ch. D. 238, 243.

(*c*) See sections 17 and 24 of that Act, now repealed.

through their own wilful default. The statute incorporated generally into instruments creating trusts the common indemnity clause which was usually inserted in such instruments. It does not substantially alter the law as it was administered by Courts of Equity, but gives it the authority and force of statute law, and appears to me to throw the *onus probandi* on those who seek to charge an executor or trustee with a loss arising from *the default of an agent when the propriety of employing an agent has been established.* In the present case, the learned Judge in the Court below has virtually decided that this was a case of proper employment of an agent for a proper purpose, and as far as I can judge, the nature of the case justifies that view " (*d*).

But where money was handed by a trustee to his solicitor to invest and the solicitor misapplied it, it was held that the trustee was liable (*e*). So, where a trustee allowed trust money to be paid to the account of his co-trustee, a solicitor (*f*).

Where two of three trustees had committed a box containing securities to the third (a stockbroker), for the purpose of conversion, it was held that they were bound to ascertain when the box was returned to the bankers, that such conversion had been effected and the new securities restored (*g*).

Apart from statute, trustees for sale are not justified in employing a solicitor to receive the purchase-money (*h*), but this difficulty has been long since removed by statute.

By section 23, sub-section 1 of the Trustee Act, 1925, trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or do any act required to be done, including the receipt and payment of money, and are not to be responsible for the default of any such agent if employed in good faith. By sub-section 2, trustees or personal representatives may appoint any person to act as agent or attorney for selling, getting in, or administering any property subject to the trust in any place outside the United Kingdom, and are not (by reason only of

(*d*) See also *Re Bird*, 16 Eq. 203; *Castle* v. *Warland*, 32 B. 660; *Re Mackay*, [1911] 1 Ch. 300; *Re City Equitable Fire Insurance Co.*, [1925] 1 Ch. 407.

(*e*) *Bostock* v. *Floyer*, 1 Eq. 26; explained by Lindley, L.J., in *Speight* v. *Gaunt*, 22 Ch. D., at p. 761.

(*f*) *Wynne* v. *Tempest*, 13 T. L. R. 360.

(*g*) *Mendes* v. *Guedalla*, 2 J. & H. 259. See *Speight* v. *Gaunt*, 22 Ch. D., at pp. 760—1.

(*h*) *Ghost* v. *Waller*, 9 B. 497; *Viney* v. *Chaplin*, 2 De G. & J. 468, 482; *Ex p. Swinbanks*, 11 Ch. D. 526.

having made such appointment) to be responsible for loss arising thereby. Without prejudice to the above provisions, sub-section 3 (replacing section 17 of the Trustee Act, 1893, which itself replaced section 56 of the Conveyancing Act, 1881), a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or property receivable under the trust by permitting the solicitor to have the custody of a deed bearing a receipt for such money or property; and a trustee is not to be chargeable with breach of trust by reason only of his having made such appointment. And a trustee may appoint a banker or solicitor to be his agent to receive any money payable under a policy of insurance by permitting such banker to have the custody of and to produce such policy. Sub-section 3 contains a proviso that nothing therein contained is to exempt a trustee from liability in case he permits money or property to remain under the control of the solicitor or banker for a longer period than is reasonably necessary to enable the solicitor or banker to pay or transfer the same to the trustee.

By section 11 of the Trustee Act, 1925, trustees may, pending the negotiation and preparation of any mortgage, or during any other time while an investment is being sought for, pay any trust money into a bank to a deposit or other account.

By section 30, sub-section 1, a trustee is to be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and is to be answerable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency of any securities, nor for any other loss unless the same happens through his own wilful default (*i*). And by sub-section 2, a trustee may reimburse himself or discharge out of the trust premises all expenses incurred in or about the execution of the trusts.

5. Investment of Trust Property.

Subject to the rules as to delegation above stated, trustees may, independently of statute, for the purpose of making or realising an investment, adopt the judgment of a skilled agent, such as a broker

(*i*) See *Re Munton*, [1927] 1 Ch. 262.

or solicitor, in matters which properly come within their professional knowledge (*k*).

Learoyd v. *Whiteley* (*l*), marks the important limitation, that the trustee must judge whether the investment is *authorised by his trust*, and that he would not be exonerated in this respect by the opinion of the agent that the investment was a good one. In that case trustees invested trust money on the security of a 5 per cent. mortgage of a freehold brickfield, with buildings, machinery and plant affixed to the soil, being advised by competent valuers that the property was a good security for the amount invested. The valuers' report was in fact based upon a valuation of more than double the amount invested, and treating the property as a going concern; but the report did not state this, nor distinguish between the value of the land and that of the buildings, machinery, etc. The trustees acted upon the report in good faith, but without making further inquiries. They were held liable for the security being insufficient, because the valuation did not distinguish the value applicable to the land apart from the speculative trade, and they were bound to judge for themselves that they could only trust to the value of the land as a real security and not to the trade.

The Trustee Act, 1925, s. 1, contains a list of investments authorised for trustees. This enactment differs from section 1 of the Trustee Act, 1893, in not being qualified by the words " unless expressly forbidden by the instrument (if any) creating the trust." But there is a general provision in section 69, sub-section 2, which has a qualifying effect of a similar nature. By section 4 a trustee is not to be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by law.

By section 8 of the Trustee Act, 1925 (re-enacting section 8 of the Trustee Act, 1893, which took the place of section 4 of the Trustee Act, 1888), it is provided that a trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably

(*k*) *Re Weall*, 42 Ch. D. 674; *Learoyd* v. *Whiteley*, 12 A. C. 727, see p. 731; *Fry* v. *Tapson*, 28 Ch. D. 268; *Jobson* v. *Palmer*, [1893] 1 Ch. 71.

(*l*) *Supra*. Cf. *Re Solomon*, [1912] 1 Ch. 261.

believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate, or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report and that the loan was made under the advice of the surveyor or valuer expressed in the report.

The investment must be within the terms of the trust. Where the trustee having power to invest the trust fund " in his own name or under his legal control," invested on contributory mortgages in the names of himself and another person, it was held that the case did not fall with section 8 of the Trustee Act, 1893 (*m*).

An investment upon a contributory mortgage is, in fact, a breach of trust since it prevents the trustee from having full control of the trust fund. An investment upon a second mortgage is *prima facie* a breach of trust; partly because the security may be realised by the prior mortgagee, and partly because the trustee did not obtain the legal estate (*n*). The changes made by the Law of Property Act, 1925, would not seem to justify a trustee in investing upon a second mortgage.

The surveyor or valuer must be instructed and employed independently of the owner of the property (*o*). If the surveyor's fees are to be paid by the owner of the property this circumstance must not be known to the surveyor, nor may there be an arrangement that the surveyor shall have only a preliminary fee or no fee at all if the transaction falls through (*p*).

It was held by Kekewich, J., in *Re Walker* (*q*), and in *Re Somerset* (*r*), that the words " reasonably believed " do not govern the words " instructed and employed independently " but that the trustee, in order to obtain the protection of the enactment, must be able to show that the surveyor was in fact so instructed and employed. This point, however, has been treated as open to doubt in later cases (*s*).

The enactment does not relieve the trustee from his general duty

(*m*) *De Dive*, [1909] 1 Ch. 328.

(*n*) See *Chapman* v. *Browne*, [1902] 1 Ch. 785.

(*o*) *Shaw* v. *Cates*, [1909] 1 Ch. 389, 403; *Re Solomon*, [1912] 1 Ch. 261.

(*p*) *Marquis of Salisbury* v. *Keymer*, [1909] W. N. 31; *Re Dive*, [1909] 1 Ch. 328.

(*q*) 59 L. J. Ch. 386; 62 L. T. 449.

(*r*) [1894] 1 Ch. 231.

(*s*) *Re Stuart*, [1897] 2 Ch. 583, 592; *Shaw* v. *Cates*, [1909] 1 Ch. 389, 403; *Re Solomon*, [1912] 1 Ch. 261, 281.

to show care and prudence. He is under a duty to take into consideration the character of the property on which it is proposed to make an advance, and he is not entitled to lend to the extent of two-thirds of the value unless the valuer expressly so advises. The valuer before making his report should consider the circumstances of the property and its liability to deterioration or fluctuation in value (*t*). It is apprehended, however, that if the character of the property is such as to come, *prima facie*, within the terms of the trust as an authorised investment, and the surveyor is selected reasonably as a surveyor of repute, the trustee, acting *bona fide* on his advice as to the value, would be protected, although the surveyor may have been negligent and his advice erroneous.

Section 8, sub-section 1 of the Trustee Act, 1925 (re-enacting section 8, sub-section 1 of the Trustee Act, 1893) is a purely relieving enactment; and accordingly, if a trustee does not bring himself within its terms, he is in no worse position than he would have been in if the section had never been enacted (*u*).

In the case of *Learoyd* v. *Whiteley*, (*x*) (which arose before the passing of the Trustee Act, 1888, section 5 of which corresponds to section 9 of the Act of 1925) the Court treated the investment as wholly unauthorised, and in estimating the trustees' liability did not think it necessary to take into account the value of what might have been within the definition of real security; and it seems that before the Act, if the security was for any reason unauthorised, it was treated as wholly improper, and the trustees liable to make good any loss. But a distinction has been drawn between an absolutely unauthorised investment and an improvident investment on security of an authorised character. The trustee is entitled to take over an investment of the former nature, accounting to the trust estate for the sum invested therein; he is not, however, entitled to an investment of the latter nature, and it may be realised without his consent (*y*).

By section 9 of the Trustee Act, 1925 (which replaces section 9 of the Trustee Act, 1893, which itself replaced section 5 of the

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(*t*) [1909] 1 Ch., at p. 398; *Palmer* v. *Emerson*, [1911] 1 Ch. 758; *Re Solomon*, [1912] 1 Ch. 261. This decision was compromised on appeal, [1913] 1 Ch. 200.

(*u*) *Re Stuart*, [1897] 2 Ch. 583, at p. 591; *Palmer* v. *Emerson*, *supra*; and see *Re Pawson's Settlement*, [1917] 1 Ch. 541.

(*x*) 12 A. C. 727.

(*y*) *Re Salmon*, 42 Ch. D. 351; *Re Hotham*, [1902] 2 Ch. 575; *Head* v *Gould*, [1898] 2 Ch. 250.

Trustee Act, 1888), where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest. In considering the question for what amount the property taken as security could properly have been accepted, the Court is guided by the same general considerations which would have guided it prior to the Trustee Act, 1888 (*z*).

Section 9 is important in cases where land has declined in value. In *Learoyd* v. *Whiteley*, however, the land was constantly being diminished in value by digging for bricks, and trustees would not be safe in trusting to the value at the time of investment of any wasting security. Trustees are not, it seems, under any duty to make a periodic investigation of the value of authorised investments retained by them (*a*).

It was laid down by Kekewich, J., in *Re Walker* (*b*), that it is for the trustee to show the propriety of the investment, independently of value. But the rule would seem to be that if the investment was *prima facie* within the terms of the trust (*e.g.*, freehold land), it is for those who allege that it was nevertheless improper in character to prove that such is the case. In *Shaw* v. *Cates* (*c*), in which case trust money had been invested upon the security of certain freehold houses, some of which were not completed, Parker, J., observed : " It is clear that the trustees had power to invest upon the security of freehold hereditaments. *The onus, therefore, of proving that the investment was altogether too hazardous to be accepted as a trust investment lies upon the plaintiffs.* In my opinion they have not discharged this onus."

By section 4 of the Trustee Act, 1925 (re-enacting section 4 of the Trustee Act, 1893, Amendment Act, 1894) a trustee is not to be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by the general law " (*d*).

Emergency.—As a general rule, the Court has no jurisdiction to

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(*z*) *Per* Parker, J., in *Shaw* v. *Cates*, [1909] 1 Ch., at p. 405.

(*a*) [1909] 1 Ch., at p. 409; and see *Re Chapman*, [1896] 1 Ch. 323; [1896] 2 Ch. 763; *Rawsthorne* v. *Rowley*, 24 T. L. R. 51; [1909] 1 Ch., at p. 409, n.

(*b*) 59 L. J. Ch. 386, 391.

(*c*) [1909] 1 Ch., at p. 395.

(*d*) *Re Chapman*, [1896] 1 Ch. 323; [1896] 2 Ch. 763.

authorise trustees to do any act in relation to the trust estate which is not authorised by the terms of the trust instrument (*e*). In a limited class of cases, however, the Court has in recent years authorised trustees to do certain acts in the management of a trust estate which under ordinary circumstances they would have no power to do. This overriding jurisdiction, which is usually exercised in chambers, is defined by the Court of Appeal in *Re New* (*f*), and that decision has been said to constitute the high-water mark of its exercise (*g*). It is exercised where there is an emergency in administration of a trust which may reasonably be supposed not to have been foreseen by the author of the trust; that emergency must render the doing of some act unauthorised by the trust most desirable or even essential in the interest of all the *cestuis que trust;* and the *cestuis que trust* or some of them must be not *sui juris*, or not then in existence, so that the consent of them all cannot be given. In *Re New* the Court authorised the trustees of three separate trust instruments to concur in a shareholders' scheme for the reconstruction of a limited liability company, under which shares in the company settled in specie were to be exchanged for shares or debentures in the new company, investments not authorised by two of the trust instruments. The trustees of these two instruments were put on an undertaking to apply to the Court if they desired to retain the new shares or debentures for more than a year. In *Re Tollemache* (*h*), Kekewich, J., states by way of illustration the more familiar examples of the exercise of this jurisdiction in chambers, showing that where the Court authorises an investment unauthorised by the trust, it never authorises the permanent retention of that investment, but merely allows it to be made as a temporary necessity in the administration of the trust estate (*i*).

But now by section 57 of the Trustee Act, 1925, it is provided (in effect) that where in the management or administration of any property vested in trustees, any sale or other disposition, or any purchase, investment or other transaction, " is in the opinion of

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(*e*) See *Re Morrison*, [1901] 1 Ch. 701; *Re Crawshay*, 60 L. T. 357; *Re New*, [1901] 2 Ch. 534.

(*f*) *Supra;* and see *West of England, etc.* v. *Murch*, 23 Ch. D. 138.

(*g*) *Per* Cozens-Hardy, L.J., in *Re Tollemache*, [1903] 1 Ch. 955, at p. 956. Cf. *Re Willis*, [1902] 1 Ch. 15 (C. A.).

(*h*) [1903] 1 Ch. 457, at pp. 459 *et seq.*

(*i*) And see *Re Wells*, [1903] 1 Ch. 848; *Havelock* v. *H.*, 17 Ch. D. 807; *Re Collins*, 32 Ch. D. 229; *Re Walker*, [1901] 1 Ch. 229.

the Court expedient," but cannot be effected by reason of the absence of any power for that purpose vested in the trustees, the Court may confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions as the Court may think fit; and any order made under the section may, from time to time, be rescinded or varied.

This enactment does not apply to Settled Land Act trustees, but by section 64, sub-section 1 of the Settled Land Act, 1925, it is provided (in effect) that any transaction affecting the settled land (not otherwise authorised by the Act or the settlement) which in the opinion of the Court would be for the benefit of the settled land, or the persons interested under the settlement, may, under an order of the Court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner. The word " transaction " is defined in sub-section 2 in very comprehensive terms.

Personal Security.—In the absence of plain *express* (*k*) authority to that effect, a trustee cannot lend trust moneys on personal security (*l*). If an express power is given, then it must be exercised with proper discretion (*m*), and any conditions prescribed as to its exercise must be strictly observed (*n*).

6. Liability for the Acts or Defaults of Co-trustees and Co-executors.

The rules applicable rest upon the same principles as hold in relation to delegation generally, and liability will attach if property is " unnecessarily " placed, or, if properly placed, is left too long under the control of a co-executor or co-trustee. Such delegation is only allowed when and so far as necessary according to usage in ordinary course of business (*o*).

In *Re Brier* (*p*), it was held that the indemnity given by Lord St. Leonard's Act only enforced the law as recognised by the old cases, and gave no protection where the act was not necessary

(*k*) *Pocock* v. *Reddington*, 5 V. 794.

(*l*) *Walker* v. *Symonds*, 3 Swans., at p. 62.

(*m*) *Knox* v. *Mackinnon*, 12 A. C. 753. Cf. *Smith* v. *Patrick*, [1901] A. C. 282.

(*n*) See, *e.g.*, *Bateman* v. *Davis*, 3 Madd. 98. As to a loan to a tenant for life on his personal security, see *Re Laing's Settlement*, [1899] 1 Ch. 593.

(*o*) See *Re Gasquoine*, [1894] 1 Ch. 470.

(*p*) 26 Ch. D. 238.

according to the ordinary course of business; in which case it would amount to " wilful default " (*q*).

The wording of a special indemnity clause, however, is sometimes so extensive as to protect a trustee from the consequences of what might otherwise be a clear breach of trust (*r*).

Ordinary Course of Business.—The judgment in the principal case is grounded on the receipt of the rents in question being necessary according to common practice in business, and the rule may now be stated thus: if one executor does an act *unnecessarily*, which enables his co-executor to obtain sole possession of property belonging to the testator's estate, which, but for that act, he could not have obtained possession of, the executor doing such an act will be liable for any loss that occurs from the misapplication of such property by his co-executor (*s*).

A trustee is bound not only to make proper inquiries from his co-trustees for what purpose the trust moneys are wanted, but also to take care that they have been duly invested in accordance with the representations made to him: *Hanbury* v. *Kirkland* (*t*).

And an executor or trustee will be liable not only if by *some act* he puts the control of property unnecessarily in the co-trustee or co-executor, but also if passively through neglect of duty he allows the co-trustee or co-executor to obtain the control, or stands by while the breach of trust is committed (*u*), or does not take proper measures to secure the property (*x*), or permits the co-executor to retain part of the assets in his hands for an unnecessarily long time (*y*).

In considering what is necessary according to the ordinary course of business, there is a difference between the case of an executor and that of a trustee of some defined trust, for the trustee as a rule has only to see to the custody and investment of the

(*q*) See *Re Owens*, 47 L. T. 61; *Buxton* v. *B.*, 1 My. & C. 80; *Re Stevens*, [1897] 1 Ch. 422.

(*r*) *Wilkins* v. *Hogg*, 8 Jur. (N.S.) 25; *Pass* v. *Dundas*, 43 L. T. 665.

(*s*) Judgment of Kay, L.J., in *Re Gasquoine*, [1894] 1 Ch. 477; and see *Walker* v. *Symonds*, 3 Swans. 1; *Dix* v. *Burford*, 19 B. 409; *Ingle* v. *Partridge*, 32 B. 661; *Re Fryer*, 3 K. & J. 317; *Lewis* v. *Nobbs*, 8 Ch. D. 591; *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

(*t*) 3 Si. 265; see also *Broadhurst* v. *Balguy*, 1 Y. & C. Ch. 16; *Mendes* v. *Guedalla*, 2 John. & H. 259.

(*u*) *Mucklow* v. *Fuller*, Jac. 198; *Booth* v. *B.*, 1 B. 125; *Dix* v. *Burford*, 19 B. 409; *Candler* v. *Tillett*, 22 B. 257.

(*x*) *Lincoln* v. *Wright*, 4 B. 427.

(*y*) *Styles* v. *Guy*, 16 Si. 230; 1 Hall & T. 523; *S. C.*, 1 Mac. & G. 422; *Dix* v. *Burford*, 19 B. 409; *Egbert* v. *Butter*, 21 B. 560; *Thompson* v. *Finch*, 22 B. 326; *Cowell* v. *Gatcombe*, 27 B. 568; Underhill on Trusts (8th ed.), p. 321

property and the payment of income to the beneficiaries. Executors have to wind up the testator's estate, and pay debts, and power may in a proper case be intrusted to a co-executor for the purpose (*z*).

But it has been held in old cases (*a*) that an executor will not be justified in joining in a transfer to his co-executor, after a considerable time has elapsed from the testator's death, upon the mere representation by his co-executor that the stock is wanted for payment of debts; and that if he neglects to make proper inquiries, he will be liable for the misappropriation of his co-executor. In *Shipbrook* v. *Hinchinbrook* (*b*), three executors, two years and a half after the death of the testator, joined in executing a power of attorney to a co-executor for the sale of stock, upon his representations that it was required for payment of debts. Eldon, C., held that they were liable for so much of the proceeds of sale as was misappropriated by their co-executor, but not for such part as they could prove was applied in payment of debts.

So an executor has been held liable if he gives a co-executor a power of attorney to collect the assets, *Doyle* v. *Blake* (*c*); or to hold securities whereby he is enabled to receive the money due thereon, *Candler* v. *Tillett* (*d*); or if he joins his co-executor in indorsing, *Hovey* v. *Blakeman* (*e*), or drawing, *Sadler* v. *Hobbs* (*f*), a bill whereby he obtains sole possession of the proceeds (*g*). And if, by agreement between trustees, one is to receive and intermeddle with such a part of the estate, and another with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made betwixt both, *Gill* v. *Att.-Gen.* (*h*).

On the other hand, the judgment of Lord Cottenham in *Clough*

(*z*) See *Hovey* v. *Blakeman*, 4 V. 608; *Bacon* v. *B.*, 5 V. 331; 5 R. R. 52; *Chambers* v. *Minchin*, 7 V. 197; 6 R. R. 111; *Re Brier*, *supra*, p. 619; *Re Chapman*, [1896] 2 Ch., at p. 773; *Hiddingh* v. *Denyssen*, 12 A. C. 624; *Re Lord de Clifford's Estate*, [1900] 2 Ch. 707.

(*a*) *Shipbrook* v. *Hinchinbrook*, 11 V. 252; 16 V. 477; 8 R. R. 138. See also *Underwood* v. *Stevens*, 1 Mer. 712; *Bick* v. *Motly*, 2 My. & K. 312; *Williams* v. *Nixon*, 2 B. 472; *Hewett* v. *Foster*, 6 B. 259; *Candler* v. *Tillett*, 22 B., at p. 263.

(*b*) *Supra*. Cf. *Langford* v. *Gascoyne*, 11 V. 333.

(*c*) 2 Sch. & L. 231; see also *Kilbee* v. *Sneyd*, 2 Moll. 200; *Lees* v. *Sanderson*, 4 Si. 28.

(*d*) 22 B. 263; *Lewis* v. *Nobbs*, 8 Ch. D. 591.

(*e*) 4 V. 596, 608.

(*f*) 2 Bro. Ch. 114.

(*g*) And see *Gregory* v. *G.*, 2 Y. & C. Exch. 313; *Dines* v. *Scott*, T. & R. 361; *Clough* v. *Bond*, 3 My. & C. 497; *Balchen* v. *Scott*, 2 V. 678.

(*h*) Hard. 314; and see *Moses* v. *Levi*, 3 Y. & C. Exch. 359.

v. *Bond* (*i*), and the qualification given in *Re Gasquoine* (*k*) of the rule as stated in *Candler* v. *Tillett* (*l*), show that the ground for the decisions that the trustees are liable for the co-trustee's receipts is, that it was *not necessary* in the ordinary course of business to give the co-trustee or co-executor control.

When three executors and trustees were authorised to carry on the testator's farming business, which was by arrangement managed by one of them, Romilly, M.R., held that in taking the accounts the executor who managed the farm was to be considered as an agent, and that the account against the other trustees would be taken upon the same footing as if the agent appointed had not been an executor or trustee (*m*).

Upon the same principle, Lord Redesdale, putting the case of an executor, living in London, remitting money to his co-executor in Suffolk, to pay debts owing there, observes, " He is considered to do this of necessity; he could not transact business without trusting some persons, and it would be impossible for him to discharge his duty if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way " (*n*).

So it has been held that an executor is not liable for the loss of a fund which he hands over to his co-executor, if he has no legal right to retain it (*o*); nor if, having disclaimed and renounced, he applies it as the agent of the one who proved the will (*p*); *secus*, if he has once acted (*q*).

As legatees are bound by the terms of the will and creditors are not, in many cases executors would be discharged as against legatees, where they would not as against creditors, *e.g.*, in case of a direction in a will to entrust the assets to some particular person : see *Doyle* v. *Blake* (*r*).

It has been held that where a trustee becomes aware of a

(*i*) 3 My. & C. 497.

(*k*) [1894] 1 Ch., at p. 477.

(*l*) 22 B., at p. 263; and see *Lowe* v. *Shields*, [1902] 1 Ir. R. 320.

(*m*) See *Toplis* v. *Hurrell*, 19 B. 423; and see *Home* v. *Pringle*, 8 Cl. & Fin. 288.

(*n*) *Joy* v. *Campbell*, 1 Sch. & L., at p. 341; *Chambers* v. *Minchin*, 7 V. 193; *Re Lord de Clifford's Estate*, [1900] 2 Ch. 707; *Re Sheppard*, [1911] 1 Ch. 50; *Re Mackay*, [1911] 1 Ch. 300.

(*o*) See *Davis* v. *Spurling*, 1 Russ. & M. 64; *Crisp* v. *Spranger*, Nels. 109.

(*p*) See *Dove* v. *Everard*, 1 Russ. & M. 231; *Stacey* v. *Elph*, 1 My. & K. 195.

(*q*) *Doyle* v. *Blake*, 2 Sch. & L. 245.

(*r*) 2 Sch. & L. 231, 240, 245, *per* Lord Redesdale; and see *Wilson* v. *Keating*, 4 De G. & J. 593.

breach of trust either meditated or committed by his co-trustee, and he conceals it, or at any rate abstains from taking the needful steps, by injunction or action, either to prevent it or to obtain restitution or redress on behalf of his *cestui que trust*, he will render himself liable for the misconduct of his co-trustee (*s*).

The legal personal representative of a sole surviving trustee who has died insolvent and indebted to his trust estate cannot, unless he has elected to act as trustee or is otherwise in the position of trustee, be ordered to exercise, in favour of the *cestui que trust*, his right of retainer in respect of the debt (*t*).

Contribution and primary liability.—Though a trustee liable for a breach of trust is as a rule entitled to contribution from his co-trustee (*u*), if the trustee be a beneficiary and has obtained a benefit, he is primarily liable to the extent of his beneficial interest (*u*). As a general rule, a trustee advising a breach of trust for his own benefit is primarily liable (*v*); but in *Butler* v. *B.* (*x*), trust money was advanced to a builder on insufficient security, and part of it applied by him in paying off a mortgage on the land to one of the trustees. That trustee was held not to be primarily liable, as the benefit was too small and remote to affect his position. In *Re Gurney* (*y*), trust funds advanced on a mortgage were applied in payment of a debt charged on the property in favour of a bank in which one of the trustees was partner, and it was held that the receipt of the money was not a conversion to his own use by the trustee, within the meaning of section 8, sub-section 1, of the Trustee Act, 1888. In *Chillingworth* v. *Chambers* (*z*), it was held that the fact that a borrower of trust money from trustees repaid out of the money so borrowed a debt due from him to one of the trustees was not of itself sufficient to render the trustee so accepting payments primarily liable for breach of trust, as having made the investment for his own benefit, the borrower of the trust money being under no restriction as to its application.

(*s*) See *Boardman* v. *Mosman*, 1 Bro. Ch. 68; *Walker* v. *Symonds*, 3 Swans. 1, *Blackwood* v. *Borrowes*, 2 Com. & L. 477; *Booth* v. *B.*, 1 B. 125; *Williams* v. *Nixon*, 2 B. 472; *Re Chertsey Market*, 6 Price, 279; *Oliver* v. *Court*, 8 Price, 166; *Hudson* v. *H.*, 1 Atk. 460; *Willand* v. *Fenn*, cited in 2 V. 268.

(*t*) See *Re Benett*, [1906] 1 Ch. 216; approving *Re Ridley*, [1904] 2 Ch. 774; disapproving *Fox* v. *Garrett*, 28 B. 16; and *Re Owen*, 23 L. R. Ir. 328; and distinguishing *Sander* v. *Heathfield*, 19 Eq. 21; and *Re Faithfull*, 57 L. T. 14.

(*u*) *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685.

(*v*) *Lockhart* v. *Reilly*, 25 L. J. Ch. 697; *Thompson* v. *Finch*, 8 De G. M. & G. 560; cf. *Re Linsley*, [1904] 2 Ch. 785.

(*x*) 7 Ch. D. 116.

(*y*) [1893] 1 Ch. 590.

(*z*) [1896] 1 Ch. 685.

In *Jackson* v. *Dickinson* (*a*), two trustees in breach of trust invested trust funds in partly paid shares of a company. Some years after the death of one trustee, the survivor, who had made every reasonable effort to dispose of the shares, but without success, paid a call as a contribution in the liquidation of the company; it was held that the deceased trustee's representatives, though not liable to the company for the call, were liable to the surviving trustee for contribution.

In *Matthews* v. *Ruggles-Brise* (*b*), it was held by Swinfen Eady, J., that although the assignment by a *cestui que trust* of his interest to a new *cestui que trust* terminates the trust relationship between the trustee and the old *cestui que trust*, it does not terminate the personal liability of the old *cestui que trust* to indemnify the trustee against claims arising under existing contractual liabilities.

7. Trustee Joining with Co-trustees in Receipts.

In the principal case of *Brice* v. *Stokes*, Eldon, C., said, "At law, where trustees join in a receipt, *prima facie*, all are to be considered as having received the money. But it is competent to a trustee, and if he means to exonerate himself from that inference, it is necessary for him to show that the money acknowledged to have been received by all was in fact received by one, and the other joined only for conformity." A person who joins with his co-trustees in a receipt for trust money, when it is indispensable that he should do so for the sake of conformity, will not *thereby alone* be rendered liable for the misapplication of the money which comes to the hands of the trustees (*c*).

For the statutory indemnity contained in section 30, subsection 1 of the Trustee Act, 1925 (which replaces section 24 of the Trustee Act, 1893), see above, p. 613.

8. Executors Joining with Co-executors in Receipts.

Lord Eldon in the principal case of *Brice* v. *Stokes*, after the passage above quoted, showing that a trustee may prove that he only joined in receipt for conformity, proceeds, "In the case of

(*a*) [1903] 1 Ch. 947.
(*b*) [1900] 1 Ch. 194.
(*c*) *Heaton* v. *Marriot*, cited Pr. Ch. 173; *Fellows* v. *Mitchell*, 1 P. W. 81; *Shipbrook* v. *Hinchinbrook*, 11 V. 252; 16 V. 477; 8 R. R. 138; *Re Fryer*, 3 K. & J. 317.

executors, it has been said, and well said, to be otherwise. An executor, as it is not necessary for him to join, interfering in the transaction unnecessarily, the inference is just the other way, he is to be considered as assuming a power over the fund, and therefore answerable for the application, as far as it is connected with the particular transaction in which he joins " (*d*).

It was, however, long since settled that where the act of signing a receipt by an executor was merely formal, and had not the effect of putting the trust funds in the possession of a co-executor, *e.g.*, if he had received the money previously, it will not render the other liable. This was all that was actually decided by Lord Northington in *Westley* v. *Clarke* (*e*); which decision, though doubted by Lord Thurlow in *Sadler* v. *Hobbs* (*f*), is approved by Lord Alvanley in *Scurfield* v. *Howes* (*g*).

In the same case of *Westley* v. *Clarke* (*h*), Lord Northington observed that the rule in the case of executors " amounts to no more than that a joint receipt given by executors is a stronger proof that they actually joined in the receipt because generally they have no occasion to join for conformity." And Lord Eldon, in *Brice* v. *Stokes*, said, " Upon considering the cases paring down the rule of late, I repeat what I have said upon a former occasion (*i*), that it is much safer for executors to abide by a general rule of that sort, than to lay down a rule, trying the application of it by looking to particular circumstances in particular cases, which will raise very different inferences in different minds." But he recognises the rule in the case of *Walker* v. *Symonds* (*k*).

The rule is thus explained by Lord Redesdale in *Joy* v. *Campbell* (*l*), " The distinction seems to be this with respect to a mere signing; that if a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving : but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all those

(*d*) See also *Aplyn* v. *Brewer*, Pr. Ch. 173; *Ex p. Belchier*, Amb. 219; *Leigh* v. *Barry*, 3 Atk. 584; *Chambers* v. *Minchin*, 7 V. 198; 6 R. R. 111.

(*e*) 1 Eden, 357.

(*f*) 2 Bro. Ch. 117.

(*g*) 3 Bro. Ch. 94; *Hovey* v. *Blakeman*, 4 V. 608; *Chambers* v. *Minchin*, 7 V. 198; *Walker* v. *Symonds*, 3 Swans. 1; Underhill on Trusts (8th ed.), pp. 320—1.

(*h*) 1 Eden, 360.

(*i*) *Chambers* v. *Minchin*, *supra*.

(*k*) 3 Swans. 1.

(*l*) 1 Sch. & L. 341. See also *Doyle* v. *Blake*, 2 Sch. & L. 242.

cases seems to have been, whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor; for it could have no other meaning. He became responsible for the application of the money just as if he had received it."

It may be taken, therefore, that, independently of the protection given by statute, a co-executor is not by joining in a receipt precluded from showing that he did not in fact receive the money, though it may be that the presumption that he did receive is stronger than in the case of a trustee.

The protection from liability given by section 30 of the Trustee Act, 1925, to trustees from signing receipts for conformity, is extended by the definition clause section 68, sub-section 17, to personal representatives.

This enactment only expresses the law recognised by the old cases (*m*), and only applies where the receipt is signed for the sake of conformity, which on the later authorities must be taken to include not only a case where the signing was a mere form, and had no effect in enabling the co-executor or trustee to obtain control, but also cases where the control of the money may properly, in the ordinary course of business, be given to the co-trustee or co-executor. Where the signing has been a mere form, and the money has been, or might have been, obtained before or without it, yet if the co-trustee or co-executor has allowed the money to remain under the control of the other, without seeing that it was properly applied, or taking proceedings to enforce its being so applied, he would generally be held liable (*n*).

9. Remedies against Trustees Barred by Concurrence, Acquiescence, or Laches.

Concurrence.—The remedy of a *cestui que trust* against his trustee for a breach of trust with regard to the investment or custody of the trust funds may be barred either by (1) concurrence, (2) acquiescence, or (3) *laches* on the part of the *cestui que trust*.

In *Brice* v. *Stokes* it is laid down by Lord Eldon that when the *cestui que trust* concurs with a trustee in the misapplication of the trust funds, he cannot be heard in a Court of equity to complain of

(*m*) *Re Brier*, 26 Ch. D. 238.

(*n*) See pp. 624—5, *supra*.

the acts of the trustee which he has himself knowingly authorised (*o*).

And a *cestui que trust* who is also trustee cannot call upon a co-trustee to replace stock which both had permitted to be sold out and misapplied (*p*), but he is entitled to call on the person who has actually received and spent the money to pay to him that part of it which became his own property (*q*).

A *cestui que trust* cannot be held to be a party to a breach of trust unless it be shown that he was cognisant at least of the facts which made it a breach of trust (*r*).

Concurrence of a person under disability would not as a rule be a protection for the trustees. Thus an infant, being incapable of consenting, cannot relieve a trustee by concurring (*s*).

But an infant has been held liable by fraud, *e.g.*, where he or she made a false representation that he or she was of age (*t*), but a person who is aware of the fact of infancy, and therefore not deceived, cannot claim that the infant is bound (*u*).

The separate estate of a married woman was not in general liable for breaches of trust committed by her, where the breach of trust did not relate to property in which, or subject to a settlement under which, she had separate estate (*x*).

But where a married woman actually concurred in a breach of trust with respect to property comprised in a settlement under which she had separate estate not subject to restraint, such property has been held to be bound (*y*), as was also property subject to an

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(*o*) And see *Buckeridge* v. *Glasse*, 1 Cr. & Ph. 135; *Fellows* v. *Mitchell*, 1 P. W. 81; *Walker* v. *Symonds*, 3 Swans. 1; *Byrchall* v. *Bradford*, 6 Madd. 13; *Wilkinson* v. *Parry*, 4 Russ. 272; *Ex p. Barnewall*, 6 De G. M. & G. 801; *Griffiths* v. *Porter*, 25 B. 236; *Life Association* v. *Siddal*, 3 De G. F. & J. 58, 74; Underhill on Trusts (8th ed.), p. 500.

(*p*) *Butler* v. *Carter*, 5 Eq. 276; *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685.

(*q*) 5 Eq. p. 281.

(*r*) *Buckeridge* v. *Glasse*, 1 Cr. & Ph. 135, *per* Lord Cottenham, C., and *Re Garnett*, 31 Ch. D. 1; but see *dicta* of Bacon, V.-C., in *Sleeman* v. *Wilson*, 13 Eq. 36.

(*s*) *Wilkinson* v. *Parry*, 4 Russ. 272.

(*t*) See notes to *Savage* v. *Foster*, vol. i, *ante*, at p. 417; and see *Overton* v. *Banister*, 3 Ha. p. 503; *Evroy* v. *Nicholas*, 2 Eq. Cas. Abr. 488, pl. 1; *Wright* v. *Snowe*, 2 De G. & Sm. 321; *Clarke* v. *Cobley*, 2 Cox, 173; *Lempriere* v. *Lange*, 12 Ch. D. 675.

(*u*) *Goode* v. *Harrison*, 5 B. & A. 147; *Bilton* v. *Hodges*, 9 Bing. 365.

(*x*) *Wainford* v. *Heyd*, 20 Eq. 321; *Johnson* v. *Gallagher*, 3 De G. & J. 494; and see the Notes to *Hulme* v. *Tenant*, vol. i.

(*y*) *Clive* v. *Carew*, 1 John. & H. 199; *Mara* v. *Manning*, 2 Jo. & Lat. 311; *Crosby* v. *Church*, 3 B. 485; *Pemberton* v. *McGill*, 1 Dr. & Sm. 266, referred to in *Sawyer* v. *S.*, 28 Ch. D. p. 605; Underhill on Trusts (8th ed.), p. 514.

absolute power of appointment under the settlement (*z*), but not, it seems property subject to a general power of appointment exercisable only by will (*a*).

Neither the married woman nor her property was bound, however, unless she actually "concurred" in the breach of trust (*b*).

Nor would her right against the trustees be barred if she was deceived or was under pressure of undue influence (*c*). A restraint on anticipation prevented her concurrence or acquiescence from having an operation on property subject to the restraint (*d*).

Section 19 of the Married Women's Property Act, 1882, provides that the Act is not to "interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for settlement, will, or other instrument" (*e*). Section 1, sub-section 2 enables a married woman to be sued separately from her husband, either in contract or in tort *or otherwise*. And by section 1 of the Married Women's Property Act, 1893, every contract entered into by a married woman, otherwise than as agent, is to be deemed to be entered into with respect to and to bind her separate property, whether she is or is not possessed of separate property at the date of the contract; but nothing in the section is to render available to satisfy any liability arising out of such contract any separate property which she is restrained from anticipating. By section 24 of the Act of 1882 the word "contract" in the Act includes the acceptance of the office of trustee or personal representative, and her liability extends to breaches of trust or devastavits committed by her as trustee or personal representative.

Even the fraud of a married woman would not make her property liable if subject to restraint on anticipation (*f*).

(*z*) *Brewer* v. *Swirles*, 2 Sm. & G. 219.

(*a*) *Kellaway* v. *Johnson*, 5 B. 319.

(*b*) *Montford* v. *Cadogan*, 19 V. 639, 640; 13 R. R. 270; 16 R. R. 135; *Bateman* v. *Davis*, 3 Madd. 98; *Ryder* v. *Bickerton*, 3 Swans. 80 (n.); *Underwood* v. *Stevens*, 1 Mer. 717; *Cresswell* v. *Dewell*, 4 Gif. 460; *Sawyer* v. *S.*, 28 Ch. D. p. 605.

(*c*) *Whistler* v. *Newman*, 4 V. 129; *Walker* v. *Shore*, 19 V. 393; *Hughes* v. *Wells*, 9 Ha. 749, see p. 773.

(*d*) *Fletcher* v. *Green*, 33 B. 426, 429; *Arnold* v. *Woodhams*, 16 Eq. 29; *Stanley* v. *S.*, 7 Ch. D. 589; *Lady Bateman* v. *Faber*, [1898] 1 Ch. 144; Underhill on Trusts (8th ed.), p. 503. The doubt on this point expressed by Turner, L.J., in *Derbishire* v. *Home*, 3 De G. M. & G. p. 113, appears not to have been well founded.

(*e*) See Notes to *Hulme* v. *Tenant*, vol. i.

(*f*) *Jackson* v. *Hobhouse*, 2 Mer. 483; *Clive* v. *Carew*, 1 J. & H. 199, 206;

Townley v. Sherborne—Brice v. Stokes.

Acquiescence.—The word "acquiescence" is used in different senses, and is sometimes applied to cases of "estoppel," where such estoppel is raised not by express representation in words, but by conduct (*g*); as said by Lord Eldon, "Looking on is in many cases as strong as using terms of encouragement" (*h*).

Standing by without objection while some person is spending money upon property in the mistaken belief that such property is his own, whereas the property belongs in fact to the party standing by, who is aware of the other's error, is conduct amounting to acquiescence or "equitable estoppel" (*i*). Acquiescence of this nature would be sufficient as an answer to a claim for a breach of trust.

Apart from statute, it seems that a trustee cannot claim indemnity from a married woman *cestui que trust*, merely upon the ground that she acquiesced in (in the sense of consenting to) a breach of trust, whether or not her interest is restrained from anticipation. In *Sawyer* v. *S.* (*k*), Fry, L.J., delivering the judgment of the Court of Appeal, said: "All the cases in which the separate estate of a married woman has been held to be affected by a breach of trust are, so far as we are aware, cases in which she has been an actual actor in the transaction herself. . . . In no case, so far as we know, has her separate estate been charged on the mere ground of her having acquiesced in or approved of the breach of trust."

But actual assent on the part of a *cestui que trust* not being under disability, with knowledge of the facts, will discharge trustees from liability, so far as regards a claim by such *cestui que trust* (*l*).

But it must be made with full knowledge (*m*), and without any misrepresentation or concealment by the trustees (*n*). Thus, in

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Arnold v. *Woodhams*, 16 Eq. 29; *Stanley* v. *S.*, 7 Ch. D. 589; *Re Glanvill*, 31 Ch. D. 532; *Lady Bateman* v. *Faber*, [1898] 1 Ch. 144.

(*g*) *Pickard* v. *Sears*, 6 A. & E. 469.

(*h*) *Dann* v. *Spurrier*, 7 V. 231.

(*i*) See Notes to *Savage* v. *Foster*, vol. i.

(*k*) 28 Ch. D. 595, 605; and see *Bolton* v. *Curre*, [1895] 1 Ch. 544.

(*l*) See *Harden* v. *Parsons*, 1 Eden, 145; *Langford* v. *Gascoyne*, 11 V. 333; *Booth* v. *B.*, 1 B. 125; *Broadhurst* v. *Balguy*, 1 Y. & C. Ch. 16; *Nail* v. *Punter*, 5 Si. 555; *Walker* v. *Symonds*, 3 Swans. 1; *Munch* v. *Cockerell*, 5 My. & C. 178; *Farrar* v. *Barraclough*, 2 Sm. & G. 231; *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104; *Sleeman* v. *Wilson*, 13 Eq. 36; *Fletcher* v. *Collis*, [1905] 2 Ch. 24.

(*m*) *Montford* v. *Lord Cadogan*, 17 V. 489; *Munch* v. *Cockerell*, 5 My. & C. 178; *Rehden* v. *Wesley*, 29 B. 213; *Re Somerset*, [1894] 1 Ch. 231.

(*n*) *Walker* v. *Symonds*, 3 Swans. 1; *Underwood* v. *Stevens*, 1 Mer. 712; *Burrows* v. *Walls*, 5 De G. M. & G. 233.

Re Salmon (*o*), an assent by beneficiaries to an investment of an authorised description, but improper, was held not to bind them, and a distinction was taken that if it had been of an "unauthorised" description they must have known it was a breach of trust, and been bound. But where money was paid with knowledge of facts, but under a mistake of rights, it was considered inequitable to allow the claim of a person who had "stood by" and allowed the payment (*p*).

In *Burrows* v. *Walls* (*q*), it was held that a letter consenting to an arrangement for deferred payments, written by one *cestui que trust* on behalf of others, did not preclude them from suing the trustees, because it was written without full knowledge of their rights. Lord Cranworth, L.C. (*r*), said: "I take it that although it is perfectly clear, on all the authorities and all principle, that no *cestui que trust* can allege that to be a breach of trust which has been done under his own sanction (for that is the meaning of acquiescence, either previous sanction or subsequent ratification); or as was said by Lord Eldon in *Walker* v. *Symonds* (*s*), 'Either concurrence in the act, or acquiescence without original concurrence, will release the trustees, yet,' as was added by Lord Eldon, 'that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence.'" And after pointing out that the beneficiaries had simply done nothing until the fund was distributable, the L.C. proceeded: "In order to be favourable to the trustee who alleges acquiescence, it must be a consent on the part of the persons who have a right to call the trustees to account, that they shall be absolved from liability, and that they will adopt the misapplication of the funds as having been done with their assent and sanction."

In *Bate* v. *Hooper* (*t*), long annuities were left unconverted for thirty years, and the tenant for life received the income, but protested that the annuities should be commuted. The children reversioners assigned their interests to a mortgagee, with the concurrence of the tenant for life. It was held that there was no acquiescence, and the trustees were to account for the difference

(*o*) 42 Ch. D. 351.

(*p*) *Stafford* v. *S.*, 1 De G. & J. 193; *Rogers* v. *Ingham*, 3 Ch. D. 351; *Re Hulkes*, 33 Ch. D. 552.

(*q*) 5 De G. M. & G. 233.

(*r*) *Ibid.*, at p. 251.

(*s*) 3 Swans. 1, at p. 64.

(*t*) 5 De G. M. & G. 338.

between the value of the long annuities one year from the testator's death and the value when paid into Court.

In *Stafford* v. *S.* (*u*), there was no question raised against the trustee, but between beneficiaries. It was held that after acquiescence in a payment for fifteen years, under a mistake of construction, there was no claim against the other beneficiaries for repayment.

A *cestui que trust* will not be affected with constructive knowledge of a breach of trust merely because he might by inquiries have discovered it (*x*).

A person is not less capable of giving an assent when his interest is in reversion than when it is in possession, but whether he has done so or not is a question to be determined on the facts of each particular case (*y*). In general, in order to affect a reversioner with acquiescence, knowledge of the facts ought to be alleged and proved (*z*), though in some cases it may be presumed from great lapse of time (*a*).

Laches, or Delay.—*Without any positive evidence of Assent.*—Mere delay will not, apart from statute, operate as a bar to a claim by a *cestui que trust.* In order to make it a bar there must be other circumstances rendering it inequitable to grant relief (*b*).

In *Bright* v. *Legerton* (*c*), relief was refused on the ground of what the Court called "gross *laches.*" In this case the question raised was as to trustees' dealings with cottages between 1828 and 1839. The beneficiary came of age in 1839, and it was proved that accounts were then submitted to him and he did not object. He commenced an action in 1860 with respect to the management of the cottages. The three trustees were dead, and apparently the vouchers were lost. Campbell, L.C., dismissed the claim. "Might such a bill," said the L.C., "be filed at the end of a century by the plaintiff's personal representative against the personal representa-

(*u*) 1 De G. & J. 193.

(*x*) *Thompson* v. *Finch*, 22 B. 325, 327; *Farrant* v. *Blanchford*, 1 De G. J. & S. 107, 119; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J., p. 73.

(*y*) *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J., p. 72, *per* Turner, L.J.

(*z*) *Taylor* v. *Cartwright*, 14 Eq. 167.

(*a*) *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 77, *per* Lord Campbell, L.C.; *Smethurst* v. *Hastings*, 30 Ch. D. 490; *Evans* v. *Benyon*, 37 Ch. D. 329.

(*b*) *Re Cross*, 20 Ch. D. 109; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; see also *Re Birch*, 27 Ch. D. 622.

(*c*) 2 De G. F. & J. 606. Cf. *Re Cross*, 20 Ch. D. 109.

tives of the three trustees, if they could be found out? I apprehend that in such a case it is unnecessary to presume the execution of a release, or to resort to any Statute of Limitations. A Court of Equity will not allow a dormant claim to be set up when the means of resisting it, if unfounded, have perished, much less cast a burden of proving such an affirmative as that forty years ago cottage rents were properly collected, when the witnesses who might have proved the fact have long ago been called into another state of existence. It has been beautifully remarked with respect to the emblem of Time, who is depicted as carrying a scythe and an hour-glass, that while with the one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed " (*d*).

In *Re Sharpe* (*e*), it was held that neither the Statute of Limitations, nor the equitable doctrine of *laches*, was a bar to an action to make directors liable for paying interest out of capital where *ultra vires*, because directors were in the position of trustees (*f*), and a claim by a liquidator in 1889 against the estate of a director who died in 1883 was held not to be a stale demand. In this case Lindley, L.J., said : " That staleness of demand as distinguished from the Statute of Limitations and analogy to it may furnish a defence in equity to an equitable claim was settled at least as early as *Smith* v. *Clay* " (*g*).

In *Erlanger* v. *New Sombrero Phosphate Co.* (*h*), Lord Blackburn said : " A Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell much more against the party *in mora*, than a similar change before he was *in mora* should do." In *Lindsay Petroleum Co.* v. *Hurd* (*i*), Selborne, L.C., said : " The doctrine of *laches* in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a

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(*d*) 2 De G. F. & J. 616; and see *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. p. 212.

(*e*) [1892] 1 Ch. 168.

(*f*) See *Re Claridge's Patent Asphalte Co.*, [1921] 1 Ch. 543, 548.

(*g*) Amb. 645; and see *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. pp. 239—241.

(*h*) 3 A. C. p. 1279.

(*i*) L. R. 5 P. C. pp. 239—241.

remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." This passage was cited by Lord Blackburn in the above-mentioned case of *Erlanger* v. *New Sombrero Phosphate Co.* (*k*), who observed of it, " I have looked in vain for any authority which gives a more distinct and definite rule than this."

In *Rochefoucauld* v. *Boustead* (*l*), Lindley, L.J., delivering the judgment of the Court of Appeal, said : " We come now to the last ground of defence—namely, laches and lapse of time apart from the Statutes of Limitations." And after referring to the facts material to this point, and after quoting the passages set out above from the judgments in *Lindsay Petroleum Co.* v. *Hurd* (*m*), and *Erlanger* v. *New Sombrero Phosphate Co.* (*n*), Lindley, L.J., proceeded : " Since 1882 the defendant has done nothing to induce the plaintiff not to sue him, nor to lead her to believe that any claim by her would be recognised. On the other hand, the plaintiff has done nothing actively to lead the defendant to suppose that she abandoned any claim she might have against him as her trustee. There is nothing to be said against her, except that she has forborne to sue for twelve years. Under these circumstances, to hold that time is a bar would be to decide that, although the Statute of Limitations is no bar to a suit by a *cestui que trust* against a trustee in a case of express trust, yet that lapse of time without more is a bar. Such a conclusion cannot be correct. Even where there is

(*k*) 3 A. C. p. 1279.
(*l*) [1897] 1 Ch. 196, 209—212; 75 L. T. 507.
(*m*) L. R. 5 P. C. p. 239.
(*n*) 3 A. C. p. 1279.

an express trust, lapse of time *coupled with other circumstances*, which render it unjust to give the plainiff relief against the defendant, will induce the Court to refuse the relief, although no Statute of Limitations might bar his claim. But in this case, which is one of express trust, there is nothing except time, and that without more is not sufficient apart from some Statute of Limitations."

10. Indemnity of a Trustee by his Cestui que Trust.

The general rule is that, independently of any express contract, and independently of statute, a trustee who accepts office *at the request* of a *cestui que trust* solely entitled, has the right to be indemnified by that *cestui que trust* personally against all loss which may accrue from the trust (*o*).

Where, for instance, the trustee of shares in a company is made a contributory on the failure of the company, he can compel the *cestui que trust* at whose request he became a trustee to indemnify him (*p*). On the same principle an absolute beneficial owner *sui juris* must in equity bear all the burdens of the ownership, and that whether he created the trust or took a transfer of the beneficial ownership (*q*). A *cestui que trust* does not by assigning his interest cease to be liable to indemnify the trustee (*r*).

And in such a case trustees and executors, after the death of the *cestui que trust*, are entitled to be indemnified out of his estate, and for that purpose can call upon residuary legatees to refund what has been paid to them (*s*); and the mere fact that the executor, previous to payment, had notice of a contingent liability, as, for instance, that trustees on behalf of the testator as *cestui que trust*, held shares in a company, which might be wound up, and in respect of which the trustees (whom the testator was bound to indemnify), might be liable as contributories, is immaterial (*t*).

It seems that trustees cannot claim an indemnity from *cestuis que trust* beforehand, against a contingent liability (*u*). In certain

(*o*) *Jervis* v. *Wolferstan*, 18 Eq. 18, 24; *Fraser* v. *Murdoch*, 6 A. C. 855, 872; *Hardoon* v. *Belilios*, [1901] A. C. 118, 123; *Matthews* v. *Ruggles-Brise*, [1911] 1 Ch. 194

(*p*) *Jervis* v. *Wolferstan*, *supra*.

(*q*) *Hardoon* v. *Belilios*, [1901] A. C. 118.

(*r*) *Matthews* v. *Ruggles-Brise*, *supra*.

(*s*) *Jervis* v. *Wolferstan*, *supra*.

(*t*) *Ibid*. Cf. *Re King*, [1907] 1 Ch. 72.

(*u*) *Brough* v. *Oddy*, 1 Russ. & M. 55; *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561; *Re Mullett*, [1885] W. N. 130. But see *Re Mackay*, [1911] 1 Ch. 300, 306.

cases, moreover, the right of the trustee to any personal indemnity from his *cestui que trust* is impliedly excluded. In *Wise* v. *Perpetual Trustee Co., Ltd.* (*x*), the lease of the property of a club which involved onerous obligations was vested in trustees. The trustees having had to pay large sums to the landlords under the lease sued certain members of the club for indemnity. Lord Lindley, delivering the judgment of the Privy Council, laid it down that although the trustees were entitled to indemnity out of any property of the club to which their lien as trustees extended, they had no right to a personal claim for indemnity against individual members (*y*).

An executor and trustee, authorised to carry on the testator's business both by the will and by the Court, who has properly incurred liabilities to trade creditors, must be indemnified against such liabilities; and where assets are deficient, such indemnity takes priority on allocation over costs awarded, on further consideration, to a plaintiff legatee. The trade creditors stand in the shoes of the executor (where he is carrying on his testator's business, and is authorised so to do) and are subrogated to his rights of indemnity and priority (*z*).

Section 62 of the Trustee Act, 1925 (re-enacting section 45 of the Trustee Act, 1893, which replaced section 6 of the Trustee Act, 1888) provides: "(1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it thinks fit, and notwithstanding that beneficiary may be a married woman restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through him.

"(2) This section applies to breaches of trust committed as well before as after the passing of this Act."

This is an alteration of the old law, so far as regards impounding the interest restrained from anticipation, but, as appears above, apart from the statute, the interest of a *cestui que trust* not under disability might have been impounded for the indemnity of the trustee, where the *cestui que trust* "instigated" the breach of

(*x*) [1903] A. C. 139.
(*y*) And see *Wylie* v. *Carlyon*, [1922] 1 Ch. 51.
(*z*) *Dowse* v. *Gorton*, [1891] A. C. 190.

trust (*a*). The words " in writing " in the above enactment only apply to consent, not to " instigation or request " (*b*).

Under this section, the Court has a discretion—" to be exercised judicially "—and may, if it thinks proper, decline to act upon the power it confers (*c*). In *Ricketts* v. *R.* (*d*), Romer, J., refused to make an order impounding the interest of a married woman in personal estate, which was reversionary at the date of the breach of trust. So in *Bolton* v. *Curre* (No. 2) (*e*), the same Judge refused to impound the interest of a married woman restrained from anticipation, on the ground that it was the duty of the trustee to protect so far as practicable a married woman, and he had failed in this duty.

In order to make a beneficiary liable under the section, in respect of an improper investment, it must be shown not only that he instigated, requested, or consented in writing to the investment, but that he knew the facts which would make it a breach of trust (*f*), but it is not necessary that the trustees should have been deceived by the beneficiary (*g*).

11. Relief of Trustees under Section 61 of the Trustee Act, 1925.

This section, re-enacting section 3 of the Judicial Trustees Act, 1896, provides : " If it appears to the Court that a trustee, whether appointed by the Court or otherwise is, or may be, personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same."

It is to be observed that section 62, sub-section 1 of the Trustee Act, 1925 (re-enacting section 45 of the Trustee Act, 1893) does not in any way diminish the rights which a trustee had under the earlier law. Independently of this enactment, a beneficiary *sui juris* who knowingly consented to a breach of trust was not only

(*a*) *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685, and cases there cited, and *Bolton* v. *Curre* (*No.* 2), [1895] 1 Ch. 544.

(*b*) *Griffith* v. *Hughes*, [1892] 3 Ch. 105.

(*c*) *Re Somerset*, [1894] 1 Ch. pp. 274—6. (*d*) 64 L. T. 263.

(*e*) [1895] 1 Ch. 544; see also *Sawyer* v. *S.*, 28 Ch. D. 595.

(*f*) *Re Somerset*, [1894] 1 Ch. 231; *Mara* v. *Browne*, [1895] 2 Ch. 69, affirmed, [1896] 1 Ch. 199; *Fletcher* v. *Collis*, [1905] 2 Ch. 24.

(*g*) *Griffith* v. *Hughes*, *supra*; *Bolton* v. *Curre*, *supra*.

precluded from making a claim in respect of the same, but was unable (if the loss was made good upon the claim of another beneficiary) to obtain any benefit therefrom (*h*). The section enlarges the trustee's rights, enabling the Court to direct the interest of the consenting beneficiary in any other part of the trust funds to be impounded for the trustee's benefit (*i*).

In *Re Lord De Clifford's Estate* (*j*), Farwell, J., pointed out that there is in fact no principle which can serve as a guide in applying the section. The Court has to find, as a fact, that the trustee has acted honestly and reasonably, and ought fairly to be excused, and has then power to grant relief. The mere fact that the trustee has shown an equal degree of care in his own affairs and in those of his *cestui que trust*, though evidence of *bona fides* is not evidence that his action was reasonable within the section (*k*). But the power given by the section is meant to be freely and fairly acted on in the exercise of judicial discretion. No general rule can be laid down, but each case must depend upon its own circumstances (*l*).

Is or may be personally liable.—The section is applicable, not only where there is a clear breach of trust, but also where it is uncertain whether there is any breach of trust or not, as in cases of doubtful construction (*m*). The section is not confined to cases where there is some executive or administrative blunder, but extends (upon suitable facts) to cases where money is paid to a person who, upon the true interpretation of the instrument, was not entitled to the same; and the power given by the section will be the more readily exercised if the erroneous payment was made upon legal advice (*n*). The jurisdiction will not, however, be exercised by anticipation of a breach of trust (*o*).

Honestly.—The standard of honesty must, of course, be always the same (*p*). Honesty, however, is in itself no ground for relief; the act must likewise be reasonable (*q*).

(*h*) See *Re Somerset*, [1894] 1 Ch. 231.

(*i*) *Fletcher* v. *Collis*, [1905] 2 Ch. 24. (*j*) [1900] 2 Ch. 712, 713.

(*k*) See *per* Farwell, J., in *Re Lord De Clifford's Estate*, [1900] 2 Ch., at p. 716, and see *per* Parker, J., *Re Mackay*, [1911] 1 Ch. pp. 304, 307.

(*l*) *Re Turner*, [1897] 1 Ch., at p. 542; *Re Roberts*, 76 L. T. 479; *Fletcher* v. *Collis*, [1905] 2 Ch. 24; *Re Allsop*, [1914] 1 Ch. 1.

(*m*) *Re Grindey*, [1898] 2 Ch., at p. 598; *Re Mackay*, [1911] 1 Ch. 300.

(*n*) *Re Allsop*, [1914] 1 Ch. 1.

(*o*) *Re Tollemache*, [1903] 1 Ch., at p. 465; *S. C.* 955.

(*p*) *Per* Parker, J., in *Re Mackay*, *supra*, at p. 304.

(*q*) *Re Turner*, *supra*; *Re Barker*, 77 L. T. 712; *Re Stuart*, [1897] 2 Ch., at p. 590; *Re Greenwood*, 105 L. T. 509.

Reasonably.—In considering whether the action of the trustee was or was not reasonable, all the circumstances of the case and the terms of the trust instrument must be regarded. If those terms be doubtful or ambiguous the trustee may be given the benefit of the doubt (*r*). The fact that he did not ask for the directions of the Court may be important in determining whether he acted reasonably (*s*). The fact that he acted with the same care as in his own affairs has been said to be irrelevant under this head (*t*), and, on the other hand, to be a fact in the trustee's favour (*u*).

The fact that in lending money on mortgage, the trustees have not satisfied the conditions of section 8, sub-section 1 of the Trustee Act, 1893, is a material circumstance, though not necessarily fatal to an application under this section (*x*).

Ought fairly to be excused.—Even though it is established that the trustees have acted honestly and reasonably, the right to relief does not follow as a matter of course. The Court has then to exercise its discretion. So where a trust company, under erroneous advice paid away trust moneys to persons not entitled thereto, it was held that the company, who were not acting gratuitously, but were remunerated for their services, and who had made no effort to recover the moneys so paid away, were not entitled to relief (*y*).

Relief under the section need not be claimed by the pleadings (*z*).

12. Statutes of Limitation and Breaches of Trust.

The question how far trustees can rely upon the provisions of Statutes of Limitation by way of defence to proceedings for breach of trust now depends almost entirely upon section 8 of the Trustee Act, 1888.

The Judicature Act, 1873, section 25, sub-section 2 (which has not been repealed by the Judicature Act, 1925), enacted that no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of trust should be

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(*r*) *Re Grindey*, *supra*; *Re Mackay*, *supra*.

(*s*) *Re Kay*, [1897] 2 Ch. 523, but see *Re Grindey*, *supra*.

(*t*) *Re De Clifford's Estates*, *supra*.

(*u*) *Re Barker*, *supra*.

(*x*) *Re Stuart*, 2 Ch. 583; *Waite* v. *Parkinson*, 85 L. T. 456, and see *Re Dive*, [1909] 1 Ch. 328; *Shaw* v. *Cates*, [1909] 1 Ch. 389.

(*y*) *National Trustees Co. of Australasia* v. *General Finance, Ltd.*, [1905] A. C. 373 (a decision on a corresponding statute of Victoria).

(*z*) *Singlehurst* v. *Tapscott Co.*, [1899] W. N. 133, and as to relief on further consideration in an administration action, see *Re Stuart*, [1897] 2 Ch. 588.

barred by any Statute of Limitations. This provision is merely a statutory declaration of a law which has always been recognised in Courts of equity (*a*). This section, however, must be read subject to the provisions of section 10 of the Real Property Limitation Act, 1874, which provides that no proceeding is to be brought to recover any sum of money or legacy charged upon land and secured by an express trust, except within the time within which the same would be recoverable if there were not any such trust.

Section 25 of the Real Property Limitation Act, 1833 (*b*), provides that where land or rent (*i.e.*, a rent-charge) is vested in a trustee upon an express trust, the right of a *cestui que trust* to bring action to recover the same is to be deemed to have first accrued at the time when such land or rent shall have been conveyed to a purchaser for value. This section gives no protection to the trustee for any breach of trust by him.

Though Courts of equity refused to allow the trustee in cases of express trust to set up the statute against his *cestui que trust*, they did permit the defence in cases of constructive trust (*c*). But as stated by Kay, L.J., in *Soar* v. *Ashwell* (*d*), " The authorities do not seem to have drawn with any precision the line of distinction between express and constructive trusts "; and as expressed by Bowen, L.J., in the same case, " There has been some variety and inconsistency both in the language used about constructive trusts and in the line of demarcation drawn between the cases of express and constructive trusts " (*e*). It is clear that for the purposes of the liabilities affecting a trustee—including the inability to rely upon the Statute of Limitations—there are many cases in which a person who has not been formally constituted a trustee will nevertheless be deemed to be in the position of an express trustee (*f*).

Since express trusts of personalty may be created verbally, or by conduct only, the defence of the statute was held not available in certain cases where agents were entrusted with monies or

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(*a*) *Per* Baggalay, L.J., in *Re Cross*, 20 Ch. D., at p. 121; Hewitt on Limitations, p. 169.

(*b*) 3 & 4 Will. 4, c. 27.

(*c*) See *Soar* v. *Ashwell*, [1893] 2 Q. B. p. 396; *Henry* v. *Hammond*, [1913] 2 K. B. 515. Hewitt on Limitations, p. 169.

(*d*) [1893] 2 Q. B. p. 401.

(*e*) *Ibid.*, p. 396.

(*f*) See the judgments in *Soar* v. *Ashwell*, *supra*; *Burdick* v. *Garrick*, 5 Ch. pp. 239, 240, 243; *Banner* v. *Berridge*, 18 Ch. D. pp. 263-265; *Lyell* v. *Kennedy*, 14 A. C. 437, 454—463; *Re Eyre-Williams*, [1923] 2 Ch. 533; Hewitt on Limitations, pp. 170—5.

funds for particular purposes (*g*). So also in *Rochefoucauld* v. *Boustead* (*h*), a person purchasing land for another was, under the circumstances of the case, held an express trustee for the person for whom he had acted, and therefore incapable of setting up the statute. The defence has, however, been allowed in cases of purely constructive trusts, where the trust was created by no instrument but arose by inference of law through the position, acts, and circumstances of the parties (*i*).

A tenant for life of leaseholds renewing a lease in his own name is a constructive and not an express trustee, and is therefore entitled to plead the statute (*k*).

It is been held that a mortgage in the form of a trust for sale is merely a security and does not make the mortgagee an express trustee (*l*); but if the power of sale is exercised before the mortgagor has become barred, the mortgagee, it seems, will become an express trustee of the surplus purchase-money (*m*).

The law under this heading has been profoundly modified by the Trustee Act, 1888 (sections 1 and 8 of which still remain unrepealed); and trustees, whether express or constructive, are now allowed under certain conditions to set up the Statute of Limitations in answer to actions for breach of trust.

Section 1, sub-section 3 provides that : " For the purposes of this Act the expression ' trustee ' shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds."

Section 1, sub-section 4 : " The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee " (*n*).

(*g*) *Burdick* v. *Garrick*, L. R. 5 Ch. 233; *Foley* v. *Hill*, 2 H. L. Cas. 28; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390; *North American Co.* v. *Watkins*, [1904] 1 Ch. 242; cf. *Mara* v. *Browne*, [1896] 1 Ch. 199.

(*h*) [1897] 1 Ch. 196.

(*i*) *Townsend* v. *T.*, 1 Bro. Ch. 550; *Beckford* v. *Wade*, 17 V. 87; see *Banner* v. *Berridge*, 18 Ch. D. 263; *Price* v. *Phillips*, [1894] W. N. 213; *Henry* v. *Hammond*, [1913] 2 K. B. 515; and see *Re Robinson*, [1911] 1 Ch. 502.

(*k*) *Petre* v. *P.*, 1 Drew. 371; and see *Clegg* v. *Edmondson*, 8 De G. M. & G. 787, 808, 812; *Sands* v. *Thompson*, 22 Ch. D. p. 617.

(*l*) *Re Alison*, 11 Ch. D. 284; *Locking* v. *Parker*, 8 Ch. 30.

(*m*) 11 Ch. D. pp. 297—8; *Chapman* v. *Corpe*, 27 W. R. 781; Hewitt on Limitations, p. 175; and see section 105 of the Law of Property Act, 1925. As to when a personal representative ceases to hold assets of the deceased in the character of personal representative and becomes trustee, see *Attenborough* v. *Solomon*, [1913] A. C. 76; *Wise* v. *Whitburn*, [1924] 1 Ch. 460.

(*n*) See *Moore* v. *Knight*, [1891] 1 Ch. 547, 553.

Townley v. Sherborne—Brice v. Stokes.

Directors of companies are trustees within the section as to monies of the company coming into their hands (*o*). The section does not apply to a trustee in bankruptcy or any other trustee who is an officer of the Court (*p*). An executor can plead the Statute of Limitations in an action for devastavit (*q*), but if, instead of suing the executor personally a creditor sues on behalf of himself and all other creditors for administration, it is not open to the executor, apart from the section 8 of the Trustee Act, 1888, to set up as a defence that he has committed a devastavit the remedy for which has become barred (*r*).

Section 8, sub-section 1 of the Trustee Act, 1888, provides that : " In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply :—

" (a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

" (b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so, nevertheless, that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(*o*) See *Re Lands Allotment Co.*, [1894] 1 Ch. 616; *Re National Bank of Wales*, [1899] 2 Ch. 629, 663; [1901] A. C. 477; *Whitman* v. *Watkin*, 78 L. T. 178.

(*p*) *Re Cornish*, [1896] 1 Q. B. 99.

(*q*) *Thorne* v. *Kerr*, 2 K. & J. 54; *Re Gale*, 22 Ch. D. 820; *Lacons* v. *Warmoll*, [1907] 2 K. B. 350.

(*r*) *Re Marsden*, 26 Ch. D. 783; *Re Hyatt*, 38 Ch. D. 609. But see under section 8 of the Trustee Act, 1888, *Re Blow*, [1914] 1 Ch. 233.

" (2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded (*s*).

" (3) This section *shall apply only to actions or other proceedings commenced after the first day of January, one thousand eight hundred and ninety, and* (*t*), shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations."

Generally. " Section 8 is cumbrously worded," said Lindley, L.J., in *How* v. *Earl Winterton* (*u*), " but the short effect of section 8 appears to me to be that except in three specified cases (namely, fraud, retention by a trustee of trust money when an action is commenced against him, and conversion of trust money to his own use), a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions and suits for breaches of trust were enumerated in them."

Trustee or any person claiming through him.—For the meaning of trustee, see above under section 1, *supra*. The words " *claiming through* " do not apparently include beneficiaries, but refer to " persons deriving property from and subject to the liabilities of the trustee or executor; that is, generally speaking, his executors, administrators or assigns " (*x*). Beneficiaries accordingly making title through trustees cannot rely on the section. The section also in terms applies only to proceedings " against " a trustee, and in *Re Chapman* (*y*), Kekewich, J., took the view (although the case was in fact decided upon another point) that section 8 was inapplicable where the executors of one of several trustees of a will took out an originating summons to ascertain whether any liability still continued in respect of a breach of trust alleged to have been committed by the trustees of the will (*y*).

Fraud or fraudulent breach of trust to which the trustee was party or privy.—Fraud within the meaning of the Act must amount

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(*s*) See *Collings* v. *Wade*, [1896] 1 Ir. R. 340, 345; *Re Somerset*, [1894] 1 Ch. 231; *Re Fountaine*, [1909] 2 Ch. 382.

(*t*) The words in italics were repealed by the S. L. R. Act, 1908.

(*u*) [1896] 2 Ch. p. 640.

(*x*) *Per* Porter, M.R., in *Leahy* v. *De Moleyns*, [1896] 1 Ir. R. 206, at p. 213.

(*y*) [1896] 1 Ch. 323, at p. 326; *sed quære*. The case was reversed on other grounds, [1896] 2 Ch. 763.

to dishonesty. A loan on authorised security or on no security at all is not fraudulent (*z*).

A trustee will only be a party or privy where his moral complicity in the fraud can be shown (*a*). A trustee principal is not a party or privy to fraudulent conduct of his agent of which he has no knowledge. "A man cannot be said to be party or privy to that in which he has taken no part and of which he knows nothing, and which has, in fact, been committed by another for his own benefit" (*b*). In *Thorne* v. *Heard* (*c*), S, a solicitor, acted for both the first and second mortgagees of certain property. The first mortgagees sold for a sum in excess of the amount due on the first mortgage, and thereby became trustees of the balance. S fraudulently represented to them that he was authorised to give a receipt on behalf of the second mortgagees for the moneys due to them. The first mortgagees, relying on the representation, left the balance in the hands of S, who fraudulently appropriated it and subsequently became insolvent. Here the fraud was purely for the benefit of the agent, and it was held that he did not act for the first mortgagees, that they were not parties or privies within the section, and that time ran, not from the discovery of the fraud, but from the date of misappropriation.

But the misrepresentations of one partner in a firm bind the other partners as to any matter within the limits of their joint business, *Blair* v. *Bromley* (*d*). If by such misrepresentations fraud is concealed, time will only run from the date at which the fraud is discovered (*e*). Section 8 in no way affects the operation of these rules relating to partners, for they depend upon principles of representation and not trust (*f*).

Still retained.—When the section is pleaded, the burden is on the plaintiff to prove that one of the exceptions mentioned in the section—*e.g.*, that the trustee "still" retains or has converted the trust property to his own use—applies (*g*). The word "still" refers to the commencement of the action, and this "exception applies to, and is confined to, cases in which at the date of the writ,

(*z*) *Collings* v. *Wade*, [1896] 1 Ir. R. 340, at p. 349.
(*a*) *Thorne* v. *Heard*, [1894] 1 Ch. 599; [1895] A. C. 495; *Collings* v. *Wade*, *supra*.
(*b*) *Per* A. L. Smith, L.J., in *Thorne* v. *Heard*, [1894] 1 Ch. p. 613.
(*c*) *Supra*.
(*d*) 2 Ph. 354; 5 Ha. 542, distinguished in *Thorne* v. *Heard*, *supra*.
(*e*) *Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59.
(*f*) *Moore* v. *Knight*, [1891] 1 Ch. 547. Cf. *Re Gurney*, [1893] 1 Ch. 590.
(*g*) *Re Page*, [1893] 1 Ch 304.

the trustee still retains—that is, has in his hands or under his control—the trust property or the proceeds thereof sought to be recovered " (*h*). If the money has been lent and lost the exception does not apply.

Received by the trustee and converted to his own use.—In *Re Gurney* (*i*), trustees, one of whom, M, was a partner in the K Bank, advanced trust moneys to G on mortgage of certain properties of a speculative value which were then subject to an equitable mortgage in favour of the bank. The moneys advanced were, by the direction of the mortgagor, applied in the payment off of his indebtedness to the bank. In proceedings against the trustees it was held that the transaction being an honest one, the payment into the bank was not a conversion to his own use by M, who was accordingly entitled to the benefit of the statute.

In *Re Timmis* (*k*), each of three trustees was absolutely entitled to one-fourth of the trust estate, the remaining fourth share was settled. It was held that the receipt by each trustee of the fourth share payable to him could not be held a conversion to his own use of a part of the remaining fourth settled share as to which there had been a breach of trust.

Sub-Clause (a). The construction of this sub-clause has proved a matter of the utmost difficulty, and the extent of its application is not even yet precisely ascertained. It assumes the existence of cases in which statutory provisions could be pleaded were it not for the fact that the defendant is a trustee. It can have no application in actions for the recovery of trust property where the trustee is in possession, for the words of the introductory clause in the section exclude from the operation of the section cases where the trust property is still retained by the trustee. Strictly construed it could have no application to actions to compel the trustee to make good loss caused by breaches of trust, for, as Fry, L.J. (*l*), pointed out, there is no right or privilege conferred by any (prior) Statute of Limitations in respect of a breach of trust (*m*).

In *How* v. *Earl Winterton* (*n*), Lindley, L.J., though sharing the difficulty of Fry, L.J., pointed out, that to exclude the opera-

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(*h*) *Per* Lindley, L.J., in *Thorne* v. *Heard*, [1894] 1 Ch. 599, at p. 604; and see *Re Tufnell*, 18 T. L. R. 705.

(*i*) [1893] 1 Ch. 593.

(*k*) [1902] 1 Ch. 176. Cf. *Re Sharp*, [1906] 1 Ch. 793.

(*l*) Sitting as an additional Judge of the Chancery Division.

(*m*) *Re Bowden*, 45 Ch. D. 444, at pp. 450—1.

(*n*) [1896] 2 Ch. 626.

tion of clause (a) on the short ground stated by Fry, L.J., would be really to deprive the clause of all meaning whatever (*o*). The learned Judge pointed out that the statute might be pleaded to an equitable action for an account against a trustee were it not for the fact that the defendant was a trustee. And Rigby, L.J., observed that sub-clause (A) dealt with remedies and not with causes of action. The trustee who undertakes a trust agrees to perform that trust. A breach of trust has a dual character; from one point of view, it is simply the violation of a legal obligation arising out of a contract into which the trustee has entered. For that breach the wrongdoer would be liable even though he were not a trustee. From another point of view the breach of duty is a breach of trust, the violation of the equitable obligation of a trustee. In applying the section this latter aspect of the breach of duty is to be ignored and the case treated simply as a breach of contract either of a simple contract or of a covenant. The appropriate statute of limitations must then be looked at, and the period appropriate in the case of a breach of a contract of the character in question would be applicable.

As a general rule a trustee, save where he has covenanted to perform the trust, becomes a simple contract debtor to his *cestui que trust* if he misapplies trust funds (*p*). Where he has covenanted to execute the trust (*q*), or acknowledged the receipt of trust moneys under hand and seal (*r*), he becomes a specialty debtor. On the other hand, he does not become a specialty debtor by executing a deed by which he is appointed trustee and by which he declares his acceptance of the trusts (*s*).

Sub-Clause (B). The words "*recover money or other property*" do not necessarily mean recover money as belonging to the person making the application. "An action to make the defendant trustee pay money into a fund in which the applicant is interested is within the section" (*t*). The clause only applies to actions against trustees where no Statute of Limitations existed at the date of the passing of the Trustee Act, 1888 (*u*). An action against an

(*o*) [1896] 2 Ch. p. 639.
(*p*) *Vernon* v. *Vawdrey*, 2 Atk. 119; *Cox* v. *Bateman*, 2 Ves. Sen. 19.
(*q*) *Montford* v. *Cadogan*, 19 V. 638; *Richardson* v. *Jenkins*, 1 Drew. 477.
(*r*) *Gifford* v. *Manley*, Cas. t. Talbot, 109.
(*s*) *Holland* v. *H.*, L. R. 4 Ch. 449; *Richardson* v. *Jenkins*, *supra*.
(*t*) *Per* Rigby, L.J., in *How* v. *Earl Winterton*, [1896] 2 Ch. 626, at p. 642.
(*u*) See sub-section 3, *supra*; *Re Richardson*, [1920] 1 Ch. 423; *Re Allsop*, [1914] 1 Ch. 1.

executor to recover a legacy is barred by section 8 of the Real Property Limitation Act, 1874, unless brought within twelve years from the time the right to receive it accrued (*x*). No Statute of Limitations applies in similar cases to trustees. The result is that where persons are appointed executors and trustees by a will, and, acting thereunder, become trustees through the completion of the administration, or by assenting to the legacies, they acquire through their trustee character the benefit of the section, and the period of limitation may thus be six years instead of twelve (*y*).

Time runs from the date of the wrongful act—the breach of trust complained of (*z*), and not from its discovery, save where the trustee is guilty of concealed fraud (*a*). Where the breach of trust consists in improper investment of trust funds resulting in loss to the estate, time runs from the date of the investment, not from the resulting loss to the estate (*b*). Time begins to run in an action by one trustee against a co-trustee for contribution in respect of a joint breach of trust from the time that the claim of the *cestui que trust* is established, or (*semble*) from the time when the plaintiff trustee has made good to the trust estate more than his share of the loss, whichever first happens (*c*). The period of limitation in an action of debt is, under 21 Jac. 1, c. 16, s. 4, six years from the arising of the right of action. In *Re Somerset* (*d*), trustees of a settled fund committed an innocent breach of trust by lending on mortgage on insufficient security. The mortgagor paid interest directly to the tenant for life by arrangement with the trustees. It was held that time ran from the date of the mortgage, and that the payment of interest was not an admission by the trustees which would take the case out of the statute.

Time does not begin to run against any beneficiary until his interest is an interest in possession (*e*). The trustees accordingly may have a good defence against the tenant for life, whose claim against them may be barred, and yet have no defence against the

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(*x*) See *Re Davis*, [1891] 3 Ch. 119; *Re Barker*, [1892] 2 Ch. 491; *Re Mackay*, [1906] 1 Ch. 25.

(*y*) *Re Timmis*, [1902] 1 Ch. 176; and see *Re Swain*, [1891] 3 Ch. 233; *Re Blow*, [1914] 1 Ch. 233.

(*z*) *Thorne* v. *Heard*, *supra*.

(*a*) See *Moore* v. *Knight*, [1891] 1 Ch. 547, *supra*, p. 643.

(*b*) *Re Somerset*, [1894] 1 Ch. 231.

(*c*) *Robinson* v. *Harkin*, [1896] 2 Ch. 415, 529; *Stirling* v. *Burdett*, [1911] 2 Ch. 418; *Wolmerhausen* v. *Gullick*, [1893] 2 Ch. 514.

(*d*) [1894] 1 Ch. 231; and see *Re Fountaine*, [1909] 2 Ch. 382.

(*e*) Sub-section 1 (b) of section 8; *Re Allsop*, [1914] 1 Ch. 1.

beneficiaries in remainder. In such cases, the trustees on making the trust fund good are entitled to receive the income of moneys brought in by them during the life of the tenant for life (*f*).

In *Mara* v. *Browne* (*g*), a married woman was entitled during the joint lives of herself and her husband, and in the event of her surviving her husband she had a life interest for the residue of her life in the same fund. The breach of trust occurred during the husband's life. It was held that so far as regards the life interest she became entitled to on her husband's death, time only began to run against her from the date of such death.

An action by a residuary legatee for the administration of the testator's estate was held, in *Re Richardson* (*h*), to be an action to recover a legacy, and accordingly not to be barred until the expiration of twelve years "after a present right to receive the same" accrued (*i*); and there being an existing Statute of Limitations applicable, section 8 of the Trustee Act, 1888, did not apply.

In *Re Williams* (*k*), it was held by Neville, J., that where an originating summons for accounts is issued against executors or trustees, the defence of the statute must be raised at the time the order to account is made, so that the order may be qualified by a reference to the statute or the point reserved for further consideration. It may be too late to set up the statute for the first time on the hearing on further consideration, or even when the accounts are being vouched before the Master.

(*f*) *Re Somerset, supra; Re Fountaine, supra; Collings* v. *Wade*, [1896] 1 Ir. R. 340, 345.

(*g*) [1895] 2 Ch. 69, reversed on some points on appeal, [1896] 1 Ch. 199, but this point was not appealed from.

(*h*) [1920] 1 Ch. 423.

(*i*) Section 8 of the Real Property Limitation Act, 1874.

(*k*) [1916] 2 Ch. 38.

TRUSTS.

KEECH *v.* SANDFORD.

1726. Select Cases in Chancery, 61.

Renewal of a Lease by a Trustee.

A being possessed of a lease of a market bequeathed it to B in trust for an infant. B, before the expiration of the term, applied to the lessor for a renewal for the benefit of the infant. The lessor refused to grant such renewal, whereupon B got a lease made to himself. Held, that B was trustee of the lease for the infant, and must assign the same to him and account for the profits, but that he was entitled to be indemnified from the covenants contained in the lease.

A PERSON being possessed of a lease of the profits of a market devised his estate to a trustee in trust for the infant. *Before* the expiration of the term the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused, in regard that, it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not enter into.

There was clear proof of the refusal to renew for the benefit of the infant, on which the trustee gets a lease made to himself.

Bill is now brought [by the infant] to have the lease assigned to him, and for an account of the profits, on this principle, that wherever a lease is renewed by a trustee or executor, it shall be for the benefit of *cestui que use*, which principle was agreed on the other side, though endeavoured to be differenced on account of the express proof of refusal to renew to the infant.

LORD CHANCELLOR KING.—I must consider this as a trust for the infant, for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*. Though I do not say there is a fraud

in this case, yet he [the trustee] should rather have let it run out than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to *cestui que use*.

So decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.

NOTES.

1. The rule as to renewal of leases generally.
2. The rule as regards particular persons, p. 654.

1. The Rule as to Renewal of Leases Generally.

The leading case is an illustration of a constructive trust arising upon the renewal of a lease by a trustee in his own name and for his own benefit; but the principle of that case applies to all varieties of property (*a*), and not merely to persons who are trustees in the strict sense of that word (*b*). The principle acted upon in the principal case has been applied to the acquisition of the reversion in fee upon a lease by a tenant for life or trustee of the lease (*c*), and it has been held to apply to the purchase of mortgaged property by the tenant for life of the equity of redemption, whose infant children were entitled in remainder, from the mortgagee exercising his statutory power of sale (*d*). The principle would seem to be that wherever a person clothed with a fiduciary or quasi-fiduciary character or position gains some advantage at the expense of the trust by availing himself of such character or position, a constructive trust is raised by Courts of equity, and the advantage gained must be held by him for the benefit of his *cestui que trust* (*e*). The

(*a*) See *e.g.*, *Cooper* v. *Phibbs*, L. R. 2 H. L. p. 165; *Griffith* v. *Owen*, [1907] 1 Ch. 195.

(*b*) See *Re Biss*, [1903] 2 Ch. 40; *Griffith* v. *Owen*, *supra*.

(*c*) See *Phillips* v. *P.*, 29 Ch. D. 673; *Bevan* v. *Webb*, [1905] 1 Ch. 620.

(*d*) *Griffith* v. *Owen*, [1907] 1 Ch. 195.

(*e*) *Docker* v. *Somes*, 2 My. & K. 664; *Aberdeen T. C.* v. *Aberdeen University*, 2 A. C. 544; *Re Biss*, [1903] 2 Ch. 40; *Griffith* v. *Owen*, *supra*.

extension of the doctrine to the acquisition of a reversion expectant on a lease, does not seem to rest on any sound principle (*f*); but in such cases the rule only seems to be applied where the lease was renewable by contract or custom (*g*).

The Rule strictly followed.—The rule laid down in the principal case has been strictly followed. Thus, as was then decided, the refusal of the lessor to renew to the *cestui que trust* (*h*) : the refusal of co-trustees to concur in a renewal for the benefit of the *cestui que trust* (*i*) : the fact that the old lease had expired (*k*) : that the lease had not customarily been renewed (*l*) : the fact that the new lease differed from the old one as being for lives instead of for a term (*m*) : or was for a different term, or at a different rent (*n*) : or comprised lands not in the old lease (*o*) : or was for a reversionary term to commence after determination of the old term (*p*) : will not prevent the application of the rule. But where the new lease comprises additional lands, the trust will attach only to the original lands (*q*).

A trustee who has renewed will be directed to assign the lease, free from incumbrances, except, it seems, any lease made by him *bona fide* at the best rent (*r*), and he must account also for the mesne rents and profits and fines which he may have received (*s*), even although the lease had expired before the bill was filed (*t*). But where a tenant for life has renewed, the account will commence only from his decease (*u*). The person renewing will be entitled to be indemnified against the personal covenants in the new lease (*u*),

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(*f*) See *Griffith* v. *Owen*, [1907] 1 Ch. p. 204.

(*g*) *Bevan* v. *Webb*, [1905] 1 Ch. 620; *Griffith* v. *Owen*, [1907] 1 Ch. pp. 204-5.

(*h*) *Supra*, p. 706; *Griffin* v. *G.*, 1 Sch. & L. 353.

(*i*) *Blewett* v. *Millett*, 7 Bro. P. C. 367.

(*k*) *Edwards* v. *Lewis*, 3 Atk. 538.

(*l*) *Killick* v. *Flexney*, 4 Bro. Ch. 161; *Featherstonhaugh* v. *Fenwick*, 17 V. 298; 11 R. R. 77; *Mulvany* v. *Dillon*, 1 Ball. & B. 409; *Eyre* v. *Dolphin*, 2 Ball & B. 290.

(*m*) *Eyre* v. *Dolphin*, 2 Ball & B. 298.

(*n*) *Mulvany* v. *Dillon*, 1 Ball & B. 409; *James* v. *Dean*, 11 V. 383; 15 V. 236; 8 R. R. 178.

(*o*) *Giddings* v. *G.*, 3 Russ. 241.

(*p*) *Bradford* v. *Brownjohn*, L. R. 3 Ch. 711.

(*q*) *Giddings* v. *G.*, *supra*; *Acheson* v. *Fair*, 3 Dr. & W. 512; *O'Brien* v. *Egan*, 5 L. R. Ir. 633.

(*r*) *Bowles* v. *Stewart*, 1 Sch. & L. 230.

(*s*) *Mulvany* v. *Dillon*, 1 Ball & B. 409; *Walley* v. *W.*, 1 Vern. 484; *Luckin* v. *Rushworth*, Finch, 392; *Blewett* v. *Millett*, 7 Bro. P. C. 367; *Rawe* v. *Chichester*, Amb. 715.

(*t*) *Eyre* v. *Dolphin*, 2 Ball & B. 290.

(*u*) *Giddings* v. *G.*, 3 Russ. 241.

and to a lien upon the estate for expenses of renewal, with interest (*x*), and for lasting improvements (*y*), even though made after bill filed (*z*), but not for any improvements adopted as a mere matter of taste or personal convenience (*a*). At the same time the plaintiff may have claims in respect of waste or deterioration, which must be set off against anything found due to the defendant in respect of improvements.

And where additional lands are comprised in the renewed lease, the expenses will be apportioned according to the value of the respective lands (*b*). Where a tenant for life renews a lease by putting in his own life, he cannot claim to be repaid any part of the expense, because by putting in his own life, he obviously conferred no benefit upon those in remainder, who were to take after his death (*c*); where, however, the tenant for life, without any obligation to do so, renews a lease by putting in the life of a stranger, the expenses thereof will, on the death of the tenant for life, be apportioned by the remainderman paying the proportion of the benefit he derived from the renewal (*d*); and such apportioned expenses will be a charge on the premises (*e*), even although the remaindermen are the children of the tenant for life, and claim as an advancement the sum paid for renewal by their father (*f*).

Where a testator has devised his interest in a leasehold subject to an annuity, it is not clearly settled whether the annuitant is bound to contribute towards a renewal (*g*). A tenant for life, under a settlement of leaseholds, procuring a renewal to himself, was held not to take the renewal as an express trustee within the meaning of the Statutes of Limitations (*h*).

(*x*) *Rawe* v. *Chichester*, Amb. 715, 720; *Coppin* v. *Fernyhough*, 2 Bro. Ch. 291; *Lawrence* v. *Maggs*, 1 Eden, 453, and note; *James* v. *Dean*, 11 V. 383; 8 R. R. 178; *Bradford* v. *Brownjohn*, L. R. 3 Ch. 711; *Isaac* v. *Wall*, 6 Ch. D. 706; *Re Ranelagh's Will*, 26 Ch. D. 590.

(*y*) *Holt* v. *H.*, 1 Ch. Ca. 190; and see *Lawrence* v. *Maggs*, 1 Eden, 453, and note; *Mill* v. *Hill*, 3 H. L. Cas. 828, 869.

(*z*) *Walley* v. *W.*, 1 Vern. 487.

(*a*) *Mill* v. *Hill*, *supra*.

(*b*) *Giddings* v. *G.*, 3 Russ. 241, 251.

(*c*) *Lawrence* v. *Maggs*, 1 Eden, 453, 455.

(*d*) *White* v. *W.*, 9 V. 554; 4 R. R. 161; *Allan* v. *Backhouse*, 2 V. & B. 65; *Giddings* v. *G.*; *Bradford* v. *Brownjohn*; *Isaac* v. *Wall*, *supra*.

(*e*) *Adderley* v. *Clavering*, 2 Bro. Ch. 659; 2 Cox, 192.

(*f*) *Lawrence* v. *Maggs*, 1 Eden, 453, 456.

(*g*) See *Maxwell* v. *Ashe*, 7 V. 184; 12 R. R. 80 (n.); *Thomas* v. *Burne*, 1 Dru. & W. 657; *Winslow* v. *Tighe*, 2 Ball & B. 195; *Stubbs* v. *Roth*, 2 Ball & B. 548; *White* v. *W.*, 9 V. 554; *Playters* v. *Abbott*, 2 My. & K. 97; *Shaftesbury* v. *Marlborough*, 2 My. & K. 111; *Reeves* v. *Creswick*, 3 Y. & C. Ex. 715; *Jones* v. *J.*, 5 Ha. 440; *Isaac* v. *Wall*, 6 Ch. D. 706.

(*h*) *Re Dane's Estate*, 5 Ir. R. Eq. 498.

Keech v. Sandford.

When it is impossible to obtain the renewal of a lease, if there be no paramount trust for renewal, overriding the disposition in favour of the tenant for life, the latter will be entitled to the sum (if any) accumulated by the direction of the settlor for that purpose (*i*). Nor would the Court in such a case, where the trustees have a mere *power* to renew, allow them to purchase the reversion under the Ecclesiastical Commissioners Act, 1860 (*k*), to the prejudice of the tenant for life (*l*). If the renewal has become impossible through the act of the testator, the trust is at an end (*m*).

Where, however, it appears to have been the *paramount intention of the testator, as indicated by the disposition made by his will*, that upon the decease of a tenant for life the remainderman should succeed to the enjoyment of substantially the same estate, the tenant for life, upon renewal becoming impracticable, will only be entitled to the income of the renewal fund, and of the proceeds of sale of the leaseholds (*n*).

In *Re Wood's Estate* (*o*), leaseholds under a Dean and Chapter, renewable by custom, were held by trustees upon trust for a tenant for life, with remainder over; and the trustees were directed, "two years, or sooner, before the time for renewal," to bring a part of the rental into a fund until a sufficient sum was raised for the renewal, "so that the estates may be always kept renewed . . . for ever." In June, 1865, and February, 1866, notices to treat for parts of the leaseholds, then having about thirteen and five years respectively to run, were given by a railway company. At Lady Day, 1866, the Dean and Chapter ceased to renew leases; and about the same date their property was taken over by the Ecclesiastical Commissioners. The values of the two properties having been assessed at amounts which, when paid, and invested in £3 per cent. stock gave a diminished income, it was argued that as the renewal had become impossible, all trust for renewal had ceased, and that the property ought to be dealt with as if it were a mere leasehold for a term of years, to which the tenant for life was entitled *in specie*; and that, therefore, the tenant for life was entitled to have the whole fund treated as converted into an

(*i*) *Morres* v. *Hodges*, 27 B. 625; Seton (7th ed.), p. 1712.
(*k*) 23 & 24 Vict. c. 124. See Statute Law Revision Act, 1892.
(*l*) *Hayward* v. *Pile*, L. R. 5 Ch. 214.
(*m*) *Penfold* v. *Shillingford*, 46 L. J. Ch. 491.
(*n*) *Maddy* v. *Hale*, 3 Ch. D. 327; *Re Barber's S. E.*, 18 Ch. D. 624; *Re Ranelagh's Will*, 26 Ch. D. 597; Seton (7th ed.), p. 1712.
(*o*) 10 Eq. 572; and see *Hollier* v. *Burne*, 16 Eq. 163.

annuity of duration equivalent to the term, and to have each year one year's payment of the annuity. James, V.-C., however, held that the tenant for life was only entitled to the dividends of the fund arising from the sale of the leaseholds to the railway company. Referring to *Morres* v. *Hodges* (*p*), and *Tardiff* v. *Robinson* (*q*), he said : " In those cases the conclusion arrived at by the Court was, that the tenant for life was entitled *in specie* to the whole rents and profits, charged only with the payment of such a sum as might be required for the renewal, and as no renewal was practicable, there was nothing by which the charge could be ascertained, and no means by which any substituted benefit could be ascertained by the Court to be given to the remainderman. In this case, however, the *primary and paramount intention* was ' that the estates may be always kept renewed, that the younger children may have an equal benefit of time, and so continue to be provided for, for ever.' * * * The testator intended to create, and was creating as he thought a perpetual estate, out of which he was carving successive interests. * * * The result, in my opinion, of the purchase by the railway company is, that one property in perpetuity is substituted for another property in perpetuity ; and that as between the tenant for life and the remainderman, I cannot take away any part of the corpus belonging to the latter, in order to make good the diminished income of the former."

And where there is a paramount trust for the renewal of such leases, overriding the interest of the tenant for life, when the renewal afterwards becomes impossible, it is the duty of trustees, if possible, to purchase the reversion from the Ecclesiastical Commissioners (*r*). And where a purchaser of the equitable interest of the tenant for life in such renewable lease, not having the legal estate in the lease in him, but assuming to act with reference to that property as if he had, purchases the reversion from the Ecclesiastical Commissioners, he will be considered to have acted in the place of the real trustees of the lease, and to have acquired the property for the benefit of all the persons entitled under the will (*s*) ; and if the property be taken under compulsory powers and the money paid

(*p*) 27 B. 625.

(*q*) 27 B. 629 (n.).

(*r*) *Re Ranelagh's Will*, 26 Ch. D. 596, 598 ; *Re Wood's Estate*, 10 Eq. 572 ; *Hollier* v. *Burne*, 16 Eq. 163 ; *Gabbett* v. *Lawder*, 11 L. R. Ir. 295 ; *Maddy* v. *Hale*, 3 Ch. D. 327.

(*s*) *Re Ranelagh's Will*, 26 Ch. D. 590, 596, 599 ; *De Rechberg* v. *Beeton*, 38 Ch. D. 192 ; *Leigh* v. *Burnett*, 29 Ch. D. 231.

into Court, then subject to his right to be recouped his purchase-money, he will only be entitled to an order for payment of the interest on the fund in Court during the life of the tenant for life under the will (*t*).

Sale of Property or of Right to Renewal.—If a person having the right of renewal sells such right, the money produced by the sale will be affected by the same trusts as the leaseholds, if renewed, would have been (*u*). And if money be taken for withdrawing opposition to a bill affecting the property, the money so received, whether the bill passes or not, must be held for all parties interested (*x*).

Forfeiture.—A lessee will not be allowed to evade the operation of the rule laid down in the principal case by fraudulently incurring a forfeiture of the lease, and then inducing the landlord to take advantage of it, and afterwards obtaining from him a new lease (*y*).

Charges, etc.—If a person entitled to a lease, subject to debts, legacies, or annuities, renews, either in his own name or in the name of a trustee, the incumbrances will remain a charge upon the renewed lease (*z*).

2. The Rule as regards Particular Persons.

Administrator.—In a case in Ireland the rule was held to apply to an *administratrix* of a deceased tenant from year to year who, upon obtaining a new tenancy from year to year, was held a trustee thereof for the next of kin of the intestate (*a*).

Agents.—A person acting as agent, or in any similar capacity, for a person having an interest in a lease, cannot renew for his own benefit (*b*). In *Mulhallen* v. *Marum* (*c*), a lease was obtained by a

(*t*) *Re Ranelagh's Will*, 26 Ch. D. 590.

(*u*) *Owen* v. *Williams*, Amb. 734.

(*x*) *Pole* v. *P.*, 2 Dr. & Sm. 420; *Ex p. Lockwood*, 14 B. 158.

(*y*) *Hughes* v. *H.*, 25 B. 575; *Stratton* v. *Murphy*, 1 Ir. R. Eq. 345.

(*z*) *Seabourne* v. *Powell*, 2 Vern. 11; *Winslow* v. *Tighe*, 2 Ball & B. 195; *Stubbs* v. *Roth*, 2 Ball & B. 548; *Webb* v. *Lugar*, 2 Y. & C. Ex. 247; *Jones* v. *Kearney*, 1 C. & L. 34; *Trumper* v. *T.*, L. R. 8 Ch. 879.

(*a*) *Kelly* v. *K.*, 8 Ir. R. Eq. 403; cf. *Ex p. Grace*, 1 Bos. & P. 376, explained in *Re Biss*, [1903] 1 Ch. 40; see also *James* v. *Dean*, 11 V. 383; *M'Cracken* v. *M'Clelland*, 11 Ir. R. Eq. 172; *Gabbett* v. *Lawder*, 11 L. R. Ir. 295; and *Re Manser*, [1910] W. N. 61.

(*b*) *Edwards* v. *Lewis*, 3 Atk. 538; *Griffin* v. *G.*, 1 Sch. & L. 352; *Mulvany* v. *Dillon*, 1 Ball & B. 417.

(*c*) 3 Dr. & W. 317. Cf. *Boddington* v. *Langford*, 15 Ir. Ch. R. 538 (n.).

person standing, by delegation, in the place of guardians, and who, at the same time, filled the characters of agent, receiver, and tenant. It was set aside by Sugden, L.C., upon the equity arising out of those relations and upon public policy.

Executor de son tort.—The general rule applies also to an executor *de son tort* renewing a lease in his own name (*d*). And where a husband having made a voluntary settlement of leaseholds on his wife obtained, without disclosing the settlement, a renewal in his own name, but with the intention of giving his wife the benefit thereof, it was held he was a constructive trustee for his wife (*e*).

Infants.—If a person jointly interested with an *infant*, and standing in a fiduciary relation towards him, renew, and the renewed lease turn out not to be beneficial, the person renewing must sustain the loss; if beneficial, the infant can claim his share of the benefit to be derived from it. But the infant must contribute to sums paid for or in consequence of renewal before he can claim any advantage (*f*).

Joint Owners.—There is no fiduciary relation between joint tenants or tenants in common as such (*g*), but if one of them stands in some special position to the other persons interested, by virtue of which position he owes a duty towards them in respect of the property, the principle of the leading case will apply (*h*).

Where a tenant for life and a remainderman of a lease for lives, take a renewal thereof to themselves and their heirs as joint tenants, though they contribute unequally towards the consideration for the new lease, in the absence of anything showing a contrary intention, their prior interests in equity will remain unaltered (*i*).

Mortgagee.—" The mortgagee is not a trustee for the mortgagor except in a very special and modified sense " (*k*), but if a mortgagee

(*d*) *Mulvany* v. *Dillon*, 1 Ball & B. 409; *Griffin* v. *G.*, 1 Sch. & L. 352.

(*e*) *Re Lulham*, 33 W. R. 788; *Parker* v. *Brooke*, 7 R. R. 299; *Dixon* v. *D.*, 9 Ch. D. 587.

(*f*) *Ex p. Grace*, 1 B. & P. 376, explained by Collins, M.R., in *Re Biss*, [1903] 2 Ch. 40, at pp. 58 and 59.

(*g*) *Re Biss*, [1903] 2 Ch. 40; *Kennedy* v. *De Trafford*, [1897] A. C. 180.

(*h*) *Palmer* v. *Young*, incorrectly reported in 1 Vern. 276. See the full report [1903] 2 Ch. 65 (n.); and see *Hamilton* v. *Denny*, 1 Ball & B. 199; *Jackson* v. *Welsh*, L. & G. t. Plunk. 346.

(*i*) See *Hill* v. *H.*, 8 Ir. R. Eq. 140, 622.

(*k*) *Per* Farwell, L.J., in *Turner* v. *Walsh*, [1909] 2 K. B. 484, at p. 496,

renew a lease *prima facie* he " doth but graft upon his stock, and it shall be for the mortgagor's benefit " (*l*). The mortgagee, however, stands in a different position to the trustee; the trustee cannot acquire the renewed lease for himself; the mortgagee can, for as against him there is only a presumption that he acquires for the mortgagor, and that may be rebutted (*m*). So a new lease obtained *bona fide* by the mortgagee, after giving all parties interested notice, and an opportunity of renewal, has been held not to be in trust for the mortgagor (*n*). In this case it was pointed out that in the earlier cases relied upon in support of a trust, the party had obtained renewal by being in possession, or it was done behind the back or by some contrivance in fraud of those interested in the old lease, and there was either a remnant of the old lease, or a tenant-right of renewal, on which the new lease could be ingrafted, but that here no part of the mortgagee's conduct showed a contrivance, nor was he in possession, and all that the mortgagee treated for was a new lease, giving full opportunity to the lessee to dispose of his interest, or to renew if able to do so.

Mortgagor.—On the other hand, if a lessee mortgage a lease renewable by custom or contract, and afterwards either obtains a new lease, or purchases the reversion in fee simple (*o*), the new lease will be held a graft on the old, for the benefit of the mortgagee (*p*), or the fee simple (when the reversion is acquired) will be subject to the mortgage. But where the owner in fee, subject to a lease, mortgaged a public-house, which at the time he was occupying as under-lessee, and the mortgage did not expressly include the goodwill of the business, and the lease was subsequently surrendered to the mortgagor, it was held that, having regard to the existence of the lease, the goodwill did not pass to the mortgagee by the mortgage deed, and that it did not accrue to him by the surrender of the lease (*q*).

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citing *Cholomondeley* v. *Clinton*, 2 J. & W., at pp. 182 *et seq.*; and see *Kennedy* v. *De Trafford*, [1897] A. C. 180; *Nutt* v. *Easton*, [1899] 1 Ch. 873.

(*l*) *Rushworth's Case*, Freem. 12; *Luckin* v. *Rushworth*, Rep. t. Finch, 392; *Rakestraw* v. *Brewer*, 2 P. W. 510; *Darrell* v. *Whitchot*, 2 Ch. R. 59; *Fosbrooke* v. *Balguy*, 1 My. & K. 226.

(*m*) See *per* Collins, M.R., in *Re Biss*, [1903] 2 Ch., at p. 56.

(*n*) *Nesbitt* v. *Tredennick*, 1 Ball & B. 29; and see *Re Biss*, *supra*.

(*o*) *Leigh* v. *Burnett*, 29 Ch. D. 231; Woodfall (21st ed.), p. 475; cf. *Bevan* v. *Webb*, [1905] 1 Ch. 620.

(*p*) *Smith* v. *Chichester*, 1 C. & L. 486.

(*q*) *Re Bennett*, [1899] 1 Ch. 316.

Keech v. Sandford.

Partners.—If one partner obtains in his own name, either during the partnership or before its assets have been sold, a renewal of a lease of the partnership property, such lease *prima facie* will be assets of the firm (*r*), but this presumption may, *semble*, though only with great difficulty, be rebutted (*s*).

In *Clegg* v. *Fishwick* (*t*), the plaintiff's husband and his partners took a lease in 1828 for the purpose of the partnership. He died in 1836, and the plaintiff became his administratrix. There was no provision made for the continuance of the partnership with the administratrix; but it was in fact carried on between her and the other partners up to the year 1849, the same partnership property being used for the purposes of the partnership. In that year the old lease having expired a new lease was taken by some of the other partners, without the privity of the plaintiff. The old lease was held the foundation of the new, and the administratrix entitled to a receiver in respect of the intestate's share of the partnership including the renewed lease.

The rule, however, to be deduced from the last-mentioned class of cases has been to some extent departed from where the trade or business carried on in connection with a lease is one of a speculative character (such as a mining concern), requiring great outlay with uncertain returns, and in any event it will not be acted upon in favour of parties who lie by in order to see how the speculation turns out (*u*).

Stranger.—Where a stranger obtains a renewal of a lease, or a reversionary lease, the old tenant has no equity against him (*x*).

Sub-lessee.—A lessee has no equity against his sub-lessee who obtains a renewal from the head landlord without consulting him (*y*). A lessee, however, obtaining a renewal of a lease at an increased rent, or purchasing the reversion, is somewhat in the position of a partner or fiduciary with respect to a sub-lessee with

(*r*) *Featherstonhaugh* v. *Fenwick*, 17 V. 298; 11 R. R. 77; *Alder* v. *Fouracre*, 3 Swans. 489; *FitzGibbon* v. *Scanlan*, 1 Dow. 269; Partnership Act, 1890, s. 29; *Clegg* v. *Edmondson*, 8 De G. M. & G. 787; *Clements* v. *Hall*, 2 De G. & J. 173; *Clements* v. *Norris*, 8 Ch. D. 129; *Re Biss*, [1903] 2 Ch. 40; Lindley on Partnership (9th ed.), pp. 395-6.

(*s*) See *per* Turner, L.J., in *Clegg* v. *Edmondson*, 8 D. M. & G. 787, 807.

(*t*) 1 M. & G. 294.

(*u*) *Clements* v. *Hall*, 2 De G. & J. 173, 188.

(*x*) *Lee* v. *Vernon*, 5 Bro. P. C. 10; *Sandwich* v. *Lichfield*, Colles, P. C. 104; *Nesbitt* v. *Tredennick*, 1 Ball & B. 29; *Att.-Gen.* v. *Gains*, 11 B. 63.

(*y*) *Maunsell* v. *O'Brien*, 1 Jones, 176, Ex. Rep. Ir.; Woodfall (21st ed.), p. 475.

whom he has entered into a *toties quoties* covenant to renew at a fixed rent or fine, and is bound either to renew upon the old terms or to convey the property to the sub-lessee upon proper terms. In *Evans* v. *Walshe* (*z*), A, the defendant, the lessee of a corporation, underlet to the plaintiff at a certain rent, with a covenant to grant renewal at the same rent, as often as the corporation should renew to him. The corporation raised the rent payable by A. Lord Redesdale granted an injunction to restrain the defendant from proceeding in ejectment, observing, "that he considered the defendant as bound to renew on the old terms, unless he chose to abandon the property, and allow the plaintiff to stand in his place for the renewal which he had obtained, which, as he had not covenanted to renew with the corporation, he might perhaps be at liberty to do. But if he thought fit to retain the benefit which he had obtained, he was bound specially to execute his covenant for renewal."

The result is the same where a lessee having granted a similar sub-lease becomes a purchaser of the reversion from the original *lessor*. Thus, in *Postlethwaite* v. *Lewthwaite* (*a*), the defendants, lessees for lives from a Dean and Chapter, without a covenant for perpetual renewal, granted an under-lease to the plaintiff for the same lives, of part of the premises, with a *toties quoties* covenant for renewal at a fixed fine. The reversion having become vested in the Ecclesiastical Commissioners, they refused to renew, but offered to sell, and the lessee purchased the reversion. Page Wood, V.-C., having regard to *Evans* v. *Walshe*, made the following decree: "The defendants offering to convey the reversion in fee simple of the premises comprised in the plaintiff's lease, in preference to granting a new lease of the premises with a covenant for perpetual renewal and otherwise on the terms of the present lease, declare that the plaintiff is entitled to have such reversion conveyed to him on the terms of paying the defendants a due proportion of the consideration paid or given by them, and of the expenses incurred by them, in purchasing the fee simple of so much of the property comprised in their original lease as they did purchase, regard being had to the existing interest of the plaintiff under his lease, and to the extent of the property therein comprised. Then there must be an inquiry what this interest is worth" (*b*).

(*z*) 2 Sch. & L. 519. (*a*) 2 John. & H. 237.

(*b*) See also *Pilkington* v. *Gore*, 8 Ir. Ch. R. 589; *Trumper* v. *T.*, L. R. 8 Ch. 870.

Keech v. Sandford.

Tenant for Life, etc.—The ground of decreeing renewals by trustees and executors to enure to the benefit of *cestuis que trust* rests upon public policy to prevent persons in similar positions from acting so as to take a benefit to themselves (*c*).

So, if a person having a limited interest in a renewable lease, as a tenant for life, renews it in his own name, he will be held a trustee for those entitled in remainder to the old lease, for in cases of limited ownership there is a duty to act for the benefit of the whole interest (*d*). Thus in *James* v. *Dean* (*e*), a testator bequeathed leaseholds for years determinable upon lives to his widow (who was his residuary legatee and executrix) for life, with remainder over; the term expired *during the testator's life*, who continued to hold as tenant from year to year: a subsequent lease, obtained by his widow, was held to be subject to the trusts of the will, as the residue of the term at his death, if any, however short, would have been (*f*). But it was laid down that if the testator had been merely a tenant at will or at sufferance of leaseholds which were renewed by his executrix (being also tenant for life under the will), she would not become a trustee of these renewed leaseholds, for as a tenancy at will or at sufferance determines upon death, no interest passes to the tenant's representatives (*g*).

But in the same case, Eldon, C., said he was inclined to think, that, had the widow not been *residuary legatee*, as well as tenant for life, she would have been a trustee for the residuary legatee. "The question," observed his Lordship, (*h*), "is new, whether an executrix, *dealing with the opportunities which she derives by her succession without title to the estate* a tenant by sufferance or at will had held, is a trustee for the person who cannot say he took an interest under the will, or whether it is to be said against her only, that the advantage she made of those opportunities should be for

(*c*) *Griffin* v. *G.*, 1 Sch. & L. 354, *per* Lord Redesdale; and see *Blewett* v. *Millett*, 7 Bro. P. C. 367.

(*d*) *Kennedy* v. *De Trafford*, [1897] A. C., p. 182, and see *Rawe* v. *Chichester*, 1 Bro. Ch. 198 (n.); *Re Biss*, [1903] 2 Ch. 40; see the extract from Bacon's Abridgment, 4 Bac. Ab. 222; set out *Parker* v. *Brooke*, 9 V., at p. 585; 7 R. R., p. 301; *Randall* v. *Russell*, 3 Mer. 190; *Longton* v. *Wilsby*, 76 L. T. 770; *Norris* v. *Le Neve*, 3 Atk. 37; *Mill* v. *Hill*, 3 H. L. C. 828; *Trumper* v. *T.*, L. R. 8 Ch. 870; Woodfall (21st ed.), p. 474.

(*e*) 11 V. 383; 15 V. 236; 8 R. R. 178.

(*f*) And see *M'Cracken* v. *M'Clelland*, 11 Ir. R. Eq. 172; *Kelly* v. *K.*, 8 Ir. R. Eq. 403.

(*g*) *James* v. *Dean*, 11 V. 383; 15 V. 236; 8 R. R. 178. Cf. *Re Manser*, [1910] W. N. 61.

(*h*) See 8 R. R. 185.

the general estate. The result is this : I think it is impossible she could hold it for herself. Not applying it to this case, but supposing another person, not the wife, was residuary legatee, the question, I should think, would be in favour of that other residuary legatee, *being a casual advantage from the dealing of the executrix* " (*i*).

Where, however, a testator believing that a certain piece of land (to which he had no title) was included in a lease, by will purported to give the land to his executrix for life, with remainders over, and after his death she obtained a lease of the piece of land, she was held to be absolutely entitled thereto (*k*).

Although a tenant for life of a lease under a settlement be himself the settlor, if he renew in his own name, he will be a trustee for the parties interested under the settlement (*l*). And the fact of the settlement containing a special provision that a particular renewal shall enure for the benefit of the trust will not prevent the application of the general rule in the case of other renewals (*m*). The renewal of a lease by a tenant for life, in her own name and at her expense, has not the effect of an appointment in her own favour under a general power of appointment by deed (*n*).

Reversion.—The doctrine extends to the case of the purchase by a tenant for life or trustee of the reversion expectant on a lease (*o*). But it has been held that *prima facie*, the doctrine in such a case is only applicable where the leases to which the reversion is subject are renewable by custom or contract (*p*). Parker, J., however, appears to have doubted whether the doctrine was to be thus limited provided that " the necessary fiduciary relation " exists (*q*).

Where a trustee or a person holding a fiduciary position has purchased the reversion on renewable leaseholds and thereby made

(*i*) And see *Mill* v. *Hill*, 3 H. L. Cas. 866; *Archbold* v. *Scully*, 9 H. L. Cas. 360; *Re Tottenham's Estate*, 16 Ir. Ch. R. 115.

(*k*) *Rawe* v. *Chichester*, Amb. 715, 720.

(*l*) *Pickering* v. *Voules*, 1 Bro. Ch. 197; *Colegrave* v. *Manby*, 6 Madd. 72; *Re Lulham*, 33 W. R. 788.

(*m*) *Tanner* v. *Elworthy*, 4 B. 487.

(*n*) *Brookman* v. *Hales*, 2 V. & B. 45; 13 R. R. 9; *Farwell* (3rd ed.), p. 220; cf. *Re Thurston*, 32 Ch. D. 508.

(*o*) *Phillips* v. *P.*, 29 Ch. D. 673 (C. A.), giving effect to a *dictum* of Sir W. Grant in *Randall* v. *Russell*, 3 Mer. at pp. 197, 198, and see *Leigh* v. *Burnett*, 29 Ch. D. 231; *Re Ranelagh's Will*, 26 Ch. D. 590, commenting on *Hardman* v. *Johnson*, 3 Mer. 347; *Gabbett* v. *Lawder*, 11 L. R. Ir. 295; *Trumper* v. *T.*, L. R. 8 Ch. 879.

(*p*) *Bevan* v. *Webb*, [1905] 1 Ch. 620, following *Longton* v. *Wilsby*, 76 L. T. 770; Underhill on Trusts (8th ed.), p. 174; but see *Griffith* v. *Owen*, [1907] 1 Ch. 195, 204.

(*q*) See *Griffith* v. *Owen*, [1907] 1 Ch. p. 206.

renewal impossible, he is bound to give full effect to charges on the previously renewable leasehold, and to satisfy those charges out of the acquired estate so far as necessary (*r*).

Tenant in Tail (Quasi).—The constructive trust does not arise in the case of a quasi tenant in tail of leaseholds; thus, a testator devised leaseholds for lives to trustees for A, and the heirs of his body, and if he should die without issue, remainder to B; A surrendered the old lease, and took a new one to himself and his heirs for three new lives, and died without issue, having devised the leaseholds to his widow for life, remainders over. A bill, filed by B, to have the benefit of the new lease, insisting that the surrender of the old lease and taking the new one was not sufficient to bar the limitation to him, and that those claiming under A ought to be held trustees of the new lease, was dismissed (*s*).

Trustees.—Where a person, trustee of property for himself and others, acquires, under an Act of Parliament, upon the representation that he was solely entitled, an absolute interest therein, he will nevertheless be held a trustee for all parties beneficially interested, of whatever estate or right he has so acquired (*t*), subject only to a lien for the moneys properly expended by him in acquiring any additional rights and improving the whole (*u*). And where the trustees of land affecting actual ownership, acquired from the Crown a right of fishing in the adjacent sea, it was held by the House of Lords, affirming the decision of the Court of Session, that the acquisition was secured for the benefit of the *cestui que trust* (*x*).

Volunteers and Purchasers with Notice.—The same remedies which may be had against trustees, executors, and limited owners renewing leases in their own names, may also be had against volunteers claiming through them (*y*) and purchasers from them, with notice express or implied (*z*).

(*r*) *Trumper* v. *T.*, *supra*.

(*s*) *Blake* v. *B.*, 1 Cox, 266; Woodfall (21st ed.), p. 475.

(*t*) *Cooper* v. *Phibbs*, L. R. 2 H. L. 149.

(*u*) *Ibid.*

(*x*) *Aberdeen Town Council* v. *Aberdeen University*, 2 A. C. 544.

(*y*) *Bowles* v. *Stewart*, 1 Sch. & L. 209; *Eyre* v. *Dolphin*, 2 Ball & B. 290; *Blewett* v. *Millett*, 7 Bro. P. C. 367.

(*z*) *Walley* v. *W.*, 1 Vern. 484; *Eyre* v. *Dolphin*, 2 Ball & B. 290; *Parker* v. *Brooke*, 9 V. 583; 7 R. R. 299; *Coppin* v. *Fernyhough*, 2 Bro. Ch. 291; *Lombard* v. *Hickson*, 13 Ir. Ch. R. 98; *Re Morgan*, 18 Ch. D. 93.

Keech v. Sandford.

And where a settlement of a lease was registered under the Irish Registry Act (6 Anne, c. 2), a purchaser, although without notice, from a limited owner who had renewed the lease in his own name, was held to be a trustee for the parties interested under the settlement (*a*).

But the *cestui que trust* may be bound by acquiescence and lapse of time (*b*). Where, however, no new rights have been created, and no one is prejudiced by the delay, the decree will be made, but without costs (*c*).

It is immaterial that the *cestui que trust* made a continual claim, if during the time he made it he took no effectual steps to enforce his alleged rights (*d*).

(*a*) *Mill* v. *Hill*, 3 H. L. Cas. 828.

(*b*) *Norris* v. *Le Neve*, 3 Atk. 38, 39; *Jackson* v. *Welsh*, L. & G. Cas. t. Plunk. 346; *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

(*c*) *Archbold* v. *Scully*, 9 H. L. Cas. 360; *Erlanger* v. *New Sombrero, etc., Co.*, 3 A. C. 1282.

(*d*) *Clegg* v. *Edmondson, supra; Lehmann* v. *McArthur*, L. R. 3 Ch. 496.

FOX *v.* MACKRETH.
PITT *v.* MACKRETH.

1788—1791. The case and arguments, shortened, are taken from 2 Bro. Ch. 400. The judgment from 2 Cox, 320. See 2 R. R. 55.

Purchase by a Trustee for Sale.

A trustee for the sale of estates for payment of debts, who purchased them himself, by taking an undue advantage of the confidence reposed in him by the settlor, and previous to the completion of the contract sold them at a highly advanced price; decreed to be a trustee for the original vendor as to the sums produced by such second sale.

This cause came on by appeal from the Rolls.

The original bill was filed in June, 1781, by the plaintiff, James Fox, Esq., against Robert Mackreth, John Dawes, and John Baynes Garforth, Esqrs. The supplemental bill was by William Morton Pitt, Esq., and James Farrer, trustees of the estate and effects of James Fox, against the same defendants, to have the benefit of the former suit.

The material part of the prayer of the original bill was, that the sale of the plaintiff's estates in the county of Surrey made to Thomas Page, Esq., might be declared to have been made in trust for the plaintiff, and that Mackreth and Dawes might be declared to be accountable to the plaintiff for what the estates were sold for to Page, and also for accounts of what was due to the defendants Mackreth and Dawes, and upon what securities; and that they might be decreed to deliver up the securities, the plaintiff offering that they should be at liberty to retain respectively, out of the purchase-moneys of the estate, what should be found justly due to them from the plaintiff, and an account of moneys due to the defendants, on account of annuities granted by the plaintiff to the defendants, the plaintiff offering that the defendants should be at liberty to retain the sum found due out of the said purchase-moneys.

Fox v. Mackreth—Pitt v. Mackreth.

The circumstances of the case made against the principal defendants, Mackreth and Dawes, as taken from the bill, answer, and evidence, appear to be these:—

That the plaintiff Fox, being seised in tail of an estate at Horseley and elsewhere, in the county of Surrey, subject to an estate for life, in some parts thereof, to his mother for her jointure in lieu of dower, and likewise seised or possessed of copyhold and leasehold estates in the same county, and also entitled to several other estates in expectancy or for life only, had, before he came of age, embarked in a very expensive course of life, and was reduced to great distresses, and, under these circumstances, had procured money by granting annuities, and engaging his friends who were of age, in bonds and judgments, for securing the payment of them; and his friends, being acquainted with his situation, proposed, that as soon as might be after he should attain his age of twenty-one years, he should suffer a recovery of the Surrey estate, which, or a competent part thereof, should be conveyed to trustees, to be sold for the payment of his debts, and redeeming the annuities for which he, and his friends on his behalf, had engaged; and he attained his age of twenty-one in the month of August, 1777, and was very soon afterwards (in the latter end of that or beginning of the next month) introduced to the defendant Mackreth (who usually supplied young men of fortune with money in their distresses), and, on account of the plaintiff's inability to make a security by mortgage, as a recovery could not be suffered till Michaelmas Term, it was agreed that the defendants, Mackreth and Dawes, should supply the plaintiff with the sum of £5,100, upon the plaintiff's granting two annuities of £500 and £350 each for his life; that Dawes, on September 23, advanced the £5,100, for which the following securities were executed:—A bond of that date by the plaintiffs, in the penal sum of £6,000, for securing to the defendant Dawes an annuity of £500, for the life of the plaintiff; a warrant of attorney of even date to confess judgment on the said bond; and an indenture tripartite, between the plaintiff of the first part, Dawes of the second part, and Garforth of the third part, whereby lands in the county of York, of which the plaintiff was seised for life, were conveyed

to Garforth, for securing the payment of the annuity of £500 to Dawes. The annuity of £350 was secured by a similar bond of the same date, warrant of attorney to confess judgment thereon, and a similar conveyance of the same lands to Garforth, for better securing the same. In the annuity of £500, Mackreth, in his answer, admitted he was interested with Dawes, but denied that he was so in that of £350.

In Michaelmas Term, 1777, a recovery was suffered of the freehold part of the Surrey estates, by which they were vested (subject to the mother's estate for life in a part thereof) in Oliver Farrer, in trust to convey the same in such manner as the plaintiff should direct, Mr. Farrer having agreed to act as a trustee for the purpose of selling the same and discharging the debts, together with and under the direction of two of the plaintiff's friends (who appear to have been Lord Ligonier and Lord Grantley), if they could be prevailed upon to accept the trust. In December, 1777, the plaintiff, being threatened with an arrest for the sum of £2,000 by the holder of bills of exchange drawn by the plaintiff while at Paris, applied to the defendant Mackreth, who agreed to lend the plaintiff £3,000 on mortgage of the Surrey estate; upon which mortgage deeds, dated 22nd and 23rd of this month, were accordingly prepared and executed. At the time of the execution of these deeds, it was proposed that the defendant Mackreth should be a trustee with Farrer for payment of the debts and redeeming the annuities, when the defendant Mackreth proposed the defendant Dawes for that purpose, as being, from the course of his business, well acquainted with many of the persons who had purchased the plaintiff's other annuities, and could assist in purchasing them at a cheaper rate than Mr. Farrer; which was assented to by the plaintiff, upon an assurance that nothing should be done without Mr. Farrer being consulted and approving thereof.

In the same month the plaintiff delivered to the defendant Mackreth a particular or rental of the estate in Surrey, made by Thomas Jackman, by which it appeared that the rents of the houses and cottages on the premises amounted to £283 1s., and those of the lands to £979 14s. (subject to the mother's jointure, which was stated at £240 a year), and the timber was valued in

the rental at £4,000, and the whole was valued at £45,000. It was also in evidence, that Mackreth sent down a man of the name of Hampton to view the estate, who was there a week, but what valuation he made, or whether the same was communicated to Mackreth, did not appear.

A trust deed was prepared by Garforth, reciting the mortgage, by which the estates were conveyed to Mackreth and Dawes (subject to Mackreth's mortgage and the annuity to Dawes) in trust to sell or mortgage the same, and to pay the debts and redeem the annuities granted by the plaintiff. These deeds being sent to Mr. Farrer, he made some objections thereto, on account of the sums advanced as the prices of the annuities, not being scheduled as gross sums carrying interest at £5 per cent., and also on account of the trustees being empowered to sell or mortgage the estates without the intervention of Mr. Fox. And it being afterwards agreed, that Mackreth should pay off Dawes, and advance some further sums, a deed-poll was prepared, calculated for execution on January 16, 1778, and indorsed on the mortgage deed, to secure such further sum of £7,000, consisting of £5,100, the consideration-money for the annuities granted by the plaintiff to Dawes, with £212 10s., interest thereon, for the quarter's arrear due December 23, 1777 (but which was not paid by Mackreth to Dawes until July 16, 1778), and £51 14s. 9½d., twenty-three days' arrear of the said annuities, from December 23 to said January 16, and £1,635 15s. 2½d. paid to the plaintiff on January 16, 1778. A new trust deed was also prepared, in which this deed-poll was recited, and the £3,000 and the £7,000 made the first charges on the estate.

On January 16, 1778, the plaintiff Fox and the defendant Mackreth dined together at the house of the defendant Garforth, for the purpose of executing these deeds, and after dinner, and before the plaintiff had executed the deeds, a conversation arose, in which it was proposed that the defendant Mackreth should become purchaser of the estate, and Jackman's valuation of £45,000 was mentioned by the plaintiff as a fair price, which was objected to by Mackreth, considering the value put thereby upon the houses and lands; upon which the defendant made a calcula-

tion of the houses at fourteen years' purchase, and the lands at thirty, together with the household furniture, valued at £500, and the timber at £4,000 (on which last two articles they agreed), amounting to £37,853 14s. The plaintiff afterwards offered to sell the estates to the defendant for £42,000, upon which the plaintiff said he would split the difference, and give £39,500 for the same, but would not give more; and the plaintiff not agreeing to accept the terms, the trust deeds were then executed by the plaintiff.

After the deeds were executed, the conversation was renewed, and the plaintiff expressing some concern with respect to his mother's jointure, in case he should accept the defendant's terms, the defendant offered the £39,500, and to subject himself to the payment of the plaintiff's mother's jointure, in case she should survive him; upon which the parties agreed, and the defendant Garforth (who had been absent during the greater part of the treaty) was called in, and drew up a memorandum of such agreement, by which the money was to be paid on or before March 25 next, till which time the plaintiff was to receive the rents and profits, and then convey the estate to the defendant Mackreth; and about twelve o'clock at night this memorandum was signed by the plaintiff, upon which the trust deed was cancelled.

On the 28th of the same month, articles for the purchase were executed by both parties. On April 24 following, the plaintiff, and Anna Fox, his mother, on May 2, executed conveyances of the estates to the defendant, in consideration of £39,500, £11,097 of which was retained by the defendant, in payment of the above mortgage of £3,000, the £7,000 secured by the deed-poll, and some other sums charged by the defendant, as advanced to the plaintiff; and the defendant gave the plaintiff, as a security for the residue (being £28,403), a common accountable receipt; and afterwards, on the objection of the plaintiff to this as the only security for the money, the defendant wrote, on the same piece of paper which contained the accountable receipt, the following charge:—"25th April, 1778. I do hereby charge all my estates in the county of Surrey with the payment of the above sum of £28,403 and interest." At the time

of signing the above, the defendant had no estates in the county of Surrey but those purchased by him of the plaintiff; and the defendant gave to the plaintiff no other security for the residue of the money than the receipt and charge.

In the interval between the execution of the articles and that of the conveyances, Mackreth had treated with Thos. Page, Esq., for the sale of the whole of the said estate; and on March 21, Mr. Page agreed to give £50,500 for the same, but no article was entered into between him and the defendant till April 30 following. Immediately after, Page was let into possession, and was to receive the rents and profits from Lady Day then last. The treaty with Page was totally unknown to the plaintiff, when he executed the conveyance to the defendant.

The plaintiff drew upon the defendant for several sums on account of the purchase-money; and in October, 1778, having sent for an account, the defendant drew one out, by which he made a balance remaining in his hands of £773 18s. 9d.; but admitted in his answer that he had therein charged moneys unpaid, as the supposed amount of two annuities and the arrears thereof then unredeemed; and afterwards in May, 1779, having then settled the said annuities, he sent the plaintiff another account, in which he made the balance £616 17s. above the other balance of £773 18s. 9d. In June, 1779, the plaintiff, being again in distress, applied to the defendant, when he advanced him £2,100 upon an annuity of £350 a year for plaintiff's life, secured by a bond in the penal sum of £4,200, and warrant of attorney to enter up judgment on the same.

Upon discovery of the sale to Page, under the circumstances as stated above, the plaintiff filed his bill [1781], insisting that the defendant Mackreth, being a trustee for him under the trust deed for payment of debts, it was his duty to sell the same for the advantage of the plaintiff: and if he purchased for himself (which the plaintiff was advised he could not) it should be for a fair and adequate consideration; that the plaintiff, having been imposed upon, ought to have the benefit of the sale; and that the sum of £700, mentioned in the articles as due to Mackreth, on mortgage, or the part thereof estimated to be due to the defendant as the value of the annuities granted to Dawes,

was a much greater sum than they were really worth on a fair valuation; that no greater allowance ought to be made out of the purchase-money than the sums really advanced, with interest from the time of advancing the same; that Mackreth had not discharged the annuities granted by the plaintiff, but the plaintiff continued liable to the same; and that at the time he granted the last annuity of £350, there was money in the defendant's hands, or the defendant was accountable to the plaintiff for larger sums, as he then had in his hands the sums for which he sold the plaintiff's estate, beyond the sum of £39,500, and therefore prayed as is before stated.

The defendant Mackreth, by his answer, insisted on the fairness of the transaction, and that the price at which he bought the estate was an adequate price, though he expected to have some benefit by selling it out in parcels; but that the purchaser, Mr. Page, having an estate in the neighbourhood, gave a larger price than it was worth to other persons. He admitted that he had in his hands a balance of £617 13s. of the purchase-money, which he claimed to retain, on account of the plaintiff being only tenant for life in a small part of the estate conveyed to the defendant, and £773 18s. 9d. the balance of the accounts sent to the plaintiff in October, 1778; and the defendant Mackreth further said, that on August 30, 1779, part of the estate being discovered to be copyhold, the defendant applied to the plaintiff to execute a letter of attorney, to surrender such copyhold premises to the defendant, which he readily agreed to, and signed such letter of attorney; and that Mr. Page, the purchaser, in November, 1779, having raised a sum of money by mortgage of part of the said estates, and afterwards having occasion to raise money by mortgage of other parts of the said estates, and the solicitor for the person advancing the money requiring to have the original deeds of December 22 and 23, 1777, and the conveyance from the plaintiff to the defendant or duplicates thereof, the defendant applied to the plaintiff to execute other parts of the deeds, which he agreed to, and, together with his mother, executed the same without expressing himself dissatisfied with the purchase made by the defendant (but it was in evidence that Mr. Farrer only consented to the plaintiff's executing the

same under a proviso that the same should not be considered as a confirmation), which acts of the plaintiff the defendant insisted would operate as confirmations of the transactions.

The cause was heard at the Rolls, before his Honor Sir Lloyd Kenyon, the then Master of the Rolls, on June 26, 27 and 29, and on July [4], 13, 14, and 26, 1786, on which last day his Honor was pleased to make his decree, whereby he declared that undue advantage was taken by the defendant Mackreth of the confidence reposed in him by the plaintiff Fox, and that therefore the defendant Mackreth ought to be considered as a trustee as to all the estates and interests comprised in the conveyance of April 23 and 24, 1778, for the said plaintiff Fox, after the execution of the said deeds; and ordered it to be referred to the Master to take an account of the money received by the defendant Mackreth from Page, and to compute interest thereon at £5 per cent. from the time of receiving the same, and to take an account of the money paid by defendant Mackreth to Dawes on account of the annuities of £500 and £350; and also an account of the money advanced by Mackreth on account of the annuity of £350 in 1779 (*a*): and an account of money advanced or paid by Mackreth on account of the mortgage in 1778, and under the contract for the purchase of the estate (*b*) and compute interest on the same; and that the defendant Mackreth should pay the plaintiff the costs of the suit in respect of his insisting on the conveyance of April 23 and 24, 1778, as a conveyance for his own benefit: and granted an injunction against the defendant Mackreth, to restrain him from proceeding at law touching any matter in question in the cause (*c*); and reserved further consideration.

From this decree there was an appeal, by the defendant Mackreth only, to the Lord Chancellor, which came on to be heard in Michaelmas Term, 1787.

(*a*) "And the particular times when, and in what manner, such sums were advanced." Reg. Lib.

(*b*) "Or the conveyance thereof, and to state the particular times when, and to whom such sums were paid, and the account in which the same were included respectively." Reg. Lib.

(*c*) This injunction was dissolved by Lord Thurlow; but, as he afterwards confessed, by mistake: see *Ex p. Lacey*, 6 V. 627; 6 R. R. 9.

Mr. Mansfield, Mr. Scott, Mr. Lloyd, Mr. Campbell, and Mr. Mitford were heard for the respondent in support of his Honour's decree.

Mr. Ambler, Mr. Madocks, Mr. Selwyn, Mr. Ainge, and Mr. Hargrave were heard for the defendant and appellant Mackreth, and their argument and Mr. Mansfield's reply are set out, 2 R. R. pp. 62, 64.

Lord Chancellor Thurlow.—The great and only doubt which I have had from the beginning to the end of this case is, whether the ground upon which I must go, if I affirm this decree, will not by necessary implication extend to many other cases, in which I shall run the hazard of undoing all the common transactions of mankind, and of rendering all their dealings too insecure. I do not agree with those who say, that, wherever such an advantage has been taken in the course of a contract by one party of another, as a man of delicacy would refuse to take, such a contract shall be set aside. Let us put this case:—Suppose A, knowing of a mine on the estate of B, and knowing at the same time that B was ignorant of it, should treat and contract with B for the purchase of that estate at only half its real value, can a Court of equity set aside this bargain? No; but why is it impossible? Not because the one party is not aware of the unreasonable advantage taken by the other of this knowledge, but *because there is no contract existing between them by which the one party is bound to disclose to the other the circumstances which have come within his knowledge*; for if it were otherwise, such a principle must extend to every case in which the buyer of an estate happened to have a clearer discernment of its real value than the seller. It is, therefore, not only necessary that great advantage should be taken in such a contract, and that such an advantage should arise from a superiority of skill or information, *but it is also necessary to show some obligation binding the party to make such a disclosure*. Therefore the question is, not whether this transaction be such as a man of honour would disclaim and disdain, but it must fall within some settled definition of wrong recognized by

this Court; for, otherwise, the general transactions of mankind would be too much in hazard and uncertainty. In this view, and in this view only, I have entertained considerable doubts on this case.

The Master of the Rolls has referred a great variety of accounts, subsisting between the parties, to the Master; and it is not quite a fair argument to consider this part of the case as altogether decided. If these points are material, the only consequence is, that, as to them, the judgment must be suspended.

In the present appeal I shall consider the case entirely on the transaction of January 16. I shall also consider certain terms necessary to be found, in analogy to the finding of a jury. First, it is necessary to find the real value to be what Page gave for the estate, or much more at least than the price given by Mackreth; for, unless there be great inadequacy of value, the case comes to nothing. The fraud or imposition of the one party affords no ground of relief, unless *damage* be sustained by the other (*d*); and, on the other hand, it does not follow, though the real value should be found such as now represented on the part of the plaintiff, that it will put an end to the contract, unless such advantage has been obtained by some of those frauds which the policy of this Court has adopted as grounds on which the set contracts aside.

The Master of the Rolls has said that Mackreth shall be a trustee, and so he must be taken *consequentially*; for, if it be true that Mackreth has cheated Fox in this bargain, he did get the estate at law, but he did not get the estate in equity, and then he is reduced to a trustee. It is *only* in consequence of his getting the estate by fraud, that he becomes a trustee. Suppose an estate to be of the value of £50,000, and Mackreth buys it for £40,000, committing great fraud in such purchase, but, from the calamities of war and other public distresses, landed property as well as stock sink in value more than one-fifth, and Mackreth then sells the estate for £35,000, or £30,000 only, would it not be true that Mackreth would be bound to pay the £10,000 as a satisfaction for the fraud

(*d*) This opinion Lord Thurlow changed, for he refused an inquiry as to the value of the estate.

committed by him, although he had not made the money he actually gave for it? The money would be due, not in consequence of what Mackreth afterwards sold it for, but what Fox lost by it at the time. The only consequence, in a Court of equity, is, that what one party lost by the undue advantage taken by the other must be answered to him.

The Master of the Rolls went on the fact of the value of the estate being that for which it was sold to Page, and thought, that, this being the value, Mackreth had cheated Fox. Taking this for the present to be so, let us go over shortly the facts of the case.

Fox began to be distressed about three or four years before he came of age. He engaged other young men, with whom he was connected, to become securities for him for sums of money he had borrowed. He had involved himself in annuities. When he came of age he found himself under this imperfect obligation in point of law, but very strong obligation in point of honour, to relieve those who had pledged their names for him. A plan was formed to sell a part of his estate. His situation as to fortune when he came of age was this: his estate in Surrey was about £1,200 per annum. Of this he was tenant in tail. He had an estate in Yorkshire of £1,100 per annum, of which he was tenant for life. He had also an estate in Ireland, of which he was tenant for life in possession, of about £5,000 or £6,000 per annum. Such was his situation when he came of age. He had resorted to a man of character in his profession, Mr. Farrer, for the purpose of settling this business. August 23, 1777, came, and no step was taken towards taking any account of his debts and annuities, or negotiating with any of his creditors; yet it is most evident that the best time for settling these matters with his creditors was before he came of age.

However, he came of age on August 23; and on September 23, it seems, the first conversation was had upon this subject. He had then been introduced to Mackreth. At that time, certainly, there was nothing confidential in their intercourse, or any close connection between them; but Fox applied to Mackreth for about £5,000. Mackreth naturally asked what security he had to offer. Fox thereupon told him his real situation, by which it appeared

that Fox had no permanent security to offer till Michaelmas Term, when he could suffer a recovery of the Surrey estate. Mackreth then proposed to him, as the ordinary mode of raising money, to buy an annuity of him at six years' purchase, which is, in truth, about half the real value; and, therefore, whoever proposes to deal with another upon this sort of terms, quits at once all idea of delicacy or generosity or propriety of conduct. It is such as cannot be endured out of a Court of justice; and, if a Court does affirm such transactions, it cannot be the heart of a Judge which affirms it, but it must be done from a fear of laying down such rules as may tend to make the general transactions of mankind too insecure. There were other modes which might have occurred to a man of different feelings. A contract to make a mortgage when the Term came would have been an effective lien on the estate; and then it would only have been necessary to have insured Fox's life to the end of Michaelmas Term. This would have been the just and honourable way of relieving him. On the other hand, it is observable that, though Mackreth adopted the other mode of raising the money, it was done in the usual course of his business; for, by profession, he dealt in the distresses of mankind. What he did, he did in his way and business of an annuity-monger. I make neither better nor worse of his conduct than that of a common and professed annuity-monger.

In November the recovery was suffered. Still nothing was done by Fox's friends towards relieving him from the annuities, which were eating him up. On December 24 Fox sends word that he was in great distress, in confinement, and wanted money immediately. Mackreth came to him and lent him money on common terms, and took a mortgage for it. A Judge cannot impute anything to this part of the transaction, either one way or another. There was no generosity on one side, nor any plot of circumvention on the other. It would be a most extravagant conjecture to suppose that by this Mackreth had in view to get the legal estate in himself. When one once gets beyond the natural result of facts, there is no end to conjecture or its consequences. This was the situation on the 24th.

Mackreth was made acquainted with the plan of the trust

deed, and it is certain that he industriously recommended himself and Dawes as trustees for this purpose. It has been said that Mackreth's forcing himself into the trust was improper, and done for some bad motive; and that taking the business out of the hands of Mr. Farrer was calculated to give Fox a bad impression of him. I do not agree to this. In whose room were Mackreth and Dawes to be substituted? The two first were Lord Grantley and Lord Ligonier, who were put in only because they were lords, I believe; for it was not very probable that they should be active or attentive in executing such a trust as this. As to Mr. Farrer himself, it is only to be said that he had, in fact, done nothing in the affair, nor taken any step towards it. I therefore really believe that Mackreth meant what he said upon that occasion; and when he proposed himself and Dawes as trustees he meant to transact the business to the best advantage. In doing this he undertook a very delicate trust: first he was to make the most of the estate; then to deal with the several annuitants. This put him into very awkward circumstances, himself and Dawes being both considerable annuitants; and therefore when he undertook to deal with annuitants at large he undertook a very nice charge, and it was incumbent on him to see with very great attention that he did not show more favour to the annuitants than he ought to do.

I certainly do not approve of Mackreth's conduct when, after having recommended himself as a trustee for these purposes, he allowed the several annuities to stand as far as they had then gone, redeeming them only from that time. However, in fact, he bought the annuities on behalf of Fox, though with his own money; but instead of considering them as discharged on December 24, when he bought them, he considered them as bought for his own use, and treated them as existing annuities. Here, therefore, he has gone beyond the line of delicacy; for this is a transaction that a Court of equity will never permit to stand. Here the Court will say he took an undue advantage of his situation. Yet it seems as if he thought this a fair mode of dealing in this sort of market.

In another instance he charged Fox more than he actually gave for the redemption of an annuity; and this part of the

transaction must of necessity be rescinded, as Mackreth has acted *unfairly* in it; and Fox has the advantage of finding that Mackreth, after having recommended himself as a trustee, and undertaken to act faithfully for his *cestui que trust*, has yet been dealing unfairly in this very article.

On January 16 it is allowed that Mackreth was a trustee of Fox, and whatever consequences arise from this character must belong to him. Considering him, therefore, as a trustee, see what was done! First, he sent down a surveyor to the estate; but he has so managed this part of the case as to prevent the Court from seeing much into it. The Court will act temperately in its conjectures on this, but at the same time will impute all that it fairly can in point of suspicion. On one side it is said that Hampton was sent down to survey the estate with a view of enabling Mackreth to make the greatest advantage of it for his private benefit; but I do not think so. I think it ought to be taken that he had the estate surveyed as a *trustee*, in order that, in that character, he might know the real value of it, and thereby be better qualified to sell it to advantage. This, then, I consider as a part execution of his trust. But then Hampton's knowledge ought to be Fox's knowledge; and upon this arises a question which I think material—whether a trustee, gaining a knowledge of the subject in the execution of his trust and at the expense of the *cestui que trust* (for I suppose the expenses incurred by the trustees must fall ultimately on Fox), and that knowledge consequently *belonging* to the *cestui que trust*, whether a trustee may not in *this respect* have the hand of justice laid upon him, if this knowledge is made use of by him to circumvent his *cestui que trust*, so as to afford a distinct ground of fraud in a Court of equity? I am rather at a loss to find what the evidence affords to this point. It appears, however, that Hampton stayed on the estate till January 17.

In these circumstances Mackreth began to deal with Fox, remaining in his character of a trustee. Fox had a valuation of the estate made by Jackman, which, though not very full or particular, yet afforded the general terms for a treaty and agreement; and it went generally to show that the estate was capable of being improved about £100 per annum. On this

valuation, lying *in medio*, one party says the estate is worth £47,000. Mackreth reasons on this survey, and says, first, that the houses are valued too high; secondly, that thirty-two years' purchase for the land is too much; next, that forty years' purchase for the lord's rent is out of all sight. Thus running down the valuation made by Jackman, he argued down Fox either from conviction or a sense of his distress, not indeed so low as £36,000, which Mackreth first proposed, but to a medium price of £39,500.

The first question to be asked is, whether the character of a trustee shall vary the consequence of this transaction from what it would be in the case of a stranger? for it has not been argued, I think, that, in the case of a stranger, this bargain could be rescinded. Now, to what conclusion does the charactor of trustee go in this case? *If a trustee, though strictly honest, buys an estate himself and then sells it for more, yet, according to the rules of a Court of equity, from general policy and not from any peculiar imputation of fraud, a trustee shall not be permitted to sell to himself, but shall remain a trustee to all intents and purposes.* It is not, therefore, in that view that Mackreth, being called a trustee, can operate. It does not rest on the name of a trustee, or on the legal or equitable relation of trustee, but on the familiar intercourse between him and Fox. Now, can I, putting myself in the place of a juryman, pronounce that Fox agreed to the price, *trusting that Mackreth knew the price and represented it fairly to him?* If A says to B, I know the value of the subject, and if you will trust me, I will fairly tell you what it is worth, and A at the same time knows the value to be double what he represents it to be, this is such an abuse of confidence as shall be relieved against, not because A is a trustee, but because he stipulated with B to tell him fairly the value, and he broke that stipulation; and then, to be sure, it makes full as strong a case as that of a trustee. But was this the express or tacit understanding of the parties here? I have no materials to affirm this fact upon; at least, I am considerably in doubt how to find any evidence of this, where one party asserts one sum to be the value of the estate, and the other another, and both try to make the best of the bargain. At the same time

there are such circumstances respecting the manner in which Mackreth undertook the trust, as make me hesitate. All this makes the question of the real value of the estate extremely material (*e*). I do not think it could have been sold at the time according to the rate of Jackman's valuation; and Mackreth's observations upon this seem to me to be well founded. No evidence has been adduced to show his valuation to be correct.

Now, see what follows on January 16. Garforth was called up and desired to put their agreement into writing. I do not see why it was necessary that this memorandum should be signed by both parties. I at first thought it showed an eagerness to get the bargain made but it seems it was agreed that more regular articles should be executed afterwards. The execution of these articles carried the transaction one step farther in point of form. Still, however, the conveyance was not executed. It is asked, whether any man of honour would let Fox execute the deeds, after he had actually sold the estate for a much larger price? Many men, perhaps, would do it; but I should never allow it to be the transaction of an honest man. Mackreth had forced himself into the confidence of Fox and was called upon, by every tie of honour and honesty, to consider himself as a trustee; but my doubt is, whether this is not too general a line to lay down in a Court of justice.

As to the manner of Mackreth's paying Fox the purchase-money, it has been much observed upon; but I do not see much in it. He had not the money by him, which may readily be supposed, but he gave an accountable note, with £5 per cent interest; and, to be sure, his note was just as good as a bond—very little danger of losing the money from a man of Mackreth's fortune; besides, it was a sort of lien on the estate. The manner in which the accounts are made up by Mackreth is objected to, and it is said that this shows a confidence reposed in Mackreth by Fox. So it does; but the question is, whether this confidence is *ad idem*—whether it shows a confidence on the part of Fox, *that Mackreth would tell him the true value of the estate?*

It is then said, that he was called upon to do several

(*e*) Not for the purpose of the decision in a case between a trustee and his *cestui que trust*. See *Ex p. James*, 8 V. 353; *Coles* v. *Trecothick*, 9 V. 247.

subsequent acts; but these are to be so naturally accounted for by other circumstances, that I do not see how fraud can be inferred from these. They are then spoken of as instances in which Fox has confirmed the original purchase. As to confirmation, it has been considered by the Court in very different ways. In *Lord Chesterfield* v. *Janssen*, the Court did not go on confirmation as it is usually understood, but on this, that Mr. Spencer, with his eyes open, and after the death of the Duchess, and when his situation was totally changed, thought proper to confirm the former bargain. So, the Judges' assistant relied on this principally, and did not give much opinion on the former part of the case. I wish they had gone further; for, as to the confirmation, he stood at that time under the former bonds. Another way in which confirmation operates is, by showing that the party then thinks himself to have been fairly dealt with. This occurs in the present case on January 28. Again, on April 25, Fox did not see he had had any advantage taken of him. The use that I think is to be made of such confirmations is as a proof that the party has seen no occasion to complain. In this view the present case is still stronger, for no complaint was made of this transaction till 1781; and therefore it is fair to infer that so notorious a disproportion of price as is now insisted upon was not within the suspicion of those who dealt for Mr. Fox; and it certainly would have been better if this suit had been brought earlier, for when are the affairs of mankind to be at rest? Nay, more than this, it is evident, and indeed not denied by the plaintiff's counsel, that the transaction never would have been impeached if Page had not given so large a price for the estate. This very much shakes my idea of the real value (*f*) of it. If this estate, situate near London, had really been sold at a great under-value, the friends of Mr. Fox must have known it by other means. Supposing the transaction with Page to be purely accidental and not springing out of the actual value, it never can affect this question. At the same time it is observable that Mackreth has

(*f*) The value, as was observed by Eldon, C., in *Ex p. Lacey*, 6 V. 627; 6 R. R. p. 11, was immaterial.

produced no evidence of the value of the estate, to show that it is not worth more than what he gave Fox.

I have been desirous of stating my thoughts on this case, that the gentlemen concerned may be apprised of them, as it will very possibly be necessary to have this matter discussed further, even before me. I have conversed with the Master of the Rolls and the Judges, with a wish to find some rule of evidence on which I can go in this case without running the hazard of shaking too much the contracts of mankind. It is of very little consequence to the public to lay down *definite* rules of *law*, if you have *indefinite* rules of *evidence*. I shall therefore at present only direct an inquiry into the real value of this estate: and if upon that inquiry the value should turn out to bear a considerable disproportion to what Mackreth gave for it, I shall probably require some assistance in laying down such rules of decision as will set men at ease as to the disposition of their property.

His Lordship, however, did not direct any such inquiry, but after a lapse of a considerable time affirmed the decree, saying only that he had considered the case very much, and that he could not see that his Honor's decree was wrong.

The defendant afterwards petitioned his Lordship for a rehearing of the appeal, but that petition was dismissed (*g*). He then appealed to the House of Lords, assigning the reasons set forth in 2 Cox, 330; but on March 14, 1791, the appeal was dismissed with costs (*h*).

NOTES.

1. Purchase by a trustee from himself, or his co-trustee.
2. Purchase by a trustee from his *cestui que trust*, p. 684.
3. Where one standing in a position of trust or confidence to another person obtains an advantage from such person, p. 690.
4. Nature of relief granted by Courts of Equity, 713.
5. Acquiescence and confirmation, p. 716.

(*g*) See 2 Cox, 158.
(*h*) *Id.*, 339; 4 Bro. P. C. 258.

Fox v. Mackreth—Pitt v. Mackreth.

1. Purchase by a Trustee from himself, or his Co-trustee.

This case further illustrates the equitable maxim, that a person in a fiduciary position (for the rule applies to all agents (*i*)), or in a position of confidence towards another shall not be allowed to make any advantage out of his position (*k*). "The Court strives anxiously to prevent a person from being placed in a position in which his interest shall pull him one way and his duty shall pull him the other" (*l*). Accordingly, a purchase by a trustee for sale, that is, a trustee buying from *himself* (*m*), although he may have given an adequate price, and gained no advantage, shall be set aside at the option of the *cestui que trust*, for "a sale by a person to himself is no sale at all" (*n*). "This doctrine as to purchases by trustees, assignees, and persons having a confidential character stands much more upon general principle than upon the circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, *however honest the circumstances*; the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases" (*o*). "It is founded," says the same Judge, "upon this: that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the Court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made an advantage or not. Suppose a trustee buys any estate, and, by the knowledge acquired in that character, discovers a valuable coal-mine under it, and, locking that up in his own breast, enters into a contract with the *cestui que trust*; if he chooses to deny it, how can the Court try that against that denial?" (*p*).

(*i*) *Ex p. Lacey*, 6 V. 627; 6 R. R. 9.

(*k*) See *Keech* v. *Sandford*, and notes, *ante*.

(*l*) *Per* Fry, J., in *Boswell* v. *Coaks*, 23 Ch. D., p. 310.

(*m*) See judgment of Eldon, C., in *Ex p. Lacey*, *supra*.

(*n*) *Per* Lindley, L.J., *Farrar* v. *Farrars, Ltd.*, 40 Ch. D., p. 409; *Tomlin* v. *Luce*, 41 Ch. D., p. 575; *Williams* v. *Scott*, [1900] A. C. 499; and see *Gibson* v. *Jeyes*, 6 V. 266; 5 R. R. 295; *Campbell* v. *Walker*, 5 V. 681; 5 R. R. 135; *Ex p. Lacey*, 6 V. 625; 6 R. R. 9; *Ex p. James*, 8 V. 337, 353; 7 R. R. 56; *Coles* v. *Trecothick*, 9 V. 247; 7 R. R. 167; *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500.

(*o*) *Per* Eldon, C., *Ex p. James*, 8 V., at p. 345.

(*p*) *Ex p. Lacey*, 6 V. 627; 6 R. R., at p. 11; *Ex p. Bennett*, 10 V. 394; *Ingle* v. *Richards*, 28 B. 361; *Hamilton* v. *Wright*, 9 Cl. & Fin. 110; *Beningfield* v. *Baxter*, 12 A. C. 167; *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500; *Re Postlethwaite*, 37 W. R., at p. 202.

Fox v. Mackreth—Pitt v. Mackreth.

"The principle is that as the trustee is bound by his duty to acquire all the knowledge possible, to enable him to sell to the utmost advantage for the *cestui que trust*, the question what knowledge he has obtained and whether he has fairly given the benefit of that knowledge to the *cestui que trust*, which he always acquires at the expense of the *cestui que trust*, no Court can discuss with competent sufficiency or safety to the parties" (*q*).

"In the case of *Fox* v. *Mackreth*, so much referred to, and now become a *leading authority*, in which I have now Lord Thurlow's own authority for saying he went upon a clear mistake in dissolving the injunction, it was never contended that if Fox, in a transaction clear of suspicion (but which must be looked at with the most attentive jealousy), had discharged Mackreth from the office of trustee, he would not have been able to hold the purchase. Why? because, being no longer a trustee, he was not under an obligation not to purchase. But we contended, that it was not in the power of Fox to dismiss him; that the trust was accepted under an express undertaking to the friends of Fox, that the trustees should not be dismissed without their privity; that Fox himself had too much imbecility of mind as to these transactions: and we contended, that between the dates of Mackreth's taking upon himself the character of trustee and purchasing, he had acquired a knowledge of the value of the estate, by sending down a surveyor *at the expense of the cestui que trust, which was not communicated to the cestui que trust* even at the moment of the supposed dissolution of the relation between them; and, under those circumstances, we contended that Mackreth remained a trustee. This was the principle upon which the cause was decided. Either that cause ought to have been decided in favour of Mackreth, or this Court originally, and the House of Lords finally, were right in refusing an issue to try whether the estate was of the value Mackreth gave, or of a greater value at that time. Upon this principle, that was an immaterial fact: for, if the original transaction was right, it was of no consequence at what price he sold it afterwards; if the original transaction was wrong, Mackreth not having discharged himself from the character of trustee, if an advantage was gained by the most fortuitous circumstances, still it was gained for the benefit of the *cestui que trust*, not of the trustee" (*r*).

(*q*) *Per* Eldon, C., *Ex p. James*, 8 V., at p. 348.

(*r*) *Per* Eldon, C., in *Ex p. Lacey*, 6 V. 627; 6 R. R. 11; *Gibson* v. *Jeyes*, 5 R. R., at p. 305. See also *Ex p. Bennett*, 10 V. 381, 394; 8 R. R. 1.

Fox v. Mackreth—Pitt v. Mackreth.

Although it has been said that a sale by a trustee to himself is no sale at all (*s*), the rule seems to be that the transaction is not *ipso facto* void but will be binding if the *cestui que trust* so elect, the *cestui que trust* having, nevertheless, an absolute right if he come in reasonable time to have it set aside (*t*).

In claiming to have the transaction set aside, it is quite unnecessary for the *cestui que trust* to show unfairness or inadequacy of price, or that the trustee has made some advantage (*u*). And this is the case, whatever may be the nature of the property, real or personal (*x*), in possession or reversion (*y*). Nor can a third person purchase for the trustee, even at an auction (*z*). And a purchase by him from co-trustees is equally objectionable (*a*); and where trustees sold property to W., and three months afterwards the same property was conveyed by W. to one of the trustees, who twenty years later sold it at a large profit, the circumstance was considered very suspicious, although a suit to set aside the sale, commenced more than thirty years after the sale, did not succeed (*b*).

Nor will a purchase by the trustees at a public auction be sustained; for if persons who are trustees to sell are there professedly as bidders to buy, that is a discouragement to others to bid. The persons present, seeing the sellers there to bid for the estate to or above its value, do not like to enter into that competition (*c*). The disability of a trustee to purchase the trust property may also preclude him from purchasing an option of purchase from a co-trustee (*d*).

Where, however, a trustee has fairly sold an estate, a subse-

(*s*) See *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 395, 409.

(*t*) *Campbell* v. *Walker*, 5 V. 680; 5 R. R. 137; *Boswell* v. *Coaks*, 23 Ch. D. 302; 11 A. C. 232; *Ex p. Moore*, 51 L. J. Ch. 72; 45 L. T. 558.

(*u*) *Ex p. Lacey*, 6 V. 625; *Ex p. Bennett*, 10 V. 393; *Gibson* v. *Jeyes*, *supra*; *Beningfield* v. *Baxter*, 12 A. C., at p. 179.

(*x*) *Killick* v. *Flexney*, 4 Bro. Ch. 161; *Hall* v. *Hallet*, 1 Cox, 134; 1 R. R. 3; *Pike* v. *Vigers*, 2 Dr. & Wal. 1; *Price* v. *Byrn*, cited 5 V. 681; 5 R. R., at p. 138.

(*y*) *Re Bloye*, 1 Mac. & G. 488, 492, 495; *Spring* v. *Pride*, 4 De G. J. & S. 395; *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. 472; *Costa Rica, etc.* v. *Forwood*, [1901] 1 Ch. 746; Lewin (13th ed.), p. 1106.

(*z*) *Campbell* v. *Walker*, *supra*; *Randall* v. *Errington*, 10 V. 423; 8 R. R. 18; *Watson* v. *Toone*, 6 Madd. 153; *Baker* v. *Carter*, 1 Y. & C. Ex. 250; *Hardwicke* v. *Vernon*, 4 V. 411; 4 R. R. 244; *Ingle* v. *Richards*, 28 B. 361.

(*a*) *Hall* v. *Noyes*, 3 Bro. Ch. 483; *Whichcote* v. *Lawrence*, 3 V. 740.

(*b*) *Re Postlethwaite*, 37 W. R. 200 (C. A.).

(*c*) *Ex p. Lacey*, 6 V. 629; 6 R. R. 11; *Ex p. James*, 8 V. 348; 7 R. R. 61; *Whichcote* v. *Lawrence*, *supra*; *Att.-Gen.* v. *Dudley*, Coop. 146.

(*d*) See *Wright* v. *Morgan*, [1926] A. C. 788; and see *infra*, p. 689.

quent *bona fide* purchase of the estate by the trustee from the purchaser is not invalid (*e*). But the trustee cannot repurchase from his own purchaser so long as the first contract is executory only (*f*).

In *Williams* v. *Scott* (*g*), an action for rescission of a contract for the sale of land, it was held that (1) the title disclosed being that of a purchaser from himself as trustee for sale, it was inequitable to force it upon the plaintiff, (2) a defence that, notwithstanding the form of the transaction, the defendant really derived title from the beneficiaries who assented to the transaction with full knowledge of all the circumstances must be proved by clear affirmative evidence to that effect, (3) a further defence that there had been an intermediate sale to a third person and a purchase by the trustee from him will not avail unless that sale were a completed one, (4) a trustee cannot adopt for his own benefit an executory contract to purchase to which he is a party as vendor.

A trustee cannot take a lease from himself (*h*). And with so great jealousy does the Court look upon a trustee becoming a lessee of the trust property, that even where a testator had given a trustee power to become lessee, he was removed, principally upon the ground that he was placed in a position in which his interest necessarily conflicted with his duty (*i*).

2. Purchase by a Trustee from his cestui que trust.

"The rule I take to be this: Not that a trustee *cannot buy from his cestui que trust*, but that he shall not buy from himself. * * * A trustee, who is entrusted to sell and manage for others, undertakes in the same moment when he becomes a trustee, not to manage for the benefit and advantage of himself. It does not preclude a new contract with those who have entrusted him. It does not preclude him from bargaining that he will no longer act as trustee" (*k*).

This discharge may be effected in two ways: First, a trustee or confidential agent "may contract with his *cestui que trust*, that

(*e*) *Baker* v. *Peck*, 9 W. R. 472; *Dover* v. *Buck*, 5 Gif. 57; but see *Re Postlethwaite*, 37 W. R. 200.

(*f*) *Parker* v. *McKenna*, L. R. 10 Ch., at p. 125; *Delves* v. *Gray*, [1902] 2 Ch. 606.

(*g*) [1900] A. C. 499.

(*h*) *Att.-Gen.* v. *Clarendon*, 17 V. 500; *Ex p. Hughes*, 6 V. 617; 6 R. R. 1.

(*i*) *Passingham* v. *Sherborne*, 9 B. 424.

(*k*) *Per* Eldon, C., *Ex p. Lacey*, 6 V. 625; 6 R. R. 9.

with reference to the contract of purchase they shall no longer stand in the relative situation of trustee and *cestui que trust*; and the trustee having, through the medium of that sort of bargain evidently, distinctly, and honestly proved that he had removed himself from the character of trustee, his purchase may be sustained" (*l*). But the trustee, before the purchase, must entirely shake off the character of trustee, by the consent of the *cestui que trust* freely given, after full information, and he must have bargained for the right to purchase (*m*). He will not be allowed to purchase if he continue to act as trustee up to the point of the sale, getting during that period all the information that may be useful to him, then discharging himself from his character and buying the property (*n*). In *Luddy's Trustee* v. *Peard* (*o*) P. had acted as solicitor of L., and had in that capacity acquired a full knowledge of his estate and affairs. L. became bankrupt. P. bought of the trustee in bankruptcy property of L.'s, the purchase being made in the name of his brother, but secretly for himself. Kay, J., held that P. was a trustee for the trustee in bankruptcy of L. of the property purchased (*p*).

Secondly, a trustee, while retaining his office, may in effect enter into a new contract, under which he may deal with his *cestui que trust*. "A trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee" (*q*).

But even then, "it is a transaction of great delicacy, and which the Court will watch with the utmost diligence; so much that it is very hazardous for a trustee to engage in such a transaction" (*r*). The law supposes the trustee to have acquired all the knowledge

(*l*) *Per* Eldon, C., *Sanderson* v. *Walker*, 13 V. 601; 9 R. R. 234.

(*m*) Eldon, C., *Ex p. James*, 8 V., at p. 353; *Ex p. Lacey*, 6 V. 625; 6 R. R. 9; *Re Worssam*, 46 L. T. 584.

(*n*) *Ex p. James*, 8 V. 337; 7 R. R. 56, at p. 67; *Spring* v. *Pride*, 4 De G. J. & S. 395.

(*o*) 33 Ch. D. 500.

(*p*) And see *Carter* v. *Palmer*, 8 Cl. & Fin., p. 705.

(*q*) *Per* Eldon, C., *Coles* v. *Trecothick*, 9 V., at pp. 246—7; *Randall* v. *Errington*, 10 V. 423; 8 R. R. 18; *Ex p. Lacey*, 6 R. R. 9; *Gibson* v. *Jeyes*, 5 R. R. 295; *Morse* v. *Royal*, 12 V. 373; cf. *Re Haslam & Hier-Evans*, [1902] 1 Ch. 765; *Wright* v. *Carter*, [1903] 1 Ch. 27.

(*r*) *Per* Eldon, C., in *Coles* v. *Trecothick*, 9 V., at p. 244.

which may be useful to him, but the communication of which to the *cestui que trust* the Court can never be sure he has made, when entering into the new contract by which he is discharged (*s*). So, in the principal case, it was fully admitted that Mackreth might have dealt with Fox for the purchase of the trust estate, had he done so without taking an undue advantage of his position as trustee, and the knowledge he had acquired in that character. The burden in such cases of proving the propriety of the transaction is thrown upon the purchaser (*t*). And a mere *tendency* to interfere with his duty, or to injure the trust, is enough to invalidate the act of a person standing in a situation of confidence (*u*).

From the strictness with which the Court views such transactions, few sales between trustees and *cestui que trusts* have been supported. In *Coles* v. *Trecothick* (*x*), however, a purchase by one of two trustees (on behalf of his father, who was in partnership in business with him) under a trust to sell for payment of debts, of part of the trust property was sustained, upon the ground that the trustees did not appear to have interfered in the business up to the sale, otherwise than that they sanctioned the acts of the *cestui que trust*, and that the *cestui que trust* had full information, and the sole management of the sale, making surveys, settling the particulars, and fixing the prices of the lots (*y*); and in *Ex p. Watts* (*z*), the solicitor to the fiat was, under special circumstances, allowed to purchase part of the bankrupt's estate.

But a purchaser in a fiduciary position must be prepared to show "*uberrima fides*," and "that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything, that he has given an adequate price, that his client has had the advantage of the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded. And *although all these conditions*

(*s*) *Ex p. Lacey*, *supra*.

(*t*) *Gibson* v. *Jeyes*, 6 V. 266; 5 R. R. 295; *Luff* v. *Lord*, 34 B. 220; *Gray* v. *Warner*, 16 Eq. 577; *Spencer* v. *Topham*, 22 B. 573; *Edwards* v. *Meyrick*, 2 Ha. 60; *Pisani* v. *Att.-Gen. for Gibraltar*, L. R. 5 P. C. 516; *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 395; *Hodson* v. *Deans*, [1903] 2 Ch. 647; and see *Re Haslam & Hier-Evans*, [1902] 1 Ch. 765; *Bath* v. *Standard Land Co., Ltd.*, [1911] 1 Ch. 618.

(*u*) *Hamilton* v. *Wright*, 9 Cl. & Fin. 111; *Plowright* v. *Lambert*, 52 L. T. 646.

(*x*) 9 V. 234.

(*y*) See also *Morse* v. *Royal*, 12 V. 355; *Clarke* v. *Swaile*, 2 Eden, 134.

(*z*) De G. 265. See also *Denton* v. *Donner*, 28 B. 285; *Luff* v. *Lord*, 34 B. 220; *Hickley* v. *H.*, 2 Ch. D. 190; *Farrar* v. *Farrars, Ltd.*, 40 Ch. D., at p. 405.

have been fulfilled * * * if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns it and invalidates it utterly" (*a*).

The Court will not ordinarily give a trustee leave to bid, because he must almost necessarily, from his position, have acquired much information relative to the property, and the Court could feel no security that he would do his duty and communicate this information so as to raise the price, if he had a prospect of becoming the purchaser (*b*).

The rule is, that if those interested in the estate insist that a trustee ought not to be allowed to bid, the Court will give so much weight to their wishes as to say that until all other ways of selling have failed, he shall not be allowed to buy (*c*). But if the Court is satisfied that no purchaser at an adequate price can be found, then it is not impossible that the plaintiff may be allowed to make proposals and to become the purchaser (*d*). In *Boswell* v. *Coaks* (*e*), leave was given to the solicitor of the defendant executor to bid for property of testator ordered to be sold by auction. The sale was conducted by the plaintiff's solicitor. The property was not sold, and the Court sanctioned a sale to defendant's solicitor and another. Held, that the leave given, and the approval of the contract, entirely put an end to the fiduciary position which the solicitor formerly occupied, and placed him in the position of a mere stranger, and that therefore he was under no obligation to disclose to the Court any facts within his knowledge affecting the value of the property. The decision was reversed by the Court of Appeal (*f*), but restored by the House of Lords (*g*).

Apart from any circumstances of doubt or suspicion, there is no absolute rule of the Court that a person, who has ceased for a considerable period to be a trustee of an instrument which contains a trust for sale, cannot become a purchaser of property subject to the trust (*h*).

(*a*) *Per* Lord O'Hagan, *McPherson* v. *Watt*, 3 A. C., at p. 266; and see Lord Cairns' speech, at pp. 263—4. See also *Lewis* v. *Hillman*, 3 H. L. Cas. 607; *Randall* v. *Errington*, 10 V. 423; *Luddy's Trustee* v. *Peard*, 33 Ch. D. 519; *Demarara Bauxite Co., Ltd.* v. *Hubbard*, [1923] A. C. 673.

(*b*) *Tennant* v. *Trenchard*, L. R. 4 Ch. 537, 547; *Geldart* v. *Ramble*, 9 Jur. 1085; *Sidny* v. *Ranger*, 12 Si. 118.

(*c*) *Per* Hatherley, C., in *Tennant* v. *Trenchard*, *supra*.

(*d*) *Ibid.*; and see *Guest* v. *Smythe*, L. R. 5 Ch. 551; *Delves* v. *D.*, 20 Eq. 77.

(*e*) 23 Ch. D. 302. (*f*) 27 Ch. D. 424.

(*g*) 11 A. C. 232.

(*h*) *Re Boles and British Land Company's Contract*, [1902] 1 Ch. 244; but see Underhill on Trusts (8th ed.), pp. 331, 333.

Fox v. Mackreth—Pitt v. Mackreth.

A merely nominal trustee, as for instance a trustee who has disclaimed, without ever acting in the trust, may become a purchaser (*i*); so may a person who has the power to become a trustee, as by proving the will, but who in fact neither proves nor administers (*k*); also a mere trustee to preserve contingent remainders (*l*); or a person who is a bare trustee in fee for another in fee, without any duties to perform (*m*); and a mortgagee with a power of sale may sell to a company in which he is a shareholder (*n*). The mere fact, however, that a receiver has been appointed will not reduce a trustee with duties to perform into the position of a mere nominal trustee (*o*).

The circumstance that two parties stand towards each other in the relation of trustee and *cestui que trust* does not affect any dealing between them unconnected with the subject of the trust (*p*); and *semble*, where the circumstances are such that the trustee is precluded from taking advantage of his *cestui que trust*, dealings between them will not be set aside (*q*).

A trustee for infants or persons under disability cannot purchase the trust estate unless by leave of a Court of equity, because persons not *sui juris* cannot enter into any contract with him which would have the effect of removing him from the character of trustee. The terms upon which such trustees might purchase were thus stated, "a bill filed: and the trustee saying so much is bid, and that he would give more. The Court would examine into the circumstances; ask who had the conduct of the transaction; whether there was any reason to suppose the premises could be sold better; and, upon the result of that inquiry, would let another person prepare the particular and let the trustee bid" (*r*). But if all the *cestuis que trust* are *sui juris*, they may consent to the trustees bidding (*s*).

(*i*) *Stacey* v. *Elph*, 1 My. & K. 195; *Chambers* v. *Waters*, 3 Si. 42; Underhill, p. 333. (*k*) *Clark* v. *C.*, 9 A. C. 733.

(*l*) *Parkes* v. *White*, 11 V. 209, 226; *Sutton* v. *Jones*, 15 V. 587; *Naylor* v. *Winch*, 1 Si. & S. 567.

(*m*) *Pooley* v. *Quilter*, 4 Drew. 189; *Denton* v. *Donner*, 23 B. 280, 290.

(*n*) *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 395; *Tomlin* v. *Luce*, 41 Ch. D. 573, at p. 575; and cf. *Kennedy* v. *De Trafford*, [1897] A. C. 180.

(*o*) *Tennant* v. *Trenchard*, L. R. 4 Ch. 537, 546.

(*p*) *Knight* v. *Marjoribanks*, 2 Mac. & G. 10; and see *Re Coomber*, [1911] 1 Ch. 723.

(*q*) *Naylor* v. *Winch*, 1 Si. & S. 555; 2 L. J. Ch. 132.

(*r*) *Per* Alvanley, M.R., *Campbell* v. *Walker*, 5 V. 682, 5 R. R. 141; *Mulvany* v. *Dillon*, 1 Ball & B. 418; *Farmer* v. *Dean*, 32 B. 327; *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. 472.

(*s*) *Ex p. James*, 8 V. 352; 7 R. R. 56.

Fox v. Mackreth—Pitt v. Mackreth.

In *Wright* v. *Morgan* (*t*), the question arose whether a trustee, who had been given by the testator an option of purchase and was therefore to that extent a beneficiary as well as a trustee, could make a valid assignment of the option to a co-trustee. The testator devised lands upon trust for sale (with a power of postponement for seven years) and to divide the proceeds amongst his children, the daughters' shares being settled. Under the will and a codicil the testator's wife and his sons, Harry and Douglas, were trustees, and there was a proviso that the land should not be sold until the same should have been offered by the testator's wife if living, and if dead by his son Douglas, to the testator's son Harry, at a valuation to be made by two valuers to be named by the testator's wife or Douglas, as the case might be, nor until Harry should have refused or omitted for three months to notify his acceptance of the offer. The testator died in August, 1902. In February, 1905, Harry assigned his share (including the said option) to Douglas. In 1905 Harry resigned the trusteeship and Nosworthy was appointed in his place. In January, 1907, the trustees having decided upon a sale the testator's widow offered the land to Douglas as in right of the option. Douglas accepted and valuers were appointed; a valuation was made and the sale was carried out. In 1924, one of the testator's daughters and her infant children brought this action to have the transaction set aside upon the ground (*inter alia*) that the option could not be validly assigned to a co-trustee. The Court upheld this contention and the sale was set aside accordingly. Lord Dunedin, who delivered the judgment in the Privy Council, observed (*u*): "There is no doubt that the option might have been assigned to a third person. There is nothing in the nature of the interest which points to non-assignability. When, however, it is found that the assignation is in favour of the person who is himself a trustee, quite another question arises. The appellant argued that this right to purchase was property in the person of Harry, who was a *cestui que trust*, and that it is settled that a trustee may purchase the interest of a *cestui que trust*. In one sense of the word 'property,' it is true that this option was the property of Harry, but the quality of the property was not like the property of land or of a chattel. If the option had been exercised by Harry himself and the property bought, then he might have transferred to a trustee just as well as to anyone else.

(*t*) [1926] A. C. 788.
(*u*) [1926] A. C., at pp. 896—7.

So also if the option had been transferred to a stranger. . . . But as it was, *the option transferred to Douglas only gave Douglas a right to ask from the trustees a contract of sale, and that contract was*, ex rei necessitate, *a contract between the trustees and himself as a trustee, and that is what the law will not allow.*"

It will be observed that the option in this case did not give the party the right to purchase when he pleased within a fixed period. The time of sale was to be fixed by the trustees, who had, therefore, a discretion to exercise, although the sale had to take place within seven years. If the option had given Harry the right to purchase the property, at any time within seven years on giving notice to the trustees, at a fixed sum payable in cash or in some other mode definitely specified in the option, the decision in *Wright* v. *Morgan* might, it is conceived, have been different.

3. Where one Standing in a Position of Trust or Confidence to another Person obtains an Advantage from such Person.

The doctrine which is applicable to purchases by trustees properly so called applies also to purchases by persons acting in a fiduciary capacity, which imposes upon them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property.

Committee of lunatic.—The committee of a lunatic's estate will not be allowed to purchase it (*v*).

Directors.—Directors stand in a fiduciary position towards the company, and if they make any profit when acting for the company they must account for it to the company (*x*). They are trustees of the powers of employing the moneys of the company, and cannot, for instance, make an unauthorised purchase of shares in their own company with that company's monies (*y*). So a director is as such precluded from dealing on behalf of the company, with himself or his firm, and he must account to the company for all profits made by such dealing (*z*). So also must his partner, although he be in

(*v*) Pope, p. 188.

(*x*) See Buckley, Companies (10th ed.), pp. 635 *et seq.*

(*y*) *Land Credit Co., etc.* v. *Fermoy*, L. R. 5 Ch. 763.

(*z*) *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. H. L. 461; *Benson* v. *Heathorn*, 1 Y. & C. Ch. 326; *Albion Steel, etc., Co.* v. *Martin*, 1 Ch. D. 580; *Re Imperial Land Co. of Marseilles*, 4 Ch. D. 566; *Imperial Mercantile Credit Association* v. *Coleman*, L. R. 6 H. L. 189; *Re Olympia, Ltd.*, [1898] 2 Ch. 153; cf. *Costa Rica Ry. Co.* v. *Forwood*, [1901] 1 Ch. 746; Buckley (10th ed.), p. 648.

no way connected with the company; for if the transaction is a partnership transaction, the partners are liable jointly and severally to the company (*a*). But the directors of a company are not trustees for individual shareholders, and may purchase their shares without disclosing pending negotiations for the sale of the company's undertakings (*b*).

Persons about to become directors of a proposed company will not be allowed to accept money to purchase shares *to qualify them* for office *from a person about to become a vendor to the company*, and with whom it was their duty to deal as trustees for the company, and such money will in contemplation of a Court of equity be held to belong to the company, and if it were applied by the directors in the purchase of shares, such shares would be considered to be unpaid for, and the directors liable on the winding up of the company to be put on the list of contributories in respect of those shares (*c*). And a gift by a promoter to a director whilst there are any questions open between the company and the promoter must be accounted for by the director to the company, and the company has the option of taking the thing given or its highest value whilst held by the director (*d*). And if promoters find directors and agree to provide them with their qualification shares gratuitously, such directors will be liable for misfeasance (*e*). And in short, whenever any person, such as a director, manager, or other officer, etc., standing in a fiduciary position with regard to a company, uses that position for the purpose of obtaining a personal advantage, he will be liable to account for that advantage to the company, either in an action (*f*), or if the company be in liquidation, then under section 215 of the Companies (Consolidation) Act, 1908, as having been guilty of "misfeasance or breach of trust" (*g*).

Promoters.—The promoters of a proposed company are under duties towards it, and are accountable to it when it comes into existence for any secret profit just as if the relationship of principal

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(*a*) *Imperial Mercantile Credit Association* v. *Coleman*, *supra*.

(*b*) *Percival* v. *Wright*, [1902] 2 Ch. 421; cf. *Burland* v. *Earle*, [1902] A. C. 83; *Allen* v. *Hyatt*, 30 T. L. R. 444, 445.

(*c*) See *Hay's Case*, L. R. 10 Ch. 593; *Archer's Case*, [1892] 1 Ch. 322; *Re London & S. W. Canal, Ltd.*, [1911] 1 Ch. 346.

(*d*) *Eden* v. *Ridsdale's Ry. Lamp, etc., Co.*, 23 Q. B. D. 368 (C. A.).

(*e*) *De Ruvigne's Case*, 5 Ch. D. 306.

(*f*) *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394.

(*g*) *Nant-y-Glo, etc., Co.* v. *Grave*, 12 Ch. D., at p. 747; and see Buckley (1909), pp. 503, 507, 508.

and agent, or of trustee and *cestui que trust* had existed (*h*), and if interested in property which is sold to the intended company they must disclose their interest. But although a promoter stands in a fiduciary relation towards the company, he is not a trustee in the full sense; and whether promoters are in fact acquiring any assets is a question of fact. "Where," said Sargant, J., "the whole scheme has throughout been that they are to sell to the intended company at a profit the assets which they are acquiring, the inference is that, *qua* those assets, they are not intending to be trustees for the company, but are intending to occupy the relationship of vendors. That this relationship when coupled with promotion involves certain fiduciary duties is undoubted, and the breach of those duties may involve unpleasant legal consequences. . . . But it is only confusing matters to identify such a fiduciary relationship with ordinary out-and-out trusteeship" (*i*).

When promoters, under the name of a syndicate, had suppressed the facts that they were the real vendors, and that they gave for the property less than the price that the company were about to give, and had obtained the acceptance of the contract from a board of their own creation, and had inserted in the prospectus statements contrary to the facts, which would lead intending shareholders to believe that the contract had been approved by all the directors, it was held by the Court of Appeal that there was no contract binding on the company, and that the sale to the company must be set aside, and judgment given against the members of the syndicate for repayment of the purchase-money (*k*). A man may properly purchase, or a body of persons may properly combine to purchase, a property, with the object and intention of selling it at a profit, whether to a company or anyone else; but if it be shown that the vendors to the company were promoters of the company, that they in fact *created their own purchaser*, the transaction will, at the instance of the company, be set aside (*l*) unless there has been full disclosure to the company of all material facts which the company ought to know (*m*); or if they were promoters at the

(*h*) *Lydney Co.* v. *Bird*, 33 Ch. D., at p. 94.

(*i*) *Omnium Electric Palaces, Ltd.* v. *Baines*, [1914] 1 Ch., at p. 347.

(*k*) *The New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73; 3 A. C. 1218; *Emma Mining Co.* v. *Grant*, 11 Ch. D. 918; *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1902] 2 Ch. 809; *Gluckstein* v. *Barnes*, [1900] A. C. 240.

(*l*) *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392; *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221; Palmer's Company Precedents (13th ed.), vol. i, p. 124.

(*m*) *Lagunas Nitrate Co.* v. *Lagunas Sundicate*, *supra*.

date at which they bought, the profit will be ordered to be paid over (*n*) unless the company bought with knowledge of the profit (*o*). The liability in these cases is joint and several (*p*).

Mortgagees.—It is perfectly well settled that a mortgagee with a power of sale cannot sell to himself (*q*), nor to any one employed by him to conduct the sale (*r*). A power of sale does not authorise the donee of the power to take the property subject to it at a price fixed by himself, although such price be the full value of the property (*s*). And such a mortgagee cannot sell to himself indirectly by means of his solicitor, nor to a trustee for himself, nor can two mortgagees sell to one of themselves, nor to one of themselves and another, because in such cases there cannot be an independent bargaining as between opposite parties (*t*). Nor can a solicitor or agent of such a mortgagee, acting for him in the matter of the sale, do so either (*u*).

In *Nutt* v. *Easton* (*x*) the executrix of the mortgagee of a reversion employed E., a solicitor, to obtain probate and, being anxious to realise, asked him to find a purchaser, when he reluctantly agreed to buy himself if a purchaser could not be found by Christmas, 1887. No purchaser being found in January, 1888, the executrix, in *bona fide* exercise of the mortgagee's power of sale, sold to E, for more than the actuarial value; it was held that the sale could not be set aside, for that on the evidence E. was not acting as solicitor of the mortgagee at the time of the sale to himself.

In *Farrar* v. *Farrars, Ltd.* (*y*), three mortgagees, of whom F. was one, and who acted as solicitor for the others in the sale, sold under their power of sale to a company. F. had promoted this company to some extent, was its solicitor, and had a substantial

(*n*) *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1902] 2 Ch. 809.

(*o*) *Whaley Bridge Co.* v. *Green*, 5 Q. B. D. 109; cf. *Salomon* v. *Salomon & Co.*, [1897] A. C. 22.

(*p*) *Phosphate, etc., Co.* v. *Hartmont*, 5 Ch. D. 456; and see sections 84 and 215 of the Companies Act, 1908.

(*q*) *Downes* v. *Grazebrook*, 3 Mer. 200; *Robertson* v. *Norris*, 1 Giff. 421; Coote (9th ed.), p. 934.

(*r*) *Whitcomb* v. *Minchin*, 5 Madd. 91; *Martinson* v. *Clowes*, 21 Ch. D. 857.

(*s*) *Per* C. A. in *Farrar* v. *Farrars, Ltd.*, *infra*; and *Tomlin* v. *Luce*, 41 Ch. D., at p. 575; and see *Warner* v. *Jacob*, 20 Ch. D. 220.

(*t*) See judgment of Chitty, J., *Farrar* v. *Farrars, Ltd.*, 40 Ch. D., at p. 404; *Martinson* v. *Clowes*, 21 Ch. D., at p. 860; *Hodson* v. *Deans*, [1903] 2 Ch. 647.

(*u*) *Martinson* v. *Clowes*, *ibid.*; *Orme* v. *Wright*, 3 Jur. 19; *Ingle* v. *Richards*, 28 B. 361; Coote (9th ed.), p. 935.

(*x*) [1899] 1 Ch. 873; and see *Allison* v. *Clayhills*, 97 L. T. 709.

(*y*) 40 Ch. D. 395 (C. A.).

interest therein as a shareholder. An action was brought by the mortgagors to set aside the sale, as being fraudulent and collusive. The Court held that a sale by a person to a corporation of which he was a member was not, either in form or substance, *a sale by a person to himself*; but such a transaction is suspicious, and there was such a conflict of interest and duty on the part of F., and such notice to the company of that conflict, that the burden of upholding the sale was thrown on the company.

On a sale by a building society as mortgagees, the secretary of the society purchased at the auction, and although there was no proof of undervalue, the sale was set aside as against the mortgagor (*z*).

A mortgagee, however, does not ordinarily stand in a fiduciary position towards the mortgagor, so as to invalidate a purchase of the equity of redemption by him from the mortgagor (*a*), or from a prior mortgagee selling under a power of sale (*b*), even, it seems, although the purchaser be a second mortgagee with a trust for sale (*c*). But where the conveyance with a trust for sale is to a third person, such person, being a trustee for both parties, cannot purchase (*d*). And see the position of a mortgagee for sale stated in cases cited below (*e*).

The true rule appears to be that a sale by mortgagor to mortgagee of the equity of redemption can be impeached only for fraud (*f*).

Where, in a deed creating a trust, there are provisions by which the trustees on making certain advances, and paying off part of a mortgage debt, are to become entitled to a charge on the estate; it seems even if a trustee making such an advance were entitled to have such a mortgage on the estate as would empower an ordinary mortgagee to foreclose, the Court would not allow him, by reason

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(*z*) *Martinson* v. *Clowes*, 21 Ch. D. 857; affirmed, [1885] W. N. 41, disapproving of *Robertson* v. *Norris*, 1 Giff. 421; cf. *Hodson* v. *Deans*, [1903] 2 Ch. 647; *Bath* v. *Standard Land Co., Ltd.*, [1911] 1 Ch. 618.

(*a*) *Knight* v. *Marjoribanks*, 2 Mac. & G. 10; and *Waters* v. *Groom*, 11 Cl. & Fin. 684; *Dobson* v. *Land*, 8 Ha. 220; *Rushbrook* v. *Lawrence*, L. R. 5 Ch. 3; *Gibbs* v. *Daniel*, 10 W. R. 688.

(*b*) *Shaw* v. *Bunny*, 2 De G. J. & S. 468.

(*c*) *Kirkwood* v. *Thompson*, 2 De G. J. & S. 613; *Locking* v. *Parker*, L. R. 8 Ch. 39.

(*d*) *Blennerhassett* v. *Day*, 2 Ball & B. 104, 133.

(*e*) *Farrar* v. *Farrars, Ltd.*, 40 Ch. D., at p. 410; *Tomlin* v. *Luce*, 41 Ch. D., at p. 575; *Kennedy* v. *De Trafford*, [1897] A. C. 180.

(*f*) *Knight* v. *Marjoribanks*, *supra*; *Dobson* v. *Land*, *supra*; *Melbourne Banking Corporation* v. *Brougham*, 7 A. C. 307.

of his fiduciary position, to take such a step, it being inconsistent with his duty as trustee to preserve the estate (*g*).

Charity Trustees.—The question has been raised whether one of the trustees of a charity can himself with propriety become a mortgagee of the charity property. It was decided in the affirmative in *Att.-Gen.* v. *Hardy* (*h*), where the trust deed contained a power of raising moneys by mortgage. In *Forbes* v. *Ross* (*i*), however, Lord Thurlow held that trustees having power to lend on personal security, could not lend to one of themselves, so that he should benefit thereby, his Lordship observing that "he proceeded upon this single ground that *a trustee cannot bargain with himself so as to derive, through the medium of the contract, any degree of forbearance or advantage whatever to himself.*" Another reason given in the case of ordinary trusts with a like power is that the settlor has the right to rely upon the united vigilance of all the trustees as to the solvency of the borrower (*k*).

Agents.—An agent employed to sell cannot purchase from his principal *unless he make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed* (*l*); and the moment it appears in a transaction between principal and agent that there has been any underhand dealing by the agent—that he has made use of another person's name as the purchaser, instead of his own—however fair the transaction may be in other respects, from that moment it has no validity in equity (*m*).

It is, moreover, well settled that it is not necessary to prove that a purchase has been made by the agent at an under-value. "A principal selling to his agent is entitled to set aside the sale upon equitable grounds, whatever may have been the price obtained for the property" (*n*); and the sale will be set aside if

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(*g*) *Tennant* v. *Trenchard*, L. R. 4 Ch. 544; and the observations made by Lord Brougham in *Hamilton* v. *Wright*, 9 Cl. & Fin. 123.

(*h*) 1 Si. (N.S.) 338. (*i*) 2 Cox, 113.

(*k*) —— v. *Walker*, 5 Rus. 7.

(*l*) *Lowther* v. *L.*, 13 V. 103; *York Buildings Co.* v. *Mackenzie*, 8 Bro. P. C. 42; and see *S. C.*, 3 Paton's Scotch App. Cas. 578, 579, where the judgments of Lords Thurlow and Loughborough are given at length; *Watt* v. *Grove*, 2 Sch. & L. 492; *Whitcomb* v. *Minchin*, 5 Madd. 91; *Woodhouse* v. *Meredith*, 1 J. & W. 204; *Oliver* v. *Court*, 8 Price, 127; *Martinson* v. *Clowes*, 21 Ch. D. 857, *supra*; *Dunne* v. *English*, 18 Eq., at p. 534; *Hodson* v. *Deans*, [1903] 2 Ch. 647. Cf. *Bath* v. *Standard Land Co., Ltd.*, [1911] 1 Ch. 618.

(*m*) *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; *Bentley* v. *Craven*, 18 B. 75; *Lewis* v. *Hillman*, 3 H. L. Cas. 607; *Walsham* v. *Stainton*, 1 De G. J. & S. 678; *M'Pherson* v. *Watt*, 3 A. C. 254.

(*n*) *Per* Sugden, L.C., in *Murphy* v. *O'Shea*, 2 Jo. & Lat. 422; and see *Dunne* v. *English*, 18 Eq., at p. 534.

the principal had no competent or disinterested adviser (*o*). "Any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognisable in this Court" (*p*).

An agent for sale who takes an interest in a purchase negotiated by himself, is bound to disclose to his principal the exact nature of his interest; and it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiry (*q*).

The burden of proving that a full disclosure was made lies on the agent, and is not discharged merely by the agent swearing that he did make such disclosure, if his evidence is contradicted by the plaintiff, and not corroborated (*r*).

An agent employed to sell an estate may, with the consent of his principal, make a profit of the transaction, as, for instance, where the bargain between them was that the agent should have whatever the estate fetched beyond a certain sum (*s*).

And after his agency is terminated by the sale of the property, he may, it seems, buy it from the purchaser. As, for instance, in the case of an auctioneer, when he has knocked the estate down, and made the written contract, when it may be said that his agency has terminated (*t*). But even in that case the Court would look with considerable suspicion on a repurchase by such an agent as an auctioneer, from the person to whom he sold the estate, because it would always be extremely difficult to find out whether there had not been some previous concert and understanding between them (*u*).

An agent or steward may also take a lease from his employer or principal (*x*), but it must always be difficult to sustain such a lease in a Court of equity, as it must be proved that full information has

(*o*) *King* v. *Anderson*, 8 Ir. R. Eq. 625; *Rossiter* v. *Walsh*, 4 Dr. & W. 485.

(*p*) *Per* James, L.J., in *Panama, etc., Co.* v. *India Rubber, etc., Co.*, L. R. 10 Ch., at p. 526; *Alexander* v. *Webber*, [1922] 1 K. B. 642.

(*q*) *Dunne* v. *English*, 18 Eq. 524; *Imperial Mercantile Credit Association* v. *Coleman*, L. R. 6 H. L. 189, 194; *Re Morvah, etc., Co., McKay's Case*, 2 Ch. D. 1; *Fawcett* v. *Whitehouse*, 1 Russ. & M. 132; *Hichens* v. *Congreve*, 1 Russ. & M. 150, n.; *Oliver* v. *Court*, 8 Price, 127, 160; *Baskett* v. *Cafe*, 4 De G. & Sm. 388; *Parker* v. *McKenna*, L. R. 10 Ch. 126.

(*r*) *Dunne* v. *English*, *supra*; and see *Clarkson* v. *Davies*, [1923] A. C. 100.

(*s*) *Morgan* v. *Elford*, 4 Ch. D. 352; and see *Re Haslam & Hier-Evans*, [1902] 1 Ch. 765.

(*t*) *Parker* v. *McKenna*, L. R. 10 Ch., at pp. 125—6; *Hay's Case*, L. R. 10 Ch. 593; cf. *Delves* v. *Gray*, [1902] 2 Ch. 606.

(*u*) L. R. 10 Ch., at p. 126; see *Re Postlethwaite*, 37 W. R. 200.

(*x*) *Selsey* v. *Rhoades*, 1 Bli. (N.S.) 1.

been imparted, and that the agreement has been entered into with perfect good faith (*y*).

If an agent employed *to make a purchase* purchases for himself, he will be held a trustee for his principal (*z*), and where the agency extends only to part of the lands included in a purchase, and there is some uncertainty as to which were intended, a reference may be directed to ascertain them, and also the price to be paid (*a*).

Nor will an agent employed to purchase be permitted, unless by the plain and express consent of his principal, to make any profit by buying and becoming a seller to him. This doctrine is recognised by Thurlow, C., in *East India Co.* v. *Henchman* (*b*), where he observes : " If, being a factor, a man buys up goods which he ought to furnish as factor, and, instead of charging porterage duties, or accepting a stipulated salary, he takes the profits and deals with his constituent as a merchant, this is a fraud for which an account is due." In *Kimber* v. *Barber* (*c*), the defendant, Barber, knowing that Kimber, the plaintiff, was anxious to obtain shares in a certain company, on January 19, 1870, called on the plaintiff and informed him that he, Barber, knew of 264 shares at £3. Barber was then authorised by Kimber to buy the shares at £3. The shares were accordingly bought, sixty-four of them were transferred to Kimber, and 200 to his nominee, one T. G. Taylor, a broker, being the transferor, and Kimber paying Barber £795 for the shares and the transfer duty. It appeared subsequently that Barber, being aware of the plaintiff's desire to obtain the shares, on January 13 wrote to Jones, asking, as for a friend, whether he would sell his shares, and on January 17 concluded an agreement with Jones for the purchase of the shares, at £2 a share, and forwarded him a blank transfer. After the interview between the plaintiff and Barber, on January 19, Barber instructed Taylor to prepare bought and sold notes to the effect that the shares had been bought through Taylor, as the broker, and the shares were afterwards transferred by Jones to Taylor. As Barber had not sufficient money to pay for all the shares, some of them were lent to him by Taylor, for the purpose of being transferred to Kimber. Kimber had transferred ten out of the sixty-four shares to other

(*y*) *Maloney* v. *Kernan*, 2 Dr. & W. 31.

(*z*) *Lees* v. *Nuttall*, 1 Russ. & M. 53; *Chattock* v. *Muller*, 8 Ch. D. 177; cf. *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*a*) *Chattock* v. *Muller*, *ibid.*

(*b*) 1 V. 289.

(*c*) L. R. 8 Ch. 56.

persons, so that at the time when the bill was filed, he held only fifty-four shares. Romilly, M.R., dismissed the bill without costs, holding that no relief could be given to the plaintiff as he had transferred 210 out of the 264 shares, and had thus rendered it impossible to set aside the transaction, but Selborne, C., reversing the decree of the Master of the Rolls, held that as Barber purchased the 264 shares from Jones, as agent for the plaintiff, the plaintiff was entitled to the benefit of that purchase, and that Barber ought to pay to the plaintiff the sum of £264, being the difference between the prices paid by the plaintiff and Barber.

In *Morison* v. *Thompson* (*d*), M. authorised defendant T., his broker, to buy a ship for £9,000. T. bought the ship for £9,250. The facts were that the vendor of the ship had arranged with his broker S., that if he, S., sold the ship for over £8,500, he, S., might retain the excess. T. and S. then arranged between themselves that T. should receive a portion of this excess, but his principal, M., had no knowledge of such arrangement. When it came to the knowledge of M. that T. had made such an arrangement and had received part of the excess, he brought an action for money had and received, and it was held such an action would lie (*e*). The relation between principal and agent established by the receipt of money, the result of a corrupt bargain, is that of debtor and creditor, not of trustee and *cestui que trust* (*f*). But if the agent has received money *from the principal* and misappropriated it, *secus* (*g*). And so if an agent is employed by his principal to obtain another to do work for him, for instance, as a sub-contractor, it would be fraud cognisable in equity if the agent entered into a contract at a preposterous price in order that he and the sub-contractor might divide the profits to accrue from it : see *Holden* v. *Webber* (*h*), in which case, however, under peculiar circumstances, the Court refused to grant any relief. So, also, if an agent is employed to obtain a lease, he shall not take it for his own benefit (*i*). Nor will an agent employed to settle a debt due

(*d*) L. R. 9 Q. B. 480.

(*e*) And see *Rothschild* v. *Brookman*, 2 Dow. & Cl. 188; *Hickens* v. *Congreve*, 4 Russ. 562; *Tyrrell* v. *Bank of London*, 10 H. L. Cas. 26; *Cavendish Bentinck* v. *Fenn*, 12 A. C. 652; *Re Leeds and Hanley Theatres, etc.*, [1902] 2 Ch. 809; *Re Darby*, [1911] 1 K. B. 95; *Re Jubilee Cotton Mills, Ltd.*, [1922] 1 Ch. 100.

(*f*) *Lister* v. *Stubbs*, 45 Ch. D. 1; *Re Thorpe*, [1891] 2 Ch. 360; *Powell* v. *Jones*, [1905] 1 K. B. 11.

(*g*) *Hay's Case*, L. R. 10 Ch. 593.

(*h*) 29 B. 117, 120.

(*i*) *Taylor* v. *Salmon*, 4 My. & C. 134.

from his principal be permitted to derive any benefit from it by purchasing it himself; because it is his duty on behalf of his employer to settle the debt upon the best terms he can obtain (*k*). And so where an agent employed by one party to a contract, surreptitiously enters into dealings for his own benefit with the other party which conflict with the performance of the duties he has undertaken to perform for his own principal, such dealings will be cognisable as a fraud by the Court of equity (*l*).

In *Massey* v. *Davies* (*m*), an agent for a colliery, who it was stipulated was to have no emolument beyond his salary, was decreed to account for the profits made by selling to his principal timber belonging to himself and another person, with whom he had clandestinely entered into partnership, under the name of that person. In this case the partner was held to have no knowledge that the agent was acting contrary to his trust, otherwise he would have been held bound, *for not only the agent acting contrary to his trust, but a man who, knowing the agent to be guilty of a breach of trust, entered into a transaction with him, will be answerable* (*n*).

Where a person is employed as a stockbroker, if he himself purchase the stock of his employer, or sell his own stock to him, without his knowledge, such sales and purchases will be set aside (*o*). In *Gillett* v. *Peppercorne* (*p*), the plaintiff employed the defendant, a stockbroker, to purchase some canal shares, and he bought them from a person who, though ostensibly owner, was a mere trustee for the defendant. Langdale, M.R., set aside the sale with costs : " It is said," observed his Lordship, " that this is every day's practice in the city. I certainly should be very sorry to have it proved to me that such a sort of dealing is usual; for nothing can be more open to the commission of fraud than transactions of this nature. Where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person whose assistance is required as agent

(*k*) *Reed* v. *Norris*, 2 My. & C. 374.

(*l*) *Panama, etc., Co.* v. *India Rubber, etc., Co.*, L. R. 10 Ch. 515, 526; *Re Etna Insurance Co.*, 7 Ir. R. Eq. 325, 424; *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394; *Alexander* v. *Webber*, [1922] 1 K. B. 642.

(*m*) 2 V. 317; 2 R. R. 218.

(*n*) And see *Turnbull* v. *Garden*, 38 L. J. Ch. 331, 334; *Mayor, etc., of Salford* v. *Lever*, [1891] 1 Q. B. 168.

(*o*) See *Brookman* v. *Rothschild*, 3 Si. 153; *S. C., nom. Rothschild* v. *Brookman*, 5 Bli. (N.S.) 165; 2 Dow. & Cl. 188.

(*p*) 3 B. 78.

has himself in the very transaction an interest directly opposed to that of his principal" (*q*).

Partners, Part Owners.—Upon the same principle, where one of several partners was employed to purchase goods for the firm, and he, unknown to his co-partners, purchased goods of his own at the market price, and made considerable profit thereby: it was held by Romilly, M.R., that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made (*r*). So in *Richie* v. *Couper* (*s*), it was held that one of several co-owners of a ship, who acted as a ship's husband, was only entitled to charge the cost price of supplies to the ship furnished by him in the course of his business (*t*).

A partner must not carry on the business of the partnership in his own or another name separate from it, otherwise than for the benefit of the partnership (*u*). Where a partner so acts, the option of the others seems to be to say: "That was a business within the scope of the partnership, and although you did it secretly or in connection with some other person, I elect to take the profits of it, because it was part of the business for which the partnership was established, and I elect to say that what you have been doing nominally for yourself, but really for the partnership, was for the benefit of the partnership" (*x*).

So again, if a person from his position as partner gets a business which is profitable, or from his position as partner gets an interest in partnership property, or in that which the partnership requires for the purposes of the partnership, he cannot hold it for himself, because he acquires it by his position of partner, and acquiring it by means of that fiduciary position, he must bring it into the partnership account. In *Russell* v. *Austwick* (*y*), two persons having joined in business as carriers under a contract with the Mint to carry bullion between London and Falmouth, one of the

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(*q*) See also *The Bank of Bengal* v. *Macleod*, 7 Moo. P. C. 35, 46; *Kimber* v. *Barber*, L. R. 8 Ch. 56; *Ladywell Mining Co.* v. *Brookes*, 35 Ch. D. 408; *Guy* v. *Churchill*, 60 L. T. 743; *Armstrong* v. *Jackson*, [1917] 2 K. B. 822.

(*r*) *Bentley* v. *Craven*, 18 B. 75; *Williams* v. *Tyre*, *ibid.*, 366, 371; *Burton* v. *Wookey*, 6 Madd. 367; see *Dunne* v. *English*, 18 Eq. 524; *Dean* v. *M'Dowell*, 8 Ch. D., at p. 355; Lindley, Partnership (9th ed.), p. 392.

(*s*) 28 B. 344.

(*t*) See also *Beck* v. *Kantorowicz*, 3 K. & J. 230; *Perens* v. *Johnson*, 3 Sm. & Giff. 419.

(*u*) See *Somerville* v. *Mackay*, 16 V. 382; *Lock* v. *Lynam*, 4 Ir. Ch. R. 188; Lindley, pp. 391—2; Partnership Act, 1890, ss. 29, 30.

(*x*) *Per* James, L.J., in *Dean* v. *M'Dowell*, 8 Ch. D., at p. 351.

(*y*) 1 Si. 52; and see Lindley, pp. 393—5.

partners, during the partnership and by virtue of his position under the existing contract, obtained a further contract in his own name for carrying silver for the Mint by another route. He was compelled to share the profits under such further contract (*z*).

So in *Gardner* v. *M'Cutcheon* (*a*), two persons were part owners of a ship which was employed in trading for the common benefit of the part owners; one of them used the ship for the purpose of a private trading of his own, and it was held that the other part owner was entitled to follow the profits thereby made.

Where, however, a partner, in breach of contract, derives profits from a separate trade not within the scope of the partnership business, which profits were not acquired by him by reason of his connection with the firm or by use of the firm's property, the co-partners, although, it seems, they may claim damages, are not entitled to an account of the profits made in such separate trade (*b*).

There is no rule which prevents a surviving partner from purchasing the share of a deceased partner from his representatives (*c*), and the trustee in bankruptcy of surviving partners who have a large claim against the deceased partner's estate may buy from the representatives of the deceased (*d*), nor does the rule prevent one of several residuary legatees from buying the share of another, or purchasing for less than the amount a charge on the share of another (*e*). But inasmuch as the Court will rarely allow persons conducting a sale to bid at it, where a sale is directed by the Court of partnership property upon a dissolution of partnership, liberty to bid at the sale will only be given to such of the partners as have not the conduct of the sale (*f*).

Executors, Administrators.—Executors or administrators will not be permitted, either immediately or by means of a trustee, to purchase for themselves any part of the assets, but will be considered as trustees for the persons interested in the estate, and must

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(*z*) See also *Glassington* v. *Thwaites*, 1 Si. & S. 124, 133; *Imperial Mercantile, etc.* v. *Coleman*, L. R. 6 H. L. 189; and the notes to *Keech* v. *Sandford*, *ante*.

(*a*) 4 B. 534; *Kuhlirz* v. *Lambert Bros.*, 108 L. T. 565.

(*b*) *Dean* v. *M'Dowell*, 8 Ch. D. 345; *Aas* v. *Benham*, [1891] 2 Ch. 244; cf. *Cassels* v. *Stewart*, 6 A. C. 64; *Trimble* v. *Goldberg*, [1906] A. C. 494; *Re Dover Coalfield, Ltd.*, [1907] 2 Ch. 76; [1908] 1 Ch. 65; Lindley (9th ed.), p. 401.

(*c*) *Chambers* v. *Howell*, 11 B. 6, 14.

(*d*) *Boswell* v. *Coaks*, 23 Ch. D. 302; 11 A. C. 232.

(*e*) *Barwell* v. *B.*, 34 B. 371.

(*f*) *Wild* v. *Milne*, 26 B. 504; Seton (7th ed.), p. 331; Lindley (9th ed.), p. 660.

account to the utmost extent of the advantage made by them of the subject so purchased (*g*). In *Watson* v. *Toone* (*h*), the purchase was rescinded after twenty years, there being concealment and disguise (*i*).

The purchase of a legacy from a legatee by an executor is voidable, and the burden is on the executor to show the fairness of the transaction, even if the legatee selling be his co-executor (*k*), and if they compound debts or mortgages, or buy them in for less than is due upon them, they will not be allowed to retain any benefit from the transaction for themselves, but for the estate (*l*).

But an executor who has renounced (*m*), or who has not proved, is under no disability to purchase the testator's assets (*n*).

Trustees in Bankruptcy.—Upon principles of general policy and without regard to the fairness of the transaction, assignees, trustees, or commissioners in bankruptcy, or the solicitor thereto, have been held incapable of purchasing the property of the bankrupt (*o*), nor could a creditor of the bankrupt, who had been consulted by the assignees as to the terms upon which the property should be put up, buy it (*p*), nor the partner of the trustee in bankruptcy (*q*), though the sale were by auction, and all the proceedings perfectly proper and regular (*r*). And a trustee cannot even purchase for another person (*s*), and such a purchase even for the benefit of the bankrupt's estate is disapproved (*t*).

Such a purchase has, however, sometimes been adopted, and in *Ex p. Gore* (*u*), on payment of costs, a purchase by an assignee, on being found beneficial by the Court, was confirmed. An assignee,

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(*g*) *Hall* v. *Hallet*, 1 Cox, 134; Underhill on Trusts (8th ed.), p. 331.

(*h*) 6 Madd. 153; see also *Rice* v. *Gordon*, 11 B. 269; and *Smedley* v. *Varley*, 23 B. 358; *Re Postlethwaite*, 60 L. T. 514; *Brindley* v. *Partridge*, 13 Ch. D. 654; *Beningfield* v. *Baxter*, 12 A. C. 167.

(*i*) *Kilbee* v. *Sneyd*, 2 Moll. 186; *Cooke* v. *Collingridge*, Jac. 607.

(*k*) *Re Biel*, 16 Eq. 577; *Luff* v. *Lord*, 34 B. 220.

(*l*) See *Anon.*, 1 Salk. 155; *Ex p. James*, 8 V. 346; 7 R. R. 56; *Ex p. Lacey*, 6 V. 628; 6 R. R. 9; *Chute* v. *Lindsay*, 6 Ir. R. Eq. 385.

(*m*) *Mackintosh* v. *Barber*, 7 Moore, 315.

(*n*) *Clark* v. *C.*, 9 A. C. 733; cf. *Re Boles and British Land Co.*, [1902] 1 Ch. 244.

(*o*) *Ex p. Lacey*, 6 V. 625; 6 R. R. 9; *Ex p. Hughes*, 6 V. 623; 6 R. R. 1; *Campbell* v. *Walker*, 5 V. 678; 5 R. R. 135; *Ex p. James*, *supra*; *Owen* v. *Foulkes*, 6 V. 330; *Ex p. Bage*, 4 Madd. 459; Williams on Bankruptcy (13th ed.), p. 350.

(*p*) *Ex p. Hughes*, *supra*.

(*q*) *Ex p. Burnell*, 7 Jur. 116.

(*r*) *Ex p. Moore*, 30 W. R. 123.

(*s*) *Ex p. Grylls*, 2 D. & C. 90.

(*t*) See *Pooley* v. *Quilter*, 2 De G. & J. 327.

(*u*) 7 Jur. 136.

moreover, has been removed by the Court in order that he might bid at a sale of the bankrupt's estate (*x*); and in a case where the Court refused to allow an assignee to bid, he was allowed to name the price he would give if the property were not sold by auction, and afterwards to buy at that price (*y*). As assignees cannot buy the estate of the bankrupt, so, also, they cannot for their own benefit buy an interest in the bankrupt's estate, because they are trustees for the creditors. In that respect there is no difference between assignees and executors, who cannot for their own benefit buy the debts of the creditors; for although, in a moral point of view, such a transaction may not be blamable, still the Court, on principles of general policy, has held assignees trustees of the debts purchased by them for the benefit of those entitled to the interest in the residue, the creditors, or the bankrupt, as the case may be (*z*).

Rule 347 of the Bankruptcy Rules, 1915, provides that neither the trustee nor any member of the committee of inspection of an estate shall, while so acting, except by leave of the Court, either directly or indirectly, by himself or any partner (*a*), clerk, agent, or servant, become purchaser of any part of the estate, and any such purchase may be set aside by the Court on the application of the Board of Trade or any creditor. And as to giving leave to trustees to bid, see *Ex p. Molineux* (*b*), *Ex p. Beaumont* (*c*).

Solicitors.—A solicitor is not incapable of contracting with or purchasing from his client; but inasmuch as the parties stand in a relation which gives, or may give, the solicitor an advantage over the client, the onus lies on the solicitor to prove that the transaction was fair (*d*); that the bargain is, speaking generally, as good as any that could have been obtained with due diligence from any other purchaser (*e*); and that the client knew that the real purchaser was his *law agent* (*f*).

(*x*) *Ex p. Perks*, 3 M. D. & De G. 385. (*y*) *Ex p. Holyman*, 8 Jur. 156.

(*z*) *Ex p. Lacey*, *supra*. And see *Pooley* v. *Quilter*, 2 De G. & J. 327; *Adams* v. *Sworder*, 2 De G. J. & S. 44.

(*a*) See *Re Gallard*, [1897] 2 Q. B. 8; *Re Spink*, 108 L. T. 572.

(*b*) 4 D. & C. 460; Williams on Bankruptcy (13th ed.), p. 350.

(*c*) 3 D. & C. 549.

(*d*) *Montesquieu* v. *Sandys*, 18 V. 302; *Cane* v. *Allen*, 2 Dow. 289; *Champion* v. *Rigby*, 1 Russ. & M. 539; *Edwards* v. *Meyrick*, 2 Ha. 60; *Gibbs* v. *Daniel*, 4 Giff. 1; *Balch* v. *Symes*, T. & R. 92; *Wright* v. *Carter*, [1903] 1 Ch. 27; *Re Haslam & Hier-Evans*, [1902] 1 Ch. 765; Underhill on Trusts (8th ed.), p. 334.

(*e*) *Pisani* v. *Att.-Gen. for Gibraltar*, L. R. 5 P. C. 516.

(*f*) *Lewis* v. *Hillman*, 3 H. L. Cas. 607; *M'Pherson* v. *Watt*, 3 A. C. 254.

Fox v. Mackreth—Pitt v. Mackreth.

In *Gibson* v. *Jeyes* (*g*), Jeyes, an attorney, sold an annuity to his client. "An attorney," says Eldon, C., "buying from his client, can never support it, unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger. That must be the rule. If it appears that in that bargain he has got an advantage by his diligence being surprised, putting fraud and incapacity out of the question, which advantage, with due diligence, he would have prevented another person from getting, a contract under such circumstances shall not stand. The principle so stated may bear hard in a particular case; but I must lay down a general principle that will apply to all cases; and I know of none short of that, if the attorney of the vendor is to be admitted to bargain for his own interest, where it is his duty to advise the vendor against himself. . . . He might contract; but then he should have said she must get another attorney to advise her as to the value, or, if she would not, this clear duty results and throws upon him the whole onus; that if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he has given his client all that reasonable advice against himself that he would have given against a third person. It is asked, where is that rule to be found? I answer, in that great rule of the Court, *that he who bargains in matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else*" (*h*). "Solicitors who deal with their clients must take care, not only that the transaction is fair, but that they are in a condition to prove that it was fair" (*i*). In *Montesquieu* v. *Sandys* (*k*), the purchase of a reversionary interest, *viz.*, a second presentation to a living, after the death of the then incumbent, by an attorney, from his client, though advantageous in the end, was sustained, no fraud or misrepresentation being proved, and the proposal coming from the client, both

(*g*) 6 V. 266, 271, 278.

(*h*) See also *Austin* v. *Chambers*, 6 Cl. & Fin. 1, 37; *Casborne* v. *Barsham*, 2 B. 76; *Trevelyan* v. *Charter*, 9 B. 140; *Savery* v. *King*, 5 H. L. Cas. 627, 656, 665; *Bellamy* v. *Sabine*, 2 Ph. 425; *Holman* v. *Loynes*, 4 De G. M. & G. 270; *Salmon* v. *Cutts*, 4 De G. & Sm. 125; *Waters* v. *Thorn*, 22 B. 547; *Pearson* v. *Benson*, 28 B. 598; *Gresley* v. *Mousley*, 3 De G. F. & J. 433; *Gibbs* v. *Daniel*, 10 W. R. 688; *Re Haslam & Hier-Evans*, [1902] 1 Ch. 765; *Demerara Bauxite Co., Ltd.* v. *Hubbard*, [1923] A. C. 673.

(*i*) *Per* Turner, L.J., in *Gresley* v. *Mousley*, *supra*.

(*k*) 18 V. 302.

the attorney and client being ignorant of the real value (*l*). The objection to a transaction of its being a purchase by a solicitor from his client, cannot be maintained by third parties (*m*). It is always advisable that a solicitor, purchasing from his client, should insist upon the intervention of another professional man to act independently on behalf of his client (*n*).

The rule laid down by Eldon, C., will not apply, if the solicitor does not act in such capacity *in hac re* (*p*); or (possibly) where he has acted for the first time as solicitor to the client and the confidence which is the basis of the rule did not therefore exist (*q*). A sale of an equity of redemption to solicitors who had acted for the vendor until shortly before the purchase and had then retired, was set aside, as it appeared that they were aware of a neglect of duty on the part of the new solicitor, and withheld from him information of importance acquired when they acted as solicitors (*r*). The disability may remain after the confidential employment has ceased (*s*). For though a person may have ceased to act as attorney for another, if by means of former transactions, while holding that character, he had acquired, at the expense of his client, a knowledge of the value of his property which the client had not, he will not be able to sustain any contract relative to such property, if he concealed from his former client the knowledge so obtained (*t*). If, however, such knowledge were communicated to the former client by the attorney, the parties would be placed upon an equality, and such communication being proved, the difficulty, *quoad hoc*, would be removed (*u*). A beneficial purchase by a solicitor from his client pending that relation cannot be supported, but the solicitor may insist on and obtain a mortgage from his client for what is justly due to him (*x*).

(*l*) See *Clanricarde* v. *Henning*, 9 W. R. 912; *Hesse* v. *Briant*, 6 De G. M. & G. 623.

(*m*) *Knight* v. *Bowyer*, 23 B. 609; cf. *Nutt* v. *Easton*, [1899] 1 Ch. 873.

(*n*) *Gibson* v. *Jeyes*, 5 R. R., at p. 306; *Pisani* v. *Att.-Gen. for Gibraltar*, L. R. 5 P. C. 516; *Wright* v. *Carter*, [1903] 1 Ch. 27; *Gibbs* v. *Daniel*, 10 W. R. 688.

(*p*) *Cane* v. *Lord Allen*, 2 Dow. 289; *Edwards* v. *Meyrick*, 2 Ha. 68.

(*q*) *Edwards* v. *Williams*, 32 L. J. Ch. 763; but see *Williamson* v. *Moriarty*, 19 W. R. 818; *Pisani* v. *Att.-Gen. for Gibraltar*, L. R. 5 P. C. 516.

(*r*) *Gibbs* v. *Daniel*, 4 Giff. 1.

(*s*) *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500; *Carter* v. *Palmer*, 8 Cl. & Fin. 657; *M'Pherson* v. *Watt*, 3 A. C. 254.

(*t*) *Cane* v. *Lord Allen*, 2 Dow. 294; *Montesquieu* v. *Sandys*, 18 V. 308; *Ex p. James*, 8 V. 352.

(*u*) *Edwards* v. *Meyrick*, 2 Ha. 69.

(*x*) *Johnson* v. *Fesenmeyer*, 3 De G. & J. 13; *Pearson* v. *Benson*, 28 B. 598.

Nor will a solicitor or a clerk acting in such capacity, be allowed to derive any benefit by reason of any information acquired during the course of his employment which it was his duty to have communicated to his employer. In *Hobday* v. *Peters* (*y*), a mortgagor consulted a solicitor, who turned her over to his clerk to assist her gratuitously. The clerk, by reason of information derived during such employment, bought up the mortgage for less than half the amount. It was held by Romilly, M.R., that he was a trustee of the benefit for the mortgagor. So again, a solicitor *employed in making a purchase* is accountable to his clients for the benefits which he may have derived clandestinely from a sale to them of his own property. Thus in *Tyrrell* v. *The Bank of London* (*z*), a solicitor was active in founding a banking company. Before its establishment he entered into a secret arrangement with a stranger, that the latter should purchase some property eligible for the banking-house on a joint speculation. After its establishment the company (the solicitor acting for it), purchased part of the premises for the banking-house, not knowing that the solicitor was interested in the property. It was held that the solicitor ought to account to the company for all the profit made by him in the transaction, but that the stranger was under no such liability (*a*). A solicitor having, under a decree, the conduct of a sale, is under an incapacity to purchase at it (*b*).

Although a solicitor may not under a decree actually have the conduct of the sale, yet if he has intervened on behalf of parties interested in the sale so as to render it his duty towards them to assist in procuring the best price for the property offered for sale, a purchase by him can only be sustained on clear proof that no loss of price resulted from his purchasing (*c*). And a solicitor who has purchased securities given by his client for smaller sums than the amounts secured, will not be allowed to hold the purchased securities as a security to himself for a larger sum than the amount which he had expended in making the purchase, even although he had inserted a clause in a deed executed by his client, that he was

(*y*) 28 B. 349.

(*z*) 10 H. L. Cas. 26.

(*a*) See also *Chaplin* v. *Young*, 33 B. 414.

(*b*) *Sidny* v. *Ranger*, 12 Si. 118; *Atkins* v. *Delmege*, 12 Ir. R. Eq. 1; *Re Bloye's Trusts*, 19 L. J. Ch. 89. As to obtaining leave to bid, see *Boswell* v. *Coaks*, 23 Ch. D. 302; 11 A. C. 232; *Popham* v. *Exham*, 10 Ir. Ch. R. 440.

(*c*) See *Guest* v. *Smythe*, L. R. 5 Ch. 551; *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 395, at p. 415; *Hickley* v. *H.*, 2 Ch. D. 190; *Grover* v. *Hugell*, 3 Russ. 428.

to be entitled to claim the full amount due on the securities (*d*), but as the Court has a discretion with regard to the allowance of interest in such cases (*e*), the solicitor may be allowed 5 per cent. on the sum he had expended in making the purchases (*f*).

Although as an ordinary rule the Court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale, except upon the terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due for principal, interest, and costs, such rule will not apply to a case where the mortgagee at the time of taking the mortgages was the solicitor of the mortgagor, for in such a case the Court will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression, without injuring the security of the mortgagee (*g*).

The obligations on a solicitor dealing with his client extend to the case of a dealing between a solicitor and the trustee in bankruptcy of his client: see *Luddy's Trustee* v. *Peard* (*h*), in which case P., the solicitor of the bankrupt L., had in that capacity acquired an intimate knowledge of the nature and value of his property. He was employed by the bankrupt to negotiate with the trustee in bankruptcy for the purchase of certain property, part of the estate. He bought it for a small sum in the name of his brother, but in fact for himself, and he concealed this fact from the trustee. It was held by Kay, J., that the solicitor could not be allowed to hold, as against the trustee in bankruptcy, an advantage obtained by him in the purchase by means of knowledge gained whilst acting as solicitor of the bankrupt (*i*).

Receivers.—On the same principle receivers or managers who have by virtue of their position acquired special knowledge of the value of property will not be allowed to purchase the property without the sanction of the Court (*k*).

Counsel.—The employment of counsel as confidential legal adviser disables him from purchasing for his own benefit charges on

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(*d*) *Macleod* v. *Jones*, 24 Ch. D. 289 (C. A.).

(*e*) *Re Unsworth's Trusts*, 2 Dr. & Sm. 337; *Douglas* v. *Culverwell*, 4 De G. F. & J. 20; *Carter* v. *Palmer*, 8 Cl. & Fin. 657.

(*f*) *Macleod* v. *Jones*, 32 W. R. 660, *per* Pearson, J., on application after payment into Court under order of the Court of Appeal, 24 Ch. D. 289.

(*g*) *Macleod* v. *Jones*, 24 Ch. D. 289 (C. A.).

(*h*) 33 Ch. D. 500.

(*i*) See *Lewis* v. *Hillman*, 3 H. L. Cas. 607; *McPherson* v. *Watt*, 3 A. C. 254; *Demerara Bauxite Co., Ltd.* v. *Hubbard*, [1923] A. C. 673.

(*k*) *Alven* v. *Bond*, Fl. & K. 196, 213; *Nugent* v. *N.*, [1908] 1 Ch. 546 (C. A.).

his client's estates without his permission; and although the confidential employment ceases, the disability continues as long as the reasons on which it is founded continue to operate (*l*).

Arbitrator.—A person chosen as arbitrator cannot buy up the unascertained claims of any of the parties to the reference; for, to use the words of Lord Manners, "that he should purchase an interest in those rights upon which he was to adjudicate, could not be endured. It would indeed be to corrupt the fountain and contaminate the award" (*m*).

Magistrate or Judge.—Upon the same principle, a judgment delivered by a Judge, who has an interest in the subject-matter of the suit, will be set aside: *Dimes* v. *Proprietors of the Grand Junction Canal* (*n*), where it was held that a judgment of Cottenham, C., assisted by Langdale, M.R. (*o*), in which, affirming the decision of the Court below, he had decided in favour of a company *in which he was a shareholder to the amount of several thousand pounds*, ought to be reversed. "No one," said Campbell, C., "can suppose that Lord Cottenham could be in the remotest degree influenced by the interest he had in this concern; but it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. . . . This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence" (*p*). And the rule does not stop at pecuniary interest, but applies wherever a person acting judicially has any *real bias* in the matter before him (*q*).

Bishop.—In *Greenlaw* v. *King* (*r*), an Act of Parliament empowered a rector, with the consent of the bishop, who was patron of the living, to raise money by annuity for building a new rectory-house, the plan and accounts of which were to be approved of by the bishop. The bishop advanced the necessary money, and

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(*l*) See *Carter* v. *Palmer*, 8 Cl. & Fin. 657; *Brown* v. *Kennedy*, 4 De G. J. & S. 217; *Pisani* v. *Att.-Gen.*, L. R. 5 P. C. 516; *McPherson* v. *Watt*, 3 A. C. 254.

(*m*) *Blennerhassett* v. *Day*, 2 Ball & B. 116.

(*n*) 3 H. L. Cas. 759.

(*o*) 2 Mac. & G. 285.

(*p*) See *Commissioners, etc., for Fobbing* v. *The Queen*, 11 A. C. 449, 460.

(*q*) *R.* v. *Farrant*, 20 Q. B. D. 58; *R.* v. *Cumberland*, 58 L. T. 491.

(*r*) 3 B. 49; *Grover* v. *Hugell*, 3 Russ. 428; cited by Romilly, M.R., in *Guest* v. *Smythe*, L. R. 5 Ch., at p. 554, n. But see *Boyd* v. *Barker*, 4 Drew. 582.

obtained a grant of the annuity charged on the living. The bishop being placed in the position of a trustee to protect the interests of the rectory, Langdale, M.R., held that he could not become the purchaser of the annuity; and that the transaction, *although there was no unfairness in it*, could not stand.

Tenant for Life.—It has been held, however, that a *tenant for life* might purchase or take in exchange lands from trustees, in whom they were vested with a power of sale and exchange, *with his consent and direction* (*s*). This was said in *Grover* v. *Hugell* (*t*) to rest upon the practice of conveyancers. But in another case James, L.J., said: "The ground of the rule is, that the power of consenting to or requesting an exercise of a power of sale is given to the tenant for life for his own benefit, *and that he is not in a fiduciary position as to it*. He has, therefore, the same right to buy from the trustees that any one else has" (*u*); but each case must "depend upon the circumstances under which and the purposes for which the power was given" (*x*). In the absence of any indication of intention by the settlor or testator (*y*) it is not considered that there is an "impropriety or conflict of interest, as regards the time for sale or the necessity for a sale, between the position of tenant for life and the position of other parties claiming under a settlement or will" (*z*). A tenant for life, with power to lease, might *at law* grant a lease to a trustee for himself (*a*); but whether such a lease would be valid *in equity* is very doubtful (*b*). The only distinct authority for the proposition that it is valid is the statement of Page-Wood, V.-C., in *Bevan* v. *Habgood* (*c*). In that case, under a mortgage, power was reserved to the mortgagor until entry by the mortgagee to grant building leases, and the Vice-Chancellor held that a lease to a trustee for the mortgagor was good. The authorities alleged to support the exception (*d*) were

(*s*) *Howard* v. *Ducane*, T. & R. 81.

(*t*) 3 Russ., at p. 432; and see *Forster* v. *Abraham*, 17 Eq., at p. 354.

(*u*) *Dicconson* v. *Talbot*, L. R. 6 Ch. 32, 37; see *Re Laing's Settlement*, [1899] 1 Ch. 593, as to loans.

(*x*) *Per* Turner, V.-C., in *Beaden* v. *King*, 9 Ha. 519.

(*y*) *Re Tempest*, L. R. 1 Ch. 485.

(*z*) And see *Forster* v. *Abraham*, 17 Eq. 351, 355.

(*a*) *Taylor* v. *Horde*, 1 Burr. 124; *Wilson* v. *Sewell*, 4 Burr. 1975; *Lord Cardigan* v. *Montague*, 2 Sugd. Pow. (7th ed.), App., p. 551.

(*b*) See *Boyce* v. *Edbrooke*, [1903] 1 Ch. 836.

(*c*) 1 John & H. 222. See this case discussed and questioned in *Boyce* v. *Edbrooke*, [1903] 1 Ch. 836.

(*d*) *Wilson* v. *Sewell*, 4 Burr. 1975; *Cardigan* v. *Montague*, Sugd. Pow. (8th ed.), App. 918; *Taylor* v. *Horde*, *supra*.

examined by Farwell, J., in *Boyce* v. *Edbrooke* (*e*), and were shown not to establish its existence.

By section 16, sub-section 2 of the Settled Land Act, 1925 (which takes the place of section 53 of the Settled Land Act, 1882), the estate owner (which expression includes the tenant for life when he has the legal estate) is to stand possessed of the settled land and the income thereof upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the equitable interests and powers affecting the same. In *Sutherland* v. *S.* (*f*), a lease granted by the tenant for life with the intention of benefiting his wife at the expense of the remaindermen was held invalid. In *Gilbey* v. *Rush* (*g*), however, a lease to the wife of the tenant for life at a full rack rent on proper conditions was held valid.

Tenants in Common.—No fiduciary relation arises simply from the fact of joint tenancy or tenancy in common of property of any nature (*h*).

Execution Creditor.—A creditor taking out execution is not precluded from becoming the purchaser of the property seized under it. "The case of trustees," observed Plumer, M.R., "is quite different; with respect to them, the principle is, that the same person shall not be buyer and seller; but here the sheriff is the seller" (*i*). And it has been held that a mere creditor, having his debt secured by an agreement from the debtor to convey an estate upon trust for the creditor to sell, and to pay (amongst others) his own debt, is not in such a fiduciary position as to be disabled from purchasing the estate from the agent of his debtor (*k*). A purchase of an estate in the West Indies by a creditor under his own execution was, *upon the circumstances*, held only a security for the debt (*l*).

(*e*) [1903] 1 Ch. 836. In this case the lease was made by a tenant for life (under statutory powers) to himself and others with whom he was in partnership. Since there was no legal covenant binding on the lessor, the requirements of the statutes, Settled Estates Act, 1877, s. 46, and Settled Land Act, 1882, s. 7, sub-ss. 2, 3, were not satisfied; and see *Ellis* v. *Kerr*, [1910] 1 Ch. 529.

(*f*) [1893] 3 Ch. 169; *Chandler* v. *Bradley*, [1897] 1 Ch. 315.

(*g*) [1906] 1 Ch. 11; cf. *Middlemas* v. *Stevens*, [1901] 1 Ch. 574, where a lease made by a tenant for life during widowhood to a man whom she was about to marry was held invalid.

(*h*) *Kennedy* v. *De Trafford*, [1897] A. C. 180; *Re Biss*, [1903] 2 Ch. 40; and see notes to *Keech* v. *Sandford*, *supra*.

(*i*) *Stratford* v. *Twynam*, Jac. 421.

(*k*) *Waters* v. *Groom*, 11 Cl. & Fin. 684.

(*l*) *Cranstoun* v. *Johnston*, 3 V. 170; 3 R. R. 80.

Fox v. Mackreth—Pitt v. Mackreth.

Guardian and Ward.—" The relation of guardian and ward is strictly that of trustee and *cestui que trust* " (*m*).

" It is almost impossible (*n*) in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty for the execution of antecedent duty " (*o*). In *Oldin* v. *Samborn* (*p*), Hardwicke, L.C., observed that it was improper for a guardian to purchase his ward's estate immediately upon his coming of age. But although it had a suspicious look, yet if he were paid the full consideration, it was not voluntary, and could not be set aside (*q*). Lord St. Leonards, however, says, with reference to Lord Hardwicke's observation in *Oldin* v. *Samborn*, that " it seems clear that such a purchase would now be set aside on general principles, without reference to the adequacy of consideration " (*r*). In *Carey* v. *C.* (*s*), leaseholds belonging to an infant were sold under a decree and purchased by his guardian in the suit (who was also receiver) at their full value, but it was set aside as fraudulent and void.

In *Grosvenor* v. *Sherratt* (*t*), a young lady, two years after she came of age, granted a mining lease as to part of the property in possession, and as to the rest in reversion to her brother-in-law and uncle, at the suggestion and advice of her father's executor, and with no independent advice. Three months afterwards the executor was taken into partnership with the lessees. It appeared that applications of other persons to become lessees had been discouraged, and concealed from the knowledge of the lady. Romilly, M.R., held, that, in order to support the lease in equity, the lessees were bound to show that no better terms could have been obtained; that the grantor had the fullest information on the subject; that she had separate, independent, and disinterested advice; and that she had deliberately and intentionally made the grant; and, the lessees having failed in proving these things, the lease was cancelled.

(*m*) Romilly, M.R., *Mathew* v. *Brise*, 14 B. 345.

(*n*) See *Hylton* v. *H.*, 2 Ves. Sen. 547; *Cray* v. *Mansfield*, 1 Ves. Sen. 379.

(*o*) *Per* Eldon, C., *Hatch* v. *H.*, 9 V. 292, at p. 296; 7 R. R. 197.

(*p*) 2 Atk. 15.

(*q*) See *Hylton* v. *H.*, 2 Ves. Sen. 549; *Dawson* v. *Massey*, 2 Ball & B. 219; *Aylward* v. *Kearney*, 2 Ball & B. 463; *Wright* v. *Proud*, 13 V. 136; *Hatch* v. *H.*, 9 V. 292; 7 R. R. 195.

(*r*) Sugd. V. & P. 692 (14th ed.).

(*s*) 2 Sch. & L. 173.

(*t*) 28 B. 659; see *Mulhallen* v. *Marum*, 3 Dru. & W. 317; *Archer* v. *Hudson*, 7 B. 560; *Low* v. *Holmes*, 8 Ir. Ch. R. 53.

Fox v. Mackreth—Pitt v. Mackreth.

If a guardian buys up incumbrances upon his ward's estate at an undervalue, he will be held a trustee for his ward, and can only charge him with what he has actually paid (*u*). If the guardian wishes to purchase property belonging to the infant which must be sold, he should apply to the Court to be allowed to bid.

Enclosure Acts, Statutory Recognition of the Principle.—The principle of these cases has been acted upon by the Legislature, which, under the General Enclosure Act, 1801 (*x*), has rendered commissioners incapable of purchasing *any* estate in the parish in which an enclosure is made until five years after the date and execution of the award. And under the Commons Enclosure Act, 1845 (*y*), a similar prohibition prevents valuers from purchasing land until after seven years from the confirmation of the award. And where trustees for sale in proceedings under sections 8 and 9 of the Lands Clauses Act, 1845, appoint one of themselves as surveyor for the purposes of valuation, the sale will be invalid, inasmuch as the valuers are placed in that position for the purpose of being a check on the trustees, and it would be contrary to any principle of right that one trustee should exercise the power by himself (*z*).

Position of Confidence. — Although there be no particular relation between the parties such as that of trustee and *cestui que trust*, principal and agent, solicitor and client, if there exist a *confidence* between them, of such a character as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the Court will not allow any transaction between the parties to stand unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him : *Tate* v. *Williamson* (*a*), in which case Tate, a young man aged twenty-three, entitled to a moiety of a freehold estate, the entirety of which brought in about £440 a year, being pressed for payment of his college debts, amounting to about £1,000, and being estranged from his father, wrote to his great-uncle for advice and assistance as to the payment of the debts. The uncle deputed the defendant, his nephew, to see Tate on the subject. The defendant met Tate, by appointment, and at this

(*u*) *Henley* v. ——, 2 Ch. Ca. 245; and see Simpson on Infants (4th ed.), pp. 223—4, 268—71.

(*x*) 41 Geo. 3, c. 109, s. 2.

(*y*) 8 & 9 Vict. c. 118, s. 129.

(*z*) *Peters* v. *Lewes and East Grinstead Ry. Co.*, 18 Ch. D. 429.

(*a*) L. R. 2 Ch. 55.

interview Tate refused to allow any attempt to compromise the debts, and said he would sell his moiety of the estate, upon which the defendant offered him £7,000 for it, payable by instalments. Tate, next day, accepted the offer. Before an agreement had been signed, the defendant obtained a valuation by a surveyor, estimating the value of the mines under the entirety at £20,000. The sale was completed without this valuation having ever been communicated to Tate. Tate's heir filed a bill to impeach the sale, and it was held that the defendant had stood in a fiduciary relation to Tate, that made it his duty to communicate to him all material information which he acquired affecting the value of the property; and that, as he had not communicated the valuation to Tate, the transaction must be set aside (*b*).

In *Ferraby* v. *Hobson* (*c*), a lease to a sister of one of two trustees was held good, where the facts which appeared in evidence completely removed all suspicion. Cottenham, C., however, in his judgment, said, "that trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust; for the suspicion which that circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove" (*d*).

4. Nature of Relief granted by Courts of Equity.

Where a person in a fiduciary position has made a purchase which is improper, according to the rules before laid down, any of the *cestuis que trust* can insist upon a reconveyance of the property from the trustee who purchased, if it remains in his hands unsold (*e*); or from a person who has purchased from him, with notice (*f*).

But the reconveyance will only be decreed upon the terms of their repaying the purchase-money, with interest at £4 per cent., and all sums which may have been expended in repairs and

(*b*) See also *Hobday* v. *Peters*, 28 B. 349; *Plowright* v. *Lambert*, 52 L. T. 652; see notes to *Huguenin* v. *Baseley*, vol. i.

(*c*) 2 Ph. 255, 261.

(*d*) See *Coles* v. *Trecothick*, 9 V. 234; *Ex p. Skinner*, 2 Mer. 453, 457.

(*e*) *Hardwicke* v. *Vernon*, 4 V. 411; 4 R. R. 244; *Randall* v. *Errington*, 10 V. 423; *Hamilton* v. *Wright*, 9 Cl. & Fin. 123; *Aberdeen T. C.* v. *Aberdeen University*, 2 A. C. 544.

(*f*) *Att.-Gen.* v. *Dudley*, Coop. 146; *Dunbar* v. *Tredennick*, 2 Ball & B. 304; *Pearson* v. *Benson*, 28 B. 598.

improvements of a permanent and lasting nature, and also such as have a tendency to bring the estate to a better sale. On the other hand, there must be an allowance for acts that deteriorate the value of the estate, and the trustee must account for all rents received by him, and for all profits, such as money arising from the sale of timber; and he must also pay an occupation rent for such part of the estate as may have been in his actual possession (*g*), but he is not bound to pay interest on rents and profits (*h*). In estimating improvements, old buildings, if incapable of repair, should be valued as old materials, but otherwise as buildings standing (*i*).

Although the purchaser has paid the purchase-money into Court, and it has been invested in the funds, he will not be entitled to any benefit from any advance in the funds, but to his purchase-money and interest only; for, if the stock had fallen, instead of advancing, he could not have been compelled to take it (*k*).

It seems that where a reconveyance by the purchaser is directed, it must, unless a lien be given to him for the balance on taking the accounts, be made at once before the accounts are taken (*l*), and a solicitor to whom a sale from his clients was set aside, has been compelled to produce the title-deeds before payment (*m*). In *York Buildings Co.* v. *Mackenzie* (*n*), the reconveyance was ordered, without prejudice to the titles and interests of the lessees and others who might have contracted with the defendant *bona fide*, and before the commencement of the suit.

If the *cestui que trust* does not wish for a reconveyance of the property, an order will be made that the expense of repairs and improvements not only substantial and lasting, but such as have a tendency to bring the estate to a better sale, after making an allowance for acts that deteriorate the value of the estate, shall be

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(*g*) *Hall* v. *Hallet*, 1 Cox, 134; 1 R. R. 3; *Nant-y-glo & Blaina, etc., Co.* v. *Grave*, 12 Ch. D., at pp. 747—8; *Ex p. Hughes*, 6 V. 624, 625; 6 R. R., at p. 8; *Campbell* v. *Walker*, 5 V. 682; 5 R. R., at p. 137; *Ex p. Bennett*, 10 V. 400, 401; *Robinson* v. *Ridley*, 6 Madd. 2; *Ex p. James*, 8 V. 351; 7 R. R. 56; *Ex p. Lacey*, 6 V. 630; 6 R. R. 9; *Mill* v. *Hill*, 3 H. L. Cas. 869; *Popham* v. *Exham*, 10 Ir. Ch. R. 440; Seton (7th ed.), pp. 2253—5.

(*h*) *Silkstone, etc., Coal Co.* v. *Edey*, [1900] 1 Ch. 167.

(*i*) *Robinson* v. *Ridley*, 6 Madd. 2.

(*k*) *Ex p. James*, 8 V. 351; 7 R. R. 56.

(*l*) *Trevelyan* v. *Charter*, 9 B. 140.

(*m*) *Shallcross* v. *Weaver*, 12 B. 272.

(*n*) 8 Bro. P. C. 42. See 3 Sugd. V. & P. 243 (10th ed.).

added to the purchase-money, and that the estate shall be put up at the accumulated sum; if anyone makes an advance upon that sum, the trustee shall not have the estate; if no one does, he will be held to his purchase (*o*), but where the trustee has bought the estate in one lot, and the *cestuis que trust* are desirous of having it sold in several lots, the *cestui que trust* must first repay him all the money he has advanced, with interest, he accounting for the rents received by him, or paying an occupation rent, if he actually occupied the estate (*p*).

Where the trustee has *resold* the estate, the *cestui que trust* can, as in the principal case, make him account for what he has received over and above the purchase-money he himself paid, with interest at £4 per cent. (*q*); and no allowance will be made to him for any loss he has incurred in the investment of what he received (*r*).

Where an agent employed by his principal to purchase property for him sells to his principal property of his own, acquired *before the agency existed*, concealing the fact that it is his own, it is clear that the principal may rescind the contract (*s*). And there is no general rule that, where rescission has become impossible, the principal is not entitled to call on the agent to account for the profit which he has made by the sale (*t*). If the agent stood in a fiduciary relation when he bought, the *cestui que trust* may rescind, or take the benefit of the bargain (*u*).

The costs of the action, if in the Chancery Division, are in the discretion of the Court (*x*). The general rule acted upon is that if such an action succeeds the trustee pays the cost of it (*y*); but this

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(*o*) *Ex p. Reynolds*, 5 V. 707; 5 R. R. 143; *Ex p. Hughes*, 6 R. R. 8; *Ex p. Lacey*, 6 V. 627; *Lister* v. *L.*, 6 V. 617; 7 R. R. 56; *Ex p. Bennett*, 10 V. 281; *Ex p. Hewitt*, 2 Mont. & Ayr. 477; *Robinson* v. *Ridley*, 6 Madd. 2; *Stepney* v. *Biddulph*, 13 W. R. 576; *Tennant* v. *Trenchard*, L. R. 4 Ch. 546.

(*p*) *Ex p. James*, 8 V. 351; 7 R. R. 56.

(*q*) *Ex p. Reynolds*, 5 V. 707; 5 R. R. 143; *Hall* v. *Hallet*, 1 Cox, 134; 1 R. R. 3; *Nant-y-glo & Blaina, etc., Co.* v. *Grave*, 12 Ch. D., at p. 747.

(*r*) *Armstrong* v. *A.*, 7 L. R. Ir. 207.

(*s*) *Re Cape Breton Co.*, 26 Ch. D. 221; *McPherson* v. *Watt*, 3 A. C. 272; *Rothschild* v. *Brookman*, 5 Bli. (N.S.) 165; *Ladywell Mining Co.* v. *Brookes*, 35 Ch. D., at p. 408; *Burland* v. *Earle*, [1902] A. C. 83.

(*t*) *Re Olympia, Ltd.*, [1898] 2 Ch. 153; [1900] A. C. 240 (*sub nom. Gluckstein* v. *Barnes*); *Re Cape Breton Co., supra*; cf. *Re Lady Forrest, etc., Ltd.*, [1901] 1 Ch. 582; *Jubilee Cotton Mills, Ltd.* v. *Lewis*, [1924] A. C. 958.

(*u*) *Lydney, etc., Co.* v. *Bird*, 33 Ch. D. 85 (C. A.); *Cavendish Bentinck* v. *Fenn*, 12 A. C. 652; *Omnium Electric Palaces, Ltd.* v. *Baines*, [1914] 1 Ch. 332

(*x*) R. S. C., Ord. LXV, r. 1.

(*y*) *Whichcote* v. *Lawrence*, 3 V. 740; *Sanderson* v. *Walker*, 13 V. 601; *Crowe* v. *Ballard*, 1 R. R. 122; *Dyson* v. *Lum*, 14 W. R. 788.

rule yields to special circumstances (*z*), and where there has been great delay on the part of the plaintiff, although he succeed he may be mulcted in costs (*a*); and if he fail the trustee may, nevertheless, be refused costs (*b*).

5. Acquiescence and Confirmation.

Acquiescence.—A *cestui que trust* who wishes to set aside a purchase by a trustee must apply within a *reasonable* period (*c*). But there is no special limit of time as to laches : it depends upon the circumstances of each particular case (*d*), and is a circumstance which, with other circumstances, is to be taken into account (*e*). In *Baker* v. *Peck* (*f*), a sale was set aside after forty-three years had elapsed (*g*).

Yet mere lapse of time for a long period may disable a person from coming to set a transaction aside (*h*). For long acquiescence under a sale to a trustee ought to be taken as evidence, that as between the trustee and *cestui que trust* the relation had been abandoned in the transaction; and that in all other respects it was fair (*i*).

Where there are other circumstances showing acquiescence beyond the mere lapse of time, a delay for a shorter period will be a bar to relief (*k*). Each case depends on its special circumstances (*l*).

But " to fix acquiescence upon a party, it should unequivocally appear that he *knew* the fact upon which the supposed acquiescence

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(*z*) *Baker* v. *Carter*, 1 Y. & C. Ex. 250; *Downes* v. *Grazebrook*, 3 Mer. 209; *Clanricarde* v. *Henning*, 30 B. 175.

(*a*) *Att.-Gen.* v. *Dudley*, Coop. 146.

(*b*) *Gregory* v. *G.*, Coop. 201; *Champion* v. *Rigby*, 1 Russ. & M. 539; *Clanricarde* v. *Henning*, *supra*.

(*c*) *Campbell* v. *Walker*, 5 V. 680, 682; 5 R. R. 135; *Morse* v. *Royal*, 12 V. 374.

(*d*) *Gresley* v. *Mousley*, 4 De G. & J., at p. 95.

(*e*) *Gregory* v. *G.*, Coop. 201.

(*f*) 9 W. R. 186.

(*g*) And see *Murphy* v. *O'Shea*, 2 Jo. & Lat. 422; *Watson* v. *Toone*, 6 Madd. 153.

(*h*) *Morse* v. *Royal*, 12 V. 355; *Campbell* v. *Walker*, 5 V., at p. 681; *Smith* v. *Clay*, 3 Bro. Ch. 639; *Gresley* v. *Mousley*, 4 De G. & J., at p. 95; *Champion* v. *Rigby*, 1 Russ. & M. 539; *Roberts* v. *Tunstall*, 4 Ha. 257; *Beaden* v. *King*, 9 Ha. 499, 532; *Clanricarde* v. *Henning*, 30 B. 175; Seton (7th ed.), p. 2256.

(*i*) *Per* Eldon, C., in *Parkes* v. *White*, 11 V. 226; and see *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J., at p. 72.

(*k*) *Wright* v. *Vanderplank*, 2 K. & J. 1; *Baker* v. *Bradley*, 7 De G. M. & G. 597.

(*l*) See *Anchor Trust Co.* v. *Bell*, [1926] Ch., at p. 824.

is founded, and to which it refers" (*m*). And in *Re Postlethwaite* (*n*), where there was no knowledge and therefore no acquiescence, it seems clear that if the facts alleged had been proved the sale would have been set aside, although more than thirty years had elapsed (*o*). But there may be cases in which, from the great lapse of time, the knowledge of such facts ought to be presumed (*p*). And the presumption of law that a particular transaction was done legally and honestly does acquire weight by lapse of time (*q*).

The distress of the *cestui que trust* may be an excuse for laches (*r*), and the poverty of the vendor, *added to other circumstances*, is a material ingredient in such cases (*s*); and it has been held that the imputation of laches does not in an equal degree apply to *a body of creditors*, to whom relief will be granted when it would be refused to an individual (*t*). But even creditors have been refused relief when their laches have been gross; as, for instance, where they acquiesced in a sale for thirty-three years (*u*).

And in considering lapse of time it only commences to run from the discovery of the circumstances giving the title to relief (*x*); and against a person under disability from the time he becomes *sui juris* (*y*). Nor will time in general run against a person so long as his interest is contingent or reversionary (*z*), or dependent on

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(*m*) *Per* Grant, M.R., in *Randall* v. *Errington*, 10 V. 428; and see judgment of Turner, L.J., in *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J., at p. 74; and *Chalmer* v. *Bradley*, 1 J. & W. 51; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; *Savery* v. *King*, 5 H. L. Cas. 624, 667; *De Bussche* v. *Alt*, 8 Ch. D. 286; *Smethurst* v. *Hastings*, 30 Ch. D., at p. 497.

(*n*) 37 W. R. 200.

(*o*) See judgment of Lindley, L.J., *ibid.*, at p. 202.

(*p*) *Life Association of Scotland* v. *Siddal*, *supra*; and see and consider *Knight* v. *Marjoribanks*, 2 Mac. & G. 10.

(*q*) *Re Postlethwaite*, *supra*.

(*r*) *Gregory* v. *G.*, Coop. 201; and see notes to *Huguenin* v. *Baseley*, vol. i.

(*s*) *Roberts* v. *Tunstall*, 4 Ha., at p. 267; *Roche* v. *O'Brien*, 1 Ball. & B. 330; and see *Gresley* v. *Mousley*, 4 De G. & J., at p. 95; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58.

(*t*) See case in the Exchequer, cited 6 V. 632; *Whichcote* v. *Lawrence*, 3 V. 740; *York Buildings Co.* v. *Mackenzie*, 8 Bro. P. C. 42.

(*u*) *Hercy* v. *Dinwoody*, 2 V. 87.

(*x*) *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; *Clanricarde* v. *Henning*, 30 B. 175; *Vane* v. *V.*, L. R. 8 Ch. 383.

(*y*) *Campbell* v. *Walker*, 5 V. 678, 682; 5 R. R. 135; *Randall* v. *Errington*, 10 V. 427; *Morse* v. *Royal*, 12 V. 373.

(*z*) *Gowland* v. *De Faria*, 17 V. 20; *Bennett* v. *Colley*, 5 Si. 191; *Leeds* v. *Amherst*, 2 Ph. 117; *Browne* v. *Cross*, 14 B. 105; *Hope* v. *Liddell*, 21 B. 183; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58; *Bowen* v. *Evans*, 1 Jo. & Lat. 178.

the will of the trustee making the purchase (*a*); but the fact of his interest being reversionary does not prevent a person interested assenting to a breach of trust (*b*).

And where fraud has been established against a party, it is for him, if he alleges laches in the other party, to show when the latter acquired a knowledge of the truth, and prove that he *knowingly* forbore to assert his right (*c*).

Although acquiescence in an improper sale may have the effect of preventing a party injured setting the sale aside, it nevertheless will not be sufficient to induce a Court of equity to exercise its discretionary power of compelling specific performance of the agreement to sell (*d*).

Confirmation.—A *cestui que trust*, if *sui juris* (*e*), may confirm an invalid sale, so that he cannot afterwards set it aside (*f*). And a *feme covert* as to her separate property, if without any fetter upon anticipation, has the same power as a *feme sole* (*g*).

In order to constitute a valid confirmation, there must be a solemn and deliberate act (*h*), done with full knowledge of all material facts, and the confirming party must be aware that the act he is doing will have the effect of confirming an impeachable transaction (*i*).

Nor will the act of confirmation be valid, if it be done in distress and difficulties, under the force, pressure, and influence of the former transaction (*k*) : and it must be an act separate and distinct

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(*a*) *Roberts* v. *Tunstall*, 4 Ha. 257.

(*b*) *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58.

(*c*) *The Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221.

(*d*) *Salmon* v. *Cutts*, 4 De G. & Sm. 125.

(*e*) *Campbell* v. *Walker*, 5 V. 678, 682.

(*f*) *Morse* v. *Royal*, 12 V. 355; *Roche* v. *O'Brien*, 1 Ball & B. 353; *Dover* v. *Buck*, 5 Giff. 57.

(*g*) See Married Women's Property Act, 1882, ss. 2 and 5; and Notes to *Hulme* v. *Tenant*, vol. i.

(*h*) *Morse* v. *Royal*, 12 V., at p. 373; and see Underhill on Trusts (8th ed.), pp. 502—3.

(*i*) *Murray* v. *Palmer*, 2 Sch. & L. 486; *Dunbar* v. *Tredennick*, 2 Ball & B. 317; *Cockerell* v. *Cholmeley*, 1 Russ. & M. 425; *Chalmer* v. *Bradley*, 1 J. & W. 51; *De Montmorency* v. *Deveraux*, 7 Cl. & Fin. 188; *Salmon* v. *Cutts*, 4 De G. & Sm. 129; *Stump* v. *Gaby*, 2 De G. M. & G. 623; *Lloyd* v. *Attwood*, 3 De G. & J. 650; and see *Lyddon* v. *Moss*, 4 De G. & J. 104; *Kempson* v. *Ashbee*, L. R. 10 Ch., at p. 20; *Re Haslam & Hier-Evans*, [1902] 1 Ch. 765; *Law* v. *L.*, [1905] 1 Ch. 140; *Barron* v. *Willis*, [1900] 2 Ch. 121; and the Notes to *Chesterfield* v. *Janssen*, vol. i.

(*k*) *Crowe* v. *Ballard*, 3 Bro. Ch. 139; *Wood* v. *Downes*, 18 V. 120; *Roche* v. *O'Brien*, 1 Ball & B. 330; *Roberts* v. *Tunstall*, 4 Ha. 257; and cf. *Beningfield* v. *Baxter*, 12 A. C., at pp. 173, 181; Underhill on Trusts, pp. 503—4.

from the impeachable transaction, and not, as in the principal case, a conveyance executed in consequence of a contract or covenant connected with it (*l*).

A confirmation of an invalid sale by the majority of the creditors of a bankrupt will not be binding upon the minority : in order to be binding all must join therein (*m*).

(*l*) *Morse* v. *Royal*, 12 V. 370; *Wood* v. *Downes*, 18 V. 124, 128; *Roche* v. *O'Brien*, 1 Ball & B. 338.

(*m*) See *Ex p. Lacey*, 6 V. 628; 6 R. R. 9; *Colebrooke's Case*, cited *Ex p. Hughes*, 6 V. 622; *Ex p. Thwaites*, 1 M. & A. 323; *Tommey* v. *White*, 3 H. L. Cas. 49.

GLENORCHY *v.* BOSVILLE.

1733. Cas. t. Talbot, 3.

Executed and Executory Trusts.

A devises real estate to his sister, B, and C, and their heirs and assigns, upon trust, until his granddaughter D should marry or die, to receive the profits, and thereout to pay her £100 a year for her maintenance; the residue to pay debts and legacies; and after payment thereof, in trust for the said D; and upon further trust, that, if she lived to marry a Protestant of the Church of England, and at the time of such marriage be of the age of twenty-one or upwards, or, if under that age, such marriage be with the consent of the said B, then *to convey the said estate*, with all convenient speed after such marriage, to the use of the said D for life, *without impeachment of waste, voluntary waste in houses excepted*; remainder to her husband for life; remainder to the issue of her body; with remainders over:—*Held*, that though D would have taken an estate tail had it been the case of an immediate devise, yet that the trust, being executory, was to be executed in a more careful and more accurate manner; and that a conveyance to D for life, remainder to her husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.

Sir Thomas Pershall devises all his real estate to his sister, Anne Pershall, and Robert Bosville, and their heirs and assigns, upon trust till his granddaughter, Arabella Pershall, marry or die, to receive the rents and profits thereof, and out of it to pay her £100 a year for her maintenance; and, as to the residue, to pay his debts and legacies; and, after the payment thereof, then in trust for his said granddaughter; and, upon further trust, that if she lived to marry a Protestant of the Church of England, and at the time of such marriage be of the age of twenty-one or upwards, or if under the age of twenty-one, and such marriage be with the consent of her aunt the said Anne Pershall, *then to convey the said estate* with all convenient speed after such marriage, *to the use of the said Arabella for her life, without impeachment of waste, voluntary waste in houses excepted*;

remainder, after her death, to her husband for life; *remainder to the issue of her body*; with several remainders over; and, upon further trust, that if the said Arabella Pershall die unmarried, then to the use of the said Anne Pershall for life; remainder to the son of his other granddaughter, Frances Ireland, in tail; remainder to Mr. Bosville, the defendant, for life; remainder to his first and other sons; remainder to the testator's right heirs; and, upon further trust, if his granddaughter marry not according to the directions of his will, then, upon such marriage, to convey the said estate to trustees; as to one moiety thereof, to the use of the said Arabella for life; remainder to trustees to preserve contingent remainders; remainder to her first and every other son, being a Protestant; with several remainders over; and as to the other moiety, to his daughter Ireland's son, in like manner.

Sir Thomas Pershall died in the year 1722, and Mrs. Arabella Pershall in 1723 attained her full age; and upon a treaty of marriage in 1729, she applies to the trustees for a conveyance of the estate to herself for life; remainder to her intended husband for life; remainder to the issue of her body; and such conveyance was executed by one of the trustees. But Mr. Bosville, the other trustee, who was also a remainderman, refused to convey. However, she having by this conveyance a legal estate tail in one moiety, and an equitable estate tail in the other moiety, suffered a recovery to the use of herself in fee, and in 1730 married the plaintiff, the Lord Glenorchy, who made a considerable settlement upon her; and as to her own estate, she covenanted to settle it upon the Lord Glenorchy and herself for life; remainder to the first and every other son of the marriage, in tail male; and, upon failure of such issue, to the survivor of the said husband and wife, in fee.

The bill was, to have a conveyance of the moiety of the said trust estate from Mr. Bosville to such uses as are limited in the said covenant; and the principal question was, whether, under the said will, the Lady Glenorchy was tenant for life or in tail? upon which two other questions arose, *viz.*, first, whether the words in the will, in an immediate devise of a legal estate, would have carried an estate tail? secondly, if so, whether the Court

will make any difference between a legal title and a trust estate executory?

The case was first argued before King, C., who said that upon the first question he should make no difficulty of determining it an estate tail, had this been an immediate devise; but that when you apply to this Court for the carrying a trust estate into execution, the doubt is whether it should not vary from the rules of law to follow the testator's intent; which would also bring on another question: What is the testator's intent in the present case?

The case came on for final argument and decision before Talbot, C., who had taken time to advise and to have the opinion of the Judges upon it.

Argument for the Plaintiffs.—The Lady Glenorchy's marrying a Protestant of the Church of England at or after the age of twenty-one, or, if under that age, marrying such an one with her aunt's, or in case she was dead, with the other trustees' consent, was a condition precedent; which, when performed, would give her an estate tail. This intent appeared from the different penning of the several clauses in this will; for it provides, in case she should not marry such a person as is before described, that she should have but a moiety for life, and trustees are appointed to preserve contingent remainders; none of which are enjoined in case she should marry a Protestant of the Church of England; which shows a difference was intended in case of performance and non-performance of the condition. Then considering it as a legal devise, no doubt but that a devise to one and the issue of his body will make an estate tail; and so it was held in the case of *King* v. *Melling* (*a*), notwithstanding the proviso there, empowering the devisee to make a jointure; so if in this case the land itself had been devised to the Lady Glenorchy, it would have made an entail at law; and there is no difference between an entail of a legal estate and of an equitable one (*b*).

(*a*) 1 Vent. 214, 225.

(*b*) *Wild's Case*, 6 Co. 16; *King* v. *Melling*, *supra*; *Shelley's Case*, 1 Co. 88 b; *Archer's Case*, 1 Co. 66; *Backhouse* v. *Wells*, 1 Eq. Ca. Abr. 184;

Glenorchy v. Bosville—Legg v. Goldwire.

The exception of waste is next to be considered; and had it not been for that, this would clearly have passed an entail; but this exception varies not the case, for here the estates must disjoin according to *Lewis Bowles' Case* (*c*), to let in the husband's estate, which must intervene between her estate and that of her issue; and the power of committing waste (*voluntary waste in houses excepted*) was given only to make her dispunishable of waste during the time she should be tenant for life only; which she must be until her husband's death, by reason of the remainder to him, but not at all to restrain the estate, which the words of the will give her, which is plainly an estate tail. The adding the words "*without impeachment of waste*" can alter nothing; for if she was tenant in tail, she had already in her that power which these words would give her; and the expressing the power which was already in her could no more abridge her estate (according to the maxim of *Expressio eorum quæ tacite insunt nil operatur*) than the power of making the jointure did in *King and Melling's Case*. In *Langley* v. *Baldwin* there were the same words as here; and in that of *Shaw and Weigh*, or *Sparrow* v. *Shaw* (*d*), which went up to the House of Lords, the prohibition went not only to voluntary but to all manner of waste, and yet there it was decreed to be an estate tail; which was a much stronger implication to make the sister to be but tenant for life than any in the present case. And in *Baile* v. *Coleman* (*e*), an estate tail was decreed by the Lord Harcourt, notwithstanding the power of leasing given to Christopher Baile. Nor can the other words, *voluntary waste in houses excepted*, carry the implication further than the former; since this Court will often restrain a tenant for life without impeachment of waste from committing waste, notwithstanding his power, as was declared by the Earl of Nottingham in *Williams* v. *Day* (*f*); *Vane* v. *Lord Barnard* (*g*). If, therefore, these words would

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Langley v. *Baldwin*, 1 Eq. Ca. Abr. 185; *Pelham-Clinton* v. *Newcastle (Duke)*, 69 L. J. Ch. 875; *Re Keane*, [1903] 1 Ir. R. 215.

(*c*) 11 Co. 79 b.

(*d*) 1 Eq. Ca. Abr. 184.

(*e*) 2 Vern. 670.

(*f*) 2 Ch. Ca. 32.

(*g*) 2 Vern. 738.

create an estate tail at law, the construction will be the same here, since a Court of equity ought not to go further than the Courts of law (*h*). Nor is there any argument to be drawn from this being an executory trust, since the case of *Baile* v. *Coleman* was such; and the case of *Leonard* v. *Earl of Sussex* (*i*) is widely different from ours, for there was an express injunction that it should be settled in such manner as that the sons should never have it in their power to bar the issue.

Argument for the Defendant.—It was argued for the defendant by Mr. Attorney-General, Mr. Verney, and Mr. Fazakerley that the Lady Glenorchy could take but an estate for life; and they took a difference between the present case, being of an executory trust, and those of *Cosens*, and of *Cook* v. *C.*, which were legal estates and executed, citing *Sandy's Case* (*k*), *White* v. *Thornborough* (*l*), *Trevor* v. *T.* (*m*), *Papillon* v. *Voice* (*n*), and referring to those cited by the Plaintiff.

Lord Chancellor Talbot.—Several observations have been made on the different penning of the several clauses of this will, from which I think no inference can be drawn; the testator having expressed himself variously in many, if not in all of them. It is plain that by the first part of this will he intended her but an estate for life till marriage; then comes the clause upon which the question depends. But before I give my opinion of that, I must observe, that the trustee has not done right; for nothing was to vest till after her marrying a Protestant. The trustee, therefore, by conveying, and enabling her to suffer a recovery before marriage, which has been done accordingly, has done wrong.

But the great question is, What estate she shall take? And *first*, considering it as a legal devise executed, it is plain that

(*h*) *Legatt* v. *Sewell*, 2 Vern. 551; *Baile* v. *Coleman*, 2 Vern. 670; *Sweetapple* v. *Bindon*, 2 Vern. 536.
(*i*) 2 Vern. 526.
(*k*) 9 Co. 127 b.
(*l*) 2 Vern. 702.
(*m*) 1 Eq. Ca. Abr. 387.
(*n*) 2 P. W. 478.

the first limitation, with the power and restriction, carries an estate for life only; so likewise of the remainder to the husband. But then come the words "*remainder to the issue of her body,*" upon which the question arises. The word "*issue*" does, *ex vi termini,* comprehend all the issue; but sometimes a testator may not intend it in so large a sense, as where there are children alive, etc. That it may be a word of purchase is clear from the case of *Backhouse* v. *Wells,* and of limitation by that of *King* v. *Melling*; but that it may be both in the same will has not nor can be proved. The word "*heirs*" is naturally a word of limitation; and when some other words expressing the testator's intent are added, it may be looked on as a word both of limitation and purchase in the same will; but should the word "*issue*" be looked upon as both, in the same will, what a confusion would it breed; for the moment any issue was born, or any issue of that issue, they would all take. The question then will be, whether Sir Thomas Pershall intended the Lady Glenorchy's issue to take by descent or by purchase? If by purchase, they can take but for life, and so every issue of that issue will take for life; which will make a succession *ad infinitum,* a perpetuity of estates for life. This inconvenience was the reason of Lord Hale's opinion in *King* v. *Melling,* that the limitation there created an estate tail. It may be the testator's intent is by this construction rendered a little precarious; but that is from the power of the law over men's estates, and to prevent confusion. Restraint from waste has been annexed to estates for life, which have been afterwards construed to be estates tail. I do not say that where an express estate tail is devised, that the annexing a power inconsistent with it will defeat the estate: no, the power shall be void. But there the power is annexed to the estate for life, which she took first; and therefore I am rather inclined to think it stronger than *King* v. *Melling,* where there was no mediate estate, as there is here to the husband; there, there was an immediate devise, here a mediate one; so the applying this power to the estate for life carries no incongruity with it. As the case of *King* v. *Melling* has never been shaken, and that of *Shaw* v. *Weigh,* or *Sparrow* v. *Shaw,* which went up to the House of Lords,

was stronger, I do not think that Courts of equity ought to go otherwise than the Courts of law; and therefore am inclinable to think it an estate tail as it would be at law.

But there is another question, *viz.*, How far in cases of trusts executory, as this is, the testator's intent is to prevail over the strength and legal signification of the words? I repeat it, I think, *in cases of trusts executed or immediate devises, the construction of the Courts of law and equity ought to be the same; for, there the testator does not suppose any other conveyance will be made; but in executory trusts he leaves somewhat to be done; the trusts to be executed in a more careful and a more accurate manner.* The case of *Leonard* v. *The Earl of Sussex*, had it been by act executed, would have been an estate tail, and the restraint had been void; but *being an executory trust, the Court decreed according to the intent as it was found expressed in the will, which must now govern our construction.* And though all parties claiming under this will are volunteers, yet are they entitled to the aid of this Court to direct their trustees. I have already said what I should incline to, if this was an immediate devise; but as it is executory, and that such construction may be made as that the issue may take without any of the inconveniences which were the foundation of the resolution in *King* v. *Melling*, and that as the testator's intent is plain that the issue should take, the conveyance, by being in the common form, *viz.*, to the Lady Glenorchy for life, remainder to her husband the Lord Glenorchy for life, remainder to their first and every other son, with a remainder to the daughters, will best serve the testator's intent. In the case of *Earl of Stamford* v. *Sir John Hobart* (*o*), it appeared that, for want of trustees to preserve the contingent remainders, all the uses intended in the will and in the Act of Parliament to take effect, might have been avoided; and therefore the Lord Cowper did, notwithstanding the words of the Act, upon great deliberation, insert trustees. In the case of *Legatt* v. *Sewell*, the words, if in a settlement, would have made an estate tail; and in that of *Baile* v. *Coleman*, the execution was to be of the

(*o*) 3 Bro. P. C. 33.

same estate as he had in the trust, which in construction of law was an estate tail. Nor is the rule generally true, that in articles and executory trusts different constructions are to be admitted; the late case of *Papillon* v. *Voice* is directly against this; and it seems to me a very strong authority for executing the intent in the one case as well as the other.

And so decreed the Lady Glenorchy but an estate for life, with remainder, etc.

LEGG *v.* GOLDWIRE.

1736. Cas. t. Talbot, 20.

Rectification of Marriage Settlement.

When a marriage settlement will be rectified by marriage articles.

N.B. by Lord Chancellor Talbot.—Where articles are entered into before marriage, and a settlement is made *after* marriage different from those articles (as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail whereby he hath it in his power to bar the issue), this Court will set up the articles against the settlement; but where both articles and settlement are *previous* to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall control the articles. And although, in the case of *West* v. *Errissey*, the articles were made to control the settlement made before marriage, yet that resolution no way contradicts the general rule; for in that case the settlement was expressly mentioned to be made in *pursuance and performance of the said marriage articles*, whereby the intent appeared to be still the same as it was at the making of the articles (*a*).

NOTES.

1. Distinction between executed and executory trusts.
2. Executory trusts under marriage articles, p. 734.
3. Executory trusts in wills and deeds of gift, p. 736.
4. Rectification of settlements, p. 745.

1. Distinction between Executed and Executory Trusts.

Fifteen years after the hearing of *Glenorchy* v. *Bosville*, Lord Hardwicke remarked that it established the distinction between

(*a*) See, however, *Bold* v. *Hutchinson*, 5 De G. M. & G. 558; *Loxley* v. *Heath*, 1 De G. F. & J. 489.

trusts executed and executory (*b*). The distinction had been taken earlier (*c*), and has ever since been recognised (*d*), for the purpose of marking two classes of trusts to which different principles of interpretation are applicable. The importance of the doctrine recognised in the principal case has been much diminished (as will be seen later) by the passing of the Law of Property Act, 1925, ss. 60, 130 and 131, and accordingly the notes which appeared in the last edition of this work have been reduced. The doctrine, however, has still importance, not merely in the case of instruments which became operative before 1926, but also as being applicable in other cases not covered by section 60, 130 and 131 of the Law of Property Act, 1925.

There is no clear definition distinguishing trusts executed from trusts executory (*e*). Not every trust to make a deed is executory, but only a trust to make a deed whereby the creator of the trust has left it to the Court to make out from general expressions what his intention is (*f*). The authorities suggest that a trust executory is one to determine within specified limits what interests shall be created and with what administrative powers they shall be accompanied. According to an often repeated expression : if the settlor has been his own conveyancer, the trust or contract, although it be one to make a deed, is not executory (*g*).

Executed Trusts.—In the construction of executed trusts, and immediate devises, Courts of equity have from early times followed the rules of law where the settlor or testator has employed words appropriate for the creation of some particular legal interest. So far as wills were concerned, the strict rules of the common law, as to the necessity for the use of technical words of limitation in the creation of estates of inheritance, had been greatly relaxed long before the Wills Act, 1837, and estates in fee simple and in tail

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(*b*) *Bagshaw* v. *Spencer*, 2 Atk., at p. 582. As to the meaning of "executory," see *Pole* v. *P.*, [1924] 1 Ch. 156.

(*c*) *Stamford* v. *Hobart*, 3 Bro. P. C. 31.

(*d*) *Bagshaw* v. *Spencer*, 2 Atk. 582; *Exel* v. *Wallace*, 2 Ves. Sen. 323; *Wright* v. *Pearson*, 1 Eden, 119; *Austen* v. *Taylor*, 1 Eden, 367; *Newcastle* v. *Lincoln*, 3 V. 387; 12 V. 217; 4 R. R. 31; Lewin (13th ed.), p. 77.

(*e*) See *Bagshaw* v. *Spencer*, 2 Atk. pp. 582-3; *Sackville-West* v. *Holmesdale (Viscount)*, L. R. 4 H. L. p. 565.

(*f*) *Egerton* v. *Brownlow (Earl)*, 4 H. L. Cas., at p. 210; *Re Ballance*, 42 Ch. D. 62.

(*g*) *Foley* v. *Burnell*, 1 Bro. Ch. 285; *Egerton* v. *Brownlow (Earl)*, 4 H. L. Cas. 210; *Scarsdale* v. *Curzon*, 1 John. & H. 51; *Trevor* v. *T.*, 1 H. L. Cas. 239; *De Havilland* v. *De Saumarez*, 14 W. R. 118.

could be created without the use of the appropriate words of limitation. But equity has followed the construction of the common law Courts, as in, *e.g.*, the construction of a devise to A and his issue (*i*).

In 1685, Lord Nottingham, in the *Duke of Norfolk's Case* (*k*), laid it down that the trust of a term in gross can be limited no otherwise in equity than the estate of a term in gross can be limited in law; and in 1708, Harcourt, L.C., in *Bale* v. *Coleman* (*l*), held that in construing a will, the testator's intent must be presumed to be consistent with the rules of law, and that as at law, the words of the will before him would certainly create an entail, the devisee took an estate tail. So, in the principal case, Lord Talbot said, "in cases of trusts executed or immediate devises, the construction of the Courts of law and equity ought to be the same." Accordingly, if an estate is vested in trustees and their heirs in trust for A for life, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of A's body, the trust being an executed trust, A, according to the rule of law in *Shelley's Case* (*m*), was held to take an estate tail (*n*). To a desire to obviate the consequences of that rule, Lord Hatherley attributed the origin of the doctrine of executory trusts (*o*).

In the case of equitable interests arising under deeds, equity, however, has departed from the common law rule that an estate in fee simple can only be created in a deed by the use of appropriate words of limitation; and several of the most eminent text-book writers have expressed the opinion that the use of technical expressions was never necessary in creating equitable estates (*p*). It is clear that a mere declaration of trust in favour of a person simply, without anything more, would give him only a life estate (*q*). On the other hand, if the provisions of the deed showed

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(*i*) See *Re Bostock's Settlement*, [1921] 2 Ch. 469.

(*k*) 3 Ch. Cas. 28. (*l*) 1 P. W., at p. 145; 2 Vern. 670.

(*m*) 1 Rep. 936.

(*n*) *Stanley* v. *Lennard*, 1 Eden, 87; *Wright* v. *Pearson*, 1 Eden, 119; *Austen* v. *Taylor*, *ibid.*, 361; *Jones* v. *Morgan*, 1 Bro. Ch. 206; *Re Keane*, [1903] 1 Ir. R. 215.

(*o*) *Sackville-West* v. *Holmesdale* (*Viscount*), L. R. 4 H. L. p. 553.

(*p*) Cruise's Digest (4th ed.), tit. 11, c. 2, s. 32; Hayes on Conveyancing (5th ed.), vol. 1, p. 91; Preston on Estates, vol. 2, p. 64; Touchstone, Preston's ed., p. 106.

(*q*) *Holliday* v. *Overton*, 15 B. 480; *Lucas* v. *Brandreth*, 28 B. 274; *Tatham* v. *Vernon*, 29 B. 604; *Re Whiston's Settlement*, [1894] 1 Ch. 661; *Dearbey* v. *Latchford*, 72 L. T. 489, 490; *Re Hudson*, 72 L. T. 892, 894; *Re Thursby's Settlement*, [1910] 2 Ch. 181.

an intent that the *cestui que trust* should take absolutely, then—if technical words are not used, or if the instrument is plainly executory and intended to be followed by another document—the intention shown would be given effect to, even independently of section 60 of the Law of Property Act, 1925 (*r*). In *Re Irwin* (*s*), however, where there was a grant to trustees by name, without words of limitation, it was held to give them merely an estate in the settlor's equitable freeholds for the lives of the trustees named and the survivor of them.

Where a trust is not executory but executed, then if in an instrument technical words are used, effect must be given to them, whether the interest dealt with is legal or equitable, and although it may appear that the intention thereby is defeated. In *Re Bostock's Settlement* (*t*), by a settlement made upon a second marriage the husband conveyed freehold land to trustees in fee simple upon trust (after the death of himself and his wife) for his "child or children now born or hereafter to be born who shall attain the age of twenty-one years," and if there should be no such child, for his own right heirs. The husband died in 1920 and the question arose whether the children were entitled to more than a life interest in the real estate settled. There were various other provisions in the settlement from which the Court of Appeal (differing on this point from Eve, J., in the Court below) took the view that an intention appeared from the deed that the children should take absolute interests, but they held, nevertheless, that, having regard to the technical terms used (*tt*) and to the fact that the instrument was not executory, the intention could not be given effect to. "A close study of the deed," said Younger, L.J., "satisfies me that it embodies from first to last no other intention than that the children of the settlor, on attaining twenty-one, are to take an absolute interest, and I cannot bring myself to doubt that the omission from the limitation of the words adapted to produce that result is an omission of the draftsman. . . . The whole ground of my judgment is that notwithstanding it, the Court has no option but to declare, however reluctantly, that these children take in the settled freeholds life interests only. I doubt whether such difficulty as that with which on some of the authorities we are here confronted would have arisen had the Court in some

(*r*) *Re Bostock's Settlement*, *infra*.
(*s*) [1904] 2 Ch. 752.
(*t*) [1921] 2 Ch. 469.
(*tt*) *Ib.*, p. 480.

recent decisions been vigilant to *distinguish between those cases where the question is one of intention, and those in which it is not one of intention at all, but is one the solution of which is governed by settled principles of construction operative in equity no less than at law*—principles from which no judicial escape is possible. . . . I find no recital which would justify the Court in saying that its operative provisions are incomplete or imperfect. I find no basis for reforming or rectifying it. Nor is there anything executory in the frame of the document. No further or additional instrument is required to give it complete effect. In these circumstances all that the Court can do is to construe it according to the import of the words used " (*u*). In a case decided by the Court of Appeal in Ireland, where (by an executed instrument) the intention to create an equitable estate of inheritance was clearly shown, it was held (distinguishing *Re Bostock*, *supra*), that there being no technical terms in the words of the trust in conflict with the intention shown, an equitable estate in tail male was thereby settled (*x*).

So, again, equity followed the law in the construction of executed trusts of personalty declared by reference to limitations of realty in strict settlement. Under such trusts (in cases not within the Law of Property Act, 1925, s. 130) the personalty vests absolutely in the person who first becomes entitled indefeasibly to an estate tail in the realty (*y*). The use, in a referential trust executed of personalty, of the words " so far as the rules of law and equity will permit," did not alter the disposition (*z*), though in an executory trust they might (*a*). A bequest or other limitation in trust for a mother and children, entitles them jointly, though from slight indications an intent to create an executory trust involving a different result may be inferred (*b*).

Executory Trusts.—In an executory trust the creator " leaves something to be done, the trusts to be executed in a more careful

(*u*) [1921] 2 Ch. pp. 487-9.

(*x*) *Land Purchase Trustee* (*Northern Ireland*) v. *Beers*, [1925] N. Ir. 191.

(*y*) *Pelham* v. *Gregory*, 3 Bro. P. C. 204; *Re Angerstein*, [1895] 2 Ch. 883; *Martelli* v. *Holloway*, L. R. 5 H. L. 532; *Re Fothergill's Estate*, [1903] 1 Ch. 149; *Re Chesham's Settlement*, [1909] 2 Ch. 329; *Re Parker*, [1910] 1 Ch. 581; *Re Harcourt; Viscount Portman* v. *Portman*, [1921] 1 Ch. 187; [1921] 2 Ch. 49; [1922] A. C. 473.

(*z*) *Vaughan* v. *Burslem*, 3 Bro. Ch. 101; *Scarsdale* v. *Curzon*, 1 John. & H. 40, 50, 54; 1 De G. J. & S. 14; *Trevor* v. *T.*, 1 H. L. Cas. 239; *Re Johnson's Trusts*, 2 Eq. 716; *Re Harcourt; Viscount Portman* v. *Portman*, *supra*.

(*a*) *Newcastle* v. *Lincoln*, 12 V. 218.

(*b*) *Curtis* v. *Graham*, 12 W. R. 998; *Newill* v. *N.*, L. R. 7 Ch. 253; *Re Seyton*, 34 Ch. D. 511; *Re Davies' Policy Trusts*, [1892] 1 Ch. 90.

and more accurate manner " (*c*), " by the preparation, in fact, of a complete and formal settlement, carrying into effect, through the operation of an apt and detailed legal phraseology, the general intention compendiously indicated by the testator " (*d*). " Has the testator left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates? " (*e*). " It is of the essence of an executory trust that it should not be fully expressed in the instrument creating it, but should require some further instrument for its complete legal expression " (*f*). " Nor is there anything executory in the frame of the document," said Younger, L.J., in *Re Bostock's Settlement* (*g*). *No further or additional instrument is required to give it complete effect.*

Where a trust is executory the Court will decree according to the intent as it is found expressed in that trust (*h*), and if its words are improper or informal, the Court will direct a settlement to be made in a proper manner, so as may best answer the intent of the parties (*i*). What the Court, if applied to, would direct, supposing that to be clear, trustees may do, and often have done, without its direction; but their discretion is, of course, limited by the words of the trust; and where a testator having directed the creation of a settlement containing a shifting clause, also directed the trustees in making the settlement to correct any defect in legal or technical or other incorrect expression in his will, and to form such settlement from what should appear to them to be his real meaning, it was held that they could not so vary the language of the shifting clause from that used in the will as to give effect to what they thought, but the Court did not think, to be the apparent intention of the testator (*k*).

Distinction between Executory Trusts in Wills, etc., and in Marriage Articles.—Executory trusts are said to occur principally in marriage articles and wills. Marriage articles, however, do not

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(*c*) Lord Talbot, *supra*.
(*d*) Lord Cairns, *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. 571.
(*e*) Lord St. Leonards, *Egerton* v. *Brownlow* (*Earl*), 4 H. L. Cas. 210.
(*f*) Lord Westbury, L. R. 4 H. L. 566.
(*g*) [1921] 2 Ch. p. 489.
(*h*) Lord Talbot, C., *supra*; *Leonard* v. *Sussex*, 2 Vern. 526.
(*i*) Lord Cowper, C., 3 Bro. P. C. 33; see also *Papillon* v. *Voice*, 2 P. W., at p. 474 (n.) (1).
(*k*) *Stanley* v. *S.*, 16 V. 491, 494, 511.

create trusts, but are executory contracts to be interpreted and given effect to upon the same principles as executory trusts. Besides marriage articles, other contracts, such as those for the sale and purchase or the letting and hire of land, are, though not often thought of in connection with this doctrine, executory and interpreted on the principles applicable to the interpretation of an executory trust. Executory trusts, moreover, may be, and occasionally are, created by deed (*l*). Sir W. Grant, M.R., said :— "I know of no difference between an executory trust in marriage articles and in a will, *except* that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. When the object is to make a provision, by the settlement of an estate, for the purpose of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention; but if a will directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement" (*m*).

2. Executory Trusts under Marriage Articles.

If, in articles before marriage, for making a settlement of the real estate of either the intended husband or wife, it is agreed that the same shall be settled upon the *heirs of the body* or the *issue* of them or either of them, in such terms as would (in the case of an instrument which came into operation before 1926 (*n*)), if construed with legal strictness, according to the rule in *Shelley's Case*, give *either* of them an estate tail, and enable *either* of them to defeat the provision for their issue, Courts of equity, considering the object of the articles, *viz.*, to make a provision for the issue of the marriage, would, in conformity with the presumed intention of the parties, direct a settlement to be made upon the husband or wife for life only, with remainder to the issue of the marriage

(*l*) *Mayn* v. *M.*, 5 Eq. 150.

(*m*) *Blackburn* v. *Stables*, 2 V. & B. 369 See also *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 574; *Deerhurst* v. *St. Albans*, 5 Madd. 260; *Rochfort* v. *Fitzmaurice*, 2 Dr. & W. 20; *Sackville-West* v. *Holmesdale* (*Viscount*), L. R. 4 H. L. 572.

(*n*) See section 131 of the Law of Property Act, 1925.

in tail, as purchasers. Thus, in *Trevor* v. *T.* (*o*), A, in consideration of an intended marriage, covenanted with trustees to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the use of the heirs male of him on her body to be begotten, and the heirs male of such heirs male issuing, remainder to the right heirs of the said A for ever. Lord Macclesfield said, that upon articles the case was stronger than on a will; that articles were only minutes or heads of the agreement of the parties, and ought to be so modelled, when they came to be carried into execution, as to make them effectual; that the intention was to give A only an estate for life; that, if it had been otherwise, the settlement would have been vain and ineffectual, and it would have been in A's power, as soon as the articles were made, to have destroyed them. And his lordship therefore held, that A was entitled to an estate for life only, and that his eldest son took by purchase as tenant in tail. This decision was affirmed on appeal in the House of Lords (*p*).

Where in marriage articles the words "heirs female," "heirs of the body," or "issue," are held to indicate an intention that the issue of the marriage should take as purchasers, a settlement will be decreed in favour of daughters as well as sons, *viz.*, on first and other sons successively in tail, with remainder to the daughters as tenants in common in tail, with cross remainders between them (*q*).

Joint Tenancy.—In *Rossiter* v. *R.* (*r*), a husband agreed to convey to trustees, for himself for life, and if his wife survived, to the use of the "wife and children," if no child, to the wife in fee. A settlement was decreed upon the wife for life with remainder to the children, *Wild's Case* (*s*), being held inapplicable to marriage articles. Where words in articles for a settlement would, if interpreted in their strict legal sense, create a joint tenancy among the children of the marriage, equity (in the case of personal estate) will decree a settlement vesting the fund in all the children as tenants in common (and in the case of real estate, since the Law

(*o*) 1 Eq. Ca. Abr. 387; 1 P. W. 622.

(*p*) 5 Bro. P. C. 122; and see *Streatfield* v. *S.*, Cas. t. Talbot, 176; *Lambert* v. *Peyton*, 8 H. L. Cas. 1; *Grier* v. *G.*, L. R. 5 H. L. 688.

(*q*) *West* v. *Errissey*, 2 P. W. 349; *Trevor* v. *T.*, 13 Si. 108; *Mason* v. *M.*, 5 Ir. R. Eq. 288; *Phillips* v. *James*, 3 De G. J. & S. 72; *Grier* v. *G.*, L. R. 5 H. L. 688; Vaizey, Settlements, p. 168.

(*r*) 14 Ir. Ch. R. 247.

(*s*) 6 Rep. 16.

of Property Act, 1925, the decree would be for a settlement upon trust for sale, the proceeds to be held in trust for all the children as tenants in common), followed by an accruer clause giving the shares of such as died under twenty-one and without issue, and if female without being married, to the others or other (*t*). This principle would now be followed with a variation corresponding with a change in the practice of conveyancing, by making the interests of the children contingent on their attaining twenty-one being sons, or being daughters attaining that age or marrying (*u*).

When articles direct personal property of the wife to be settled upon trust for the husband and wife "during their lives," they will be carried into effect by giving the wife the first life interest to her separate use (*x*). As to adding "without power of anticipation," see remarks of James, L.J., *Teasdale* v. *Braithwaite* (*y*).

Although provisions in marriage articles may be vague, the Court will endeavour to carry them out as well as it can. Thus, where in marriage articles there was a trust "to provide suitably" for the settlor's younger children, it was held in a case in Ireland that it was not too vague to be executed, and that the Court ought to direct an inquiry what the provisions should be (*z*).

3. Executory Trusts in Wills and Deeds of Gift.

In the case of a will or deed of gift the intention that the very words mentioned in the instrument are not to be used as proper for the more complete conveyance, must be plainly manifested by the first instrument, and will not be assumed merely because the trust is executory (*a*). There is no power to modify the frame of a will by reason of what one may suppose *ought* to have been the intention of the testator. The principle to go upon is to follow the meaning of the words in the will (*b*). In *Sweetapple* v.

(*t*) *Taggart* v. *T.*, 1 Sch. & L. 84; *Roche* v. *R.*, 2 Jo. & Lat. 561; and see *Marryat* v. *Townly*, 1 Ves. Sen. 102.

(*u*) *Cogan* v. *Duffield*, 2 Ch. D. 48. See the statutory trusts for the issue of an intestate, A. E. Act, 1925, s. 47, sub-s. 1, where the interests of sons (as well as daughters) are made to vest at twenty-one *or* marriage.

(*x*) *Cogan* v. *Duffield*, 2 Ch. D. 44.

(*y*) 5 Ch. D. 632; and cf. Cotton, L.J., in *Re Parrott*, 33 Ch. D. 276; *Re Dunnill's Trust*, Ir. R. 6 Eq. 322.

(*z*) *Brenan* v. *B.*, 2 Ir. R. Eq. 266.

(*a*) *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. p. 555.

(*b*) *Surtees* v. *S.*, 12 Eq. 405, 406; *Rhodes* v. *R.*, 7 A. C. 192, 199; *Scale* v. *Rawlins*, [1892] A. C. 342, at p. 345

Bindon (*c*), B by will gave £300 to her daughter Mary, to be laid out by her executrix in lands and settled to the only use of her daughter Mary and her children, and if she died without issue the land to be equally divided between her brothers and sisters then living; Lord Cowper said, that, had it been an immediate devise of land, Mary, the daughter, would have been, by the words of the will, tenant in tail: and in the case of a voluntary devise, the Court must take it as they found it, and not lessen the estate or benefit of the legatee: although upon the like words in marriage articles it might be otherwise (*d*).

Where a testator, as in *Glenorchy* v. *Bosville*, directs an estate to be conveyed to a person for life "*without impeachment of waste*," or to a person for life with a limitation to trustees "*to preserve contingent remainders*," he would be considered to have indicated his intention, that in a subsequent limitation to the issue or heirs of the body of the person to whom the life interest is given, such issue or heirs should take as purchasers, and a strict settlement would accordingly be directed (*e*).

"The object of making provision for the children of a marriage, and the object of making provision for the holders of a peerage," said Lord Cairns in *Sackville-West* v. *Holmesdale* (*f*), "would appear to be so analogous that it would be the duty of the Court in the latter, as in the former case, to prevent as far as possible the defeat of the object." In that case Lady Amherst by a codicil to her will reciting, correctly, the grant of a barony to her sister D for life, with remainder to the second son of D and the heirs male of his body, *directed a settlement* to be made to correspond as nearly as possible with the limitation of the peerage, in a "course of entail." Deeds for carrying into effect this settlement were to be prepared, the settlement was to be effected in such manner, etc., as the trustees should consider proper, or as their counsel should advise. Held (*g*), that the estates ought to be limited in strict settlement to the second and other younger sons of D for their respective lives, without impeachment for waste,

(*c*) 2 Vern. 536.

(*d*) See also *Samuel* v. *S.*, 9 Jur. 222; *Harrison* v. *Naylor*, 2 Cox, 247; *Marshall* v. *Bousfield*, 2 Madd. 166; *Blackburn* v. *Stables*, 2 V. & B. 370; *Meure* v. *M.*, 2 Atk. 266; *Jervoise* v. *Northumberland*, 1 J. & W. 559; *Randall* v. *Daniel*, 24 B. 193; *Lowry* v. *L.*, 13 L. R. Ir. 317.

(*e*) See *Papillon* v. *Voice*, 2 P. W. 471.

(*f*) L. R. 4 H. L. p. 575.

(*g*) Hatherley, L.C., dissenting.

remainder to their sons successively in tail male, as in the patent creating the barony, and that the leaseholds and chattels were to be settled in such manner as should most nearly correspond with such course of strict settlement, and a shifting clause was added in exact accordance with the proviso in the patent, which proviso has, however, been since held to be invalid (*h*). In *Re Johnston* (*i*), the testatrix gave plate and a leasehold house to A C, Earl of Essex, and " to his successors to be enjoyed with and to go with the title." She also bequeathed to her trustees her furniture, pictures, statuary, etc., upon trust to select and set aside a portion of it for the Earl of Essex, to be " *settled* as heir-looms and go with the title." Held, the plate and leasehold passed to the Earl absolutely; but that the gift to the trustees to select, etc., created an executory trust, and a settlement was directed giving the Earl a life interest with remainder to the next heir to the title for life (*k*).

In *Austen* v. *Taylor* (*l*), land was devised to trustees in trust to pay an annuity; and subject thereto in trust for A for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A, remainder to the testator's right heirs: and the residue of the testator's personal estate was to be laid out in the purchase of lands which should thereafter *remain, continue, and be*, to the same uses as the land before devised. Lord Northington distinguished the case from *Papillon* v. *Voice*, on the ground that the testator *refers no settlement to his trustees to complete, but declares his own uses and trusts*, which being declared, he knew no instance where the Court had proceeded so far as to alter or change them. Legal effect must be given to the words used.

Certain of the alterations made by the Law of Property Act, 1925, have an important bearing upon the mode in which executory instruments will be construed and given effect to. It will be borne in mind that section 60 of that Act provides that a conveyance of freehold land to any person without words of limitation, or any equivalent expression, shall pass the fee simple or other the whole

(*h*) *The Buckhurst Peerage*, 2 A. C. 1. See, further, *Dorchester* v. *Effingham*, 3 B. 180; *Bankes* v. *Le Despencer*, 10 Si. 576.

(*i*) 26 Ch. D. 538; cf. *Re Hill*, [1902] 1 Ch. 807. See, now, sections 130 and 131 of the L. P. Act, 1925, set out *infra*.

(*k*) And see *Bankes* v. *Le Despencer*, 10 Si. 576.

(*l*) 1 Eden, 361.

interest which the grantor had power to convey, unless a contrary intention appears in the conveyance; but this provision applies only to instruments executed after the commencement of the Act. By section 130, sub-section 1, an interest in tail, or in tail male, or in tail female, or in tail special, may be created by way of trust in any property, real or personal, but only by the like expressions as those by which before the commencement of the Act a similar estate could have been created by deed (not being an executory instrument) in freehold land, and with the like results, and accordingly all statutory provisions relating to estates tail in real property shall apply to entailed interests in personal property.

By section 130, sub-section 2, expressions in an instrument coming into operation after the commencement of the Act, which, in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall (save as thereinafter provided) operate in equity, in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property had been personal estate, would have been created therein by similar expressions before the commencement of the Act. By sub-section 3, where personal estate (including the proceeds of sale of land directed to be sold and chattels directed to be held as heirlooms) is, after the commencement of the Act, directed to be enjoyed or held upon trusts corresponding to trusts affecting land in which, either before or after the commencement of the Act, an entailed interest has been created and is subsisting, such direction shall be deemed sufficient to create a corresponding entailed interest in such personal estate. By sub-section 5, where personal chattels are settled without reference to settled land on trust creating entailed interests, the trustees, with the consent of the usufructuary (if of full age), may sell the same, and the proceeds are to be held upon the same trusts as the chattels would have been held upon if the same had not been sold.

Sub-section 6 provides that an entailed interest shall only be capable of being created by a settlement of real or personal property or the proceeds of sale thereof (including the will of a person dying after the commencement of the Act) or by an agreement for a settlement in which the trusts to affect the property are sufficiently declared.

By section 131 of the same Act it is provided that where by any instrument coming into operation after the commencement of the Act an interest in any property is expressed to be given to the heir or issue, or any class of the heirs or issue of any person in words which, but for this section would, under the rule in *Shelley's Case*, have operated to give to that person an interest in fee simple or an entailed interest, such words shall operate in equity as words of purchase and not of limitation, and shall have effect accordingly, and in the case of an interest in any property expressed to be given to an heir or heirs, the same person or persons shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of the Act.

Joint Tenancy.—Where, in a will or deed, there are directions for a settlement, in terms which are ordinarily construed to create a joint tenancy, the Court will, if to do so is needed in order to effectuate the intent shown, carry them out by giving a tenancy in common in the settlement. Though a trust executed for a parent and children entitles them jointly, yet slight circumstances have been relied on as grounds for inferring an intent to declare an executory trust (*m*), which must be executed by a trust for the parent for life, remainder in the case of personalty for the children, including those after born, as tenants in common (*n*), and ordinarily, it is submitted, contingently on their attaining twenty-one, or, being girls, marrying, and in the case of realty as tenants in common, in tail or in fee, as the language of the executory trust may indicate (*o*).

In *White* v. *Briggs* (*p*), the testator declared that after the death of his wife, his nephew, C. W., should "be considered heir to all his property not otherwise disposed of," and he directed "that whatever portion of his property might thereafter be possessed by him, should be *secured by his executors for the benefit of his family.*" Cottenham, L.C., held that as regards the real estate, "family" meant heir-at-law, and that in the gift of the personal property it meant "next-of-kin."

A direction to trustees to settle property upon a wife of the

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(*m*) *Newill* v. *N.*, L. R. 7 Ch. 257.

(*n*) *Vaughan* v. *Headfort*, 10 Si. 639; *Ogle* v. *Corthorn*, 9 Jur. 325; *Combe* v *Hughes*, 14 Eq. 415; *Mayn* v. *M.*, 5 Eq. 150.

(*o*) *Mayn* v. *M.*, *supra*; *Marryat* v. *Townly*, 1 Ves. Sen. 102; *Synge* v. *Hales*, 2 Ball & B. 499.

(*p*) 2 Phil. 583.

testator's son, should he marry, has been held, in the absence of words indicating an intention to restrict the jointure to the wife of a first marriage, to authorise the settlement of a jointure upon the wife of a second marriage (*q*).

Where a testator directed that his daughters' shares of *personalty* under his will should be "settled upon themselves *strictly*" (*without any mention being made of children*) (*r*), it was held by Romilly, M.R., that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her for life, to her separate use, without power of anticipation; and if she died in the life of her husband, then her share should go as she should by will appoint, and in default of appointment, to her next-of-kin, exclusively of her husband; and if she survived her husband, then to her absolutely (*s*).

But although there may be no mention of *children* in a direction to settle, it seems that the settlement will be extended to them when such appears to be the *intention* of the testator (*r*). Thus, in *Duckett* v. *Thompson* (*t*), where a bequest of £2,000 was made for the benefit of a *feme sole*, "to be paid upon her marriage, and to be settled upon her by her settlement," it was held that a settlement should be made of the legacy upon the legatee and her children. As to excluding the *jus mariti* only where money was bequeathed to be settled on testator's daughters "independent of their coverture," see *Eustace* v. *Robinson* (*u*).

But where a testator gave a share of his property to each of his two daughters, with a mere general direction that it was "to be settled on themselves at their marriage," Bacon, V.-C., thought these words imported an absolute gift to the daughters, and that they were entitled to their shares absolutely (*x*).

When, however, the Court comes to the conclusion that the testator's intention is shown that the children of the legatee should take under a settlement directed to be made of a legacy, the Court will ordinarily direct a settlement upon the legatee for life, with a power to appoint among his children, with limitations in default

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(*q*) *Mason* v. *M.*, 5 Ir. R. Eq. 288. See *Re Parrott*, 33 Ch. D. p. 277; *Nash* v. *Allen*, 42 Ch. D. 54.

(*r*) See *Re Spicer*, 84 L. T. 195.

(*s*) *Loch* v. *Bagley*, 4 Eq. 122; distinguished in *Re Spicer*, 84 L. T. 195.

(*t*) 11 L. R. Ir. 424; and see *Re Ballance*, 42 Ch. D. 62.

(*u*) 7 L. R. Ir. 83.

(*x*) *Magrath* v. *Morehead*, 12 Eq. 491; *Laing* v. *L.*, 10 Si. 315; *Kennerley* v. *K.*, 10 Ha. 160; *Munt* v. *Glynes*, 41 L. J. Ch. 639.

of appointment to children who being sons attain twenty-one, or being daughters attain that age or marry, as tenants in common (*y*). But the Court will exercise a discretion in modifying the trusts indicated by the general directions in the will, so as to give effect to the intention (*z*).

The settlement may be made by the judgment, but it should bear the usual settlement stamp (*a*).

Chattels Directed by Will, etc., to go in Strict Settlement.—Where chattels are settled by an *immediate bequest*, or by a *trust executed* upon the same trusts as have been declared of real estate in strict settlement, *viz.*, upon first and other sons successively in tail, if there is no restriction as to the attainment of twenty-one years or the fulfilment of any other condition, such chattels (in the case of an instrument coming into operation before 1926 (*b*)) will vest absolutely in the first tenant in tail at his birth, whether the limitation of the chattels be expressed *in extenso*, or created by reference to the limitations of the realty (*c*), and such reference may be made effectually either by declaring that the chattels are to go upon the limitations of the realty or by saying that they are to be treated as heirlooms (*d*).

The addition of the words "so far as the rules of law or equity will permit," or the circumstance that the legal estate is left in executors, will not alter the general rule, or make the trusts executory (*e*).

Doctrine of Cy-près.—Where an *executory trust*, if carried literally into effect, would be void for illegality, as where it would infringe the rule against perpetuities, the Court, in order to carry the testator's intention into effect as far as possible, or *cy-près*, will

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(*y*) *Taggart* v. *T.*, 1 Sch. & L. 84; *Young* v. *Macintosh*, 13 Si. 445; *Turner* v. *Sargent*, 17 B. 515; *Charlton* v. *Rendall*, 11 Ha. 296; *Stanley* v. *Jackman*, 23 B. 450; *Cogan* v. *Duffield*, 2 Ch. D. 44; *Oliver* v. *O.*, 10 Ch. D. 765; *Re Gowan*, 17 Ch. D. 778; *Eustace* v. *Robinson*, 7 L. R. Ir. 83.

(*z*) *Re Parrott*, 33 Ch. D. 274; and see *Nash* v. *Allen*, 42 Ch. D. 54.

(*a*) *Re Gowan*, 17 Ch. D. p. 780.

(*b*) See L. P. Act, 1925, s. 130, sub-s. 3.

(*c*) *Doncaster* v. *D.*, 3 K. & J. 26; *Rowland* v. *Morgan*, 6 Ha. 463.

(*d*) *Scarsdale* v. *Curzon*, 1 John. & H. 40; *Re Johnson's Trusts*, 2 Eq. 716; *Re Fothergill*, [1903] 1 Ch. 149.

(*e*) *Tollemache* v. *Coventry*, 2 Cl. & Fin. 611; *Re Exmouth*, 23 Ch. D. 158; *Harrington* v. *H.*, L. R. 5 H. L. 87; *Scarsdale* v. *Curzon*, 1 John. & H. 40; *Christie* v. *Gosling*, L. R. 1 H. L. 279; *Re Johnston*, 26 Ch. D. 538; *Re Johnson's Trusts*, 2 Eq. 716; *Re Angerstein*, [1895] 2 Ch. 883; *Re Hill*, [1902] 1 Ch. 807; *Re Fothergill*, [1903] 1 Ch. 149; *Re Harcourt*, [1921] 1 Ch. 187; [1921] 2 Ch. 49; [1922] 2 A. C. 473.

direct a settlement to be made as strictly as the new law will permit (*f*).

Where in marriage articles or a will, a settlement is directed to be made with the *usual powers* or *proper powers*, the Court has ordered the following powers to be inserted in the settlement. Powers of sale and exchange (*g*); of maintenance and advancement (*h*); of varying securities (*i*); powers of partition where there is any joint property (*k*); powers of appointing new trustees (*l*); a power to cut timber for benefit of all persons interested in the estate (*m*); a power of advancement (*n*). But not a power to raise portions (*o*), nor to jointure a future wife (*p*).

Where a testator by his will directed a settlement of real and personal property to be made, but *gave no direction as to powers*, Romilly, M.R., was of opinion that the testator, by simply directing a settlement, ought to be held to have intended all the *usual* powers to be included, *e.g.*, usual powers of leasing, sale and exchange, for the appointment of new trustees, together with a receipt clause, and provisions for maintenance, education, and advancement for the children or issue living at the death of the tenant for life, during their minority (*q*). As to the mode of settling a wife's fortune approved by the Court, see *Cogan* v. *Duffield* (*r*), *Re Gowan* (*s*), *Re Parrott* (*t*), *Nash* v. *Allen* (*u*). As to giving the wife a power of appointing a life estate to her husband, *Charlton* v. *Rendall* (*x*). As to giving her a power of appointment by will in default of issue, *Stanley* v. *Jackman* (*y*). As to inserting a hotchpot clause, *Lees* v. *L.* (*z*). As to a clause for separate use with restraint on anticipa-

(*f*) *Miles* v. *Harford*, 12 Ch. D. 691; see *Hampton* v. *Holman*, 5 Ch. D. 183, 190.
(*g*) *Hill* v. *H.*, 6 Si. 145; *Bedford* v. *Abercorn*, 1 My. & C. 312; *Peake* v. *Penlington*, 2 V. & B. 311; *Horne* v. *Barton*, Jac. 439; Sug. Pow. (8th ed.), p. 839.
(*h*) *Re Parrott*, 33 Ch. D. 274; *Mayn* v. *M.*, 5 Eq. 150.
(*i*) *Sampayo* v. *Gould*, 12 Si. 426.
(*k*) *Hill* v. *H.*, *supra*.
(*l*) *Lindow* v. *Fleetwood*, 6 Si. 152; *Sampayo* v. *Gould*, *supra*.
(*m*) *Davenport* v. *D.*, 33 L. J. Ch. 33.
(*n*) *Mayn* v. *M.*, 5 Eq. 150.
(*o*) *Higginson* v. *Barneby*, 2 S. & S. 518; *Grier* v. *G.*, L. R. 5 H. L. 688.
(*p*) *Bedford* v. *Abercorn*, 1 My. & C. 312; but see *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. p. 577.
(*q*) *Turner* v. *Sargent*, 17 B. 515; *Wise* v. *Piper*, 13 Ch. D. 848.
(*r*) 2 Ch. D. p. 49.
(*s*) 17 Ch. D. 778.
(*t*) 33 Ch. D. 274.
(*u*) 42 Ch. D. 54.
(*x*) 11 Ha. 296.
(*y*) 23 B. 450.
(*z*) Ir. R. 5 Eq. 549.

tion, *Turner* v. *Sargent, supra; Stanley* v. *Jackman, supra; Re Dunnill's Trusts* (*a*), *Symonds* v. *Wilkes* (*b*), *Clive* v. *C.* (*c*). As to inserting a power of revocation, *Bankes* v. *Le Despencer* (*d*). As to giving by marriage settlement to intended husband or wife a general power of appointment, *Bristow* v. *Warde* (*e*), *Minton* v. *Kirwood* (*f*). As to the duplication of charges by referential words, *Hindle* v. *Taylor* (*g*), *Boyd* v. *B.* (*h*).

Most of the powers which it has been customary to insert in settlements (whether created by deed or will) are now implied by statute. For the wide powers of management given to a tenant for life, reference may be made to Part II of the Settled Land Act, 1925. Under the Trustee Act, 1925, s. 31, trustees, where a beneficiary is an infant, are given powers of maintenance, if the trust is created after 1925. Where the trust arose before 1926, section 43 of the Conveyancing Act, 1881, is applicable. Section 32 of the Trustee Act, 1925, gives trustees of personalty settlements and wills power of advancement if trust created after 1925.

Where an agreement for a lease stipulates that the lease shall contain all usual and customary covenants or clauses, or where it is silent on the subject, the Court refuses to insert covenants to reside on the premises, or against assignment without consent, and limits the proviso for re-entry to non-payment of rent (*i*). The fact that the subject-matter of the lease is a public-house makes no difference (*k*). As pointed out in a learned work, the question what covenants are " usual " depends, to some extent, on the practice of conveyancers, which varies from time to time, and also upon the character of the property agreed to be demised (*l*).

In carrying into effect executory trusts, it is now settled that where, in order to give effect to the general intention, an estate of inheritance is cut down to an estate for life, the Court will make the holder of such life estate dispunishable for waste (*m*).

(*a*) Ir. R. 6 Eq. 322.
(*b*) 11 Jur. (N.S.) 659.
(*c*) L. R. 7 Ch. 433.
(*d*) 11 Si. 508.
(*e*) 2 V. 336.
(*f*) L. R. 3 Ch. 614.
(*g*) 5 De G. M. & G. 577.
(*h*) 9 L. T. 166.
(*i*) *Re Lander*, [1892] 3 Ch. 41, following *Henderson* v. *Hay*, 3 Bro. Ch. 632, and reviewing all the cases.
(*k*) *Ibid.*
(*l*) Woodfall (21st ed.), p. 150.
(*m*) *Leonard* v. *Sussex*, 2 Vern. 526; *Woolmore* v. *Burrows*, 1 Si. 512; *Bankes* v. *Le Despencer*, 11 Si. 508; *White* v. *Briggs*, 15 Si. 17; 2 Ph. 583; *Stanley* v. *Coulthurst*, 10 Eq. 259; *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. 543.

Glenorchy v. Bosville—Legg v. Goldwire.

Where a settlement of land has been directed to be made upon a woman on marriage, for her life with a restraint upon anticipation, it has been held that no clause should be added to the settlement, making her unimpeachable for waste (*n*).

4. Rectification of Settlements.

The rectification, setting aside, or cancellation of deeds or other instruments, is assigned to the Chancery Division by the Judicature Act, 1925, s. 56, sub-s. 1, which takes the place of section 34 of the Act of 1873. If a settlement directed to be made by a testator is improperly framed, it may, as in *Glenorchy* v. *Bosville*, be rectified in accordance with the will; but, with regard to a settlement agreed to be made by articles, if both articles and settlement are made *before* (*o*) marriage, the settlement will not *in general* be controlled by the articles, because, as observed by Lord Talbot in the principal case of *Legg* v. *Goldwire*, "when all parties are at liberty, the settlement will be taken as a new agreement."

And an agreement of an informal character which would have been binding if the marriage had taken place immediately, was considered to be superseded by a formal agreement for a settlement, executed before the marriage, eleven months later than the earlier document to which it contained no reference (*p*).

Evidence is admissible, however, to show that articles constituted the final agreement between the parties, and that the discrepancy between the articles and the settlement, although both were executed before the marriage, arose from mistake, and upon this being proved the Court will rectify the settlement, and make it conformable to the real intention of the parties (*q*); but "in order to justify the Court in taking such a course, it is obvious that a *clear* intention must be proved; it must be shown that the settlement does not carry into effect the intention of the parties. If there be merely evidence of doubtful or ambiguous words having been used, the settlement itself is the construction which the parties have put upon those doubtful or ambiguous words" (*r*).

"It lies on those who seek to alter the instrument to show why

(*n*) *Clive* v. *C.*, L. R. 7 Ch. 433.
(*o*) But see *Bold* v. *Hutchinson*, 5 De G. M. & G. 558, 567—8.
(*p*) See *Re Badcock*, 17 Ch. D. 361; cf. *Loxley* v. *Heath*, 1 De G. F. & J. 489.
(*q*) *Bold* v. *Hutchinson*, 5 De G. M. & G. 558, 568.
(*r*) *Per* Cottenham, L.C., in *Breadalbane* v. *Chandos*, 2 My. & C. 739.

it should be altered, not on those who support it to show why it should not be altered " (*s*).

The Court will only rectify a marriage settlement when the mistake is shown to be common to both parties, and it is essential that the extent of the rectification should be clearly ascertained and defined by evidence contemporaneous with or anterior to the deed (*t*). The Court will be guided by what was the intention of the parties *at the time when the deed was executed*, not by a previously expressed intention, for that might have been departed from (*u*): and not by what would have been their intention if, when they executed it, the result of what they did had been present to their minds (*x*). Before relief will be granted the Court must be convinced that a common mistake has occurred. It is not enough to show that the effect of the settlement was not what the plaintiff intended (*y*). It must be shown that the actual contract and intention of the contracting parties was different from that expressed in the deed (*z*). Mere parol evidence is sufficient (*a*). But whether, many years after the settlement, the uncontradicted evidence of the plaintiff is sufficient, " uncontradicted because there was no one to contradict it," *quære* (*b*). The plaintiff's evidence alone has, nevertheless, been considered sufficient in several cases where no other evidence could be obtained (*c*). The Court, however, acts with great caution in rectifying marriage settlements, and in requiring proof of the exact contract which the parties intended to enter into, because it is impossible to undo the marriage or to remit the parties to the same positions they were in before the marriage (*d*).

(*s*) *Per* Cotton, L.J., *Tucker* v. *Bennett*, 38 Ch. D. p. 9; *Lloyd* v. *Cocker*, 19 B. 140; *Milner* v. *M.*, Ir. R. 8 Eq. 488.

(*t*) *Bradford* v. *Romney*, 30 B. 431; *Bentley* v. *Mackay*, 31 B. 143; 4 De G. F. & J. 279; *Sells* v. *S.*, 1 Dr. & Sm. 42; *Thompson* v. *Whitmore*, 1 John. & H. 268.

(*u*) *Fowler* v. *F.*, 4 De G. & J. 250; *Tucker* v. *Bennett*, 38 Ch. D. p. 15.

(*x*) *Wilkinson* v. *Nelson*, 9 W. R. 393; *Barrow* v. *B.*, 18 B. 529; *Clark* v. *Girdwood*, 7 Ch. D. 9 (C. A.); *Tucker* v. *Bennett*, 38 Ch. D. p. 13 (C. A.); *Maunsell* v. *M.*, 1 L. R. Ir. 529.

(*y*) *Tucker* v. *Bennett*, 38 Ch. D. 1. (*z*) *Ibid.*, p. 13.

(*a*) *Johnson* v. *Bragge*, [1901] 1 Ch. 28; *Tomlinson* v. *Leigh*, 14 W. R. 121; and see *Meeking* v. *M.*, [1927] 1 Ch. 77.

(*b*) See *Tucker* v. *Bennett*, 38 Ch. D. p. 15.

(*c*) *Cook* v. *Fearn*, 27 W. R. 212; *Edwards* v. *Bingham*, 28 W. R. 89; *Hanley* v. *Pearson*, 13 Ch. D. 545; and see *Lovesy* v. *Smith*, 15 Ch. D. 655, at p. 664. See also *Re Daniel's Settlement Trusts*, 1 Ch. D. 375; *Cogan* v. *Duffield*, 2 Ch. D. 44; *Killick* v. *Gray*, 46 L. T. 583; *Re De la Touche's Settlement*, 10 Eq. 599.

(*d*) See *Harris* v. *Pepperell*, 5 Eq. 4.

Glenorchy v. Bosville—Legg v. Goldwire.

A settlement will also be rectified when an improper settlement has been prepared by, or at the instance of, one of the parties, who undertook to prepare a proper one, especially if it were made contrary to the intention of the party whose property was settled (*e*); and *a fortiori* where the party who prepared the settlement in his own favour was the solicitor to the other party and the only one employed (*f*).

When the evidence clearly establishes the mistake and the true intention of the parties *at the time*, the Court will give effect to such intention by rectifying the deed in any manner that may be necessary (*g*).

Where the settlement, *though made before* marriage, is expressly mentioned to be made *in pursuance* or *in performance of the marriage articles*, the settlement will be rectified by them, and it will not be necessary to resort to evidence (*h*).

Where the settlement is made *after* marriage and articles were signed before marriage, the settlement will in all cases, whether it is mentioned to be made in pursuance or performance of articles or not, be controlled and rectified by them. These distinctions as to rectifying settlements by articles (subject to the qualifications laid down by Cranworth, C., in *Bold* v. *Hutchinson*, *supra*) are well stated by Lord Talbot in *Legg* v. *Goldwire*, *supra*, and "though the limitations of the settlement may agree with the words of the article, still, if it does not carry out the *intent*, the Court will reform it" (*i*). Where there was a mere general recital of the articles, and they were not produced, and the settlement had been long acted upon, the Court *declined to reform it* (*k*), but where a post-nuptial settlement recited an intention to benefit the children, the Court so construed the settlement as to supply the omission to provide for daughters (*l*).

An *executed* trust, in favour of volunteers, is irrevocable by the settlor (*m*). A deed of voluntary settlement may, of course, be set

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(*e*) *Corley* v. *Stafford*, 1 De G. & J. 238; *Clark* v. *Girdwood*, 7 Ch. D. 9.

(*f*) *Lovesy* v. *Smith*, 15 Ch. D. 655; cf. *Tucker* v. *Bennett*, 38 Ch. D. 1.

(*g*) See *Wilkinson* v. *Nelson*, 7 Jur. (N.S.) 480; *Re Bird's Trusts*, 3 Ch. D. 214; *Re Daniel's Settlement Trusts*, 1 Ch. D. 375; Vaizey, Sett., Vol. II, p. 1575; *Welman* v. *W.*, 15 Ch. D. 570; Seton (7th ed.), p. 1644.

(*h*) *West* v. *Errissey*, 2 P. W. 349; *Bold* v. *Hutchinson*, 5 De G. M. & G. p. 568.

(*i*) *Cogan* v. *Duffield*, 2 Ch. D. p. 49. (*k*) *Mignon* v. *Parry*, 31 B. 211.

(*l*) *Re Daniel's Sett. Trusts*, 1 Ch. D. 375 (C. A.).

(*m*) Notes to *Ellison* v. *E.*, *infra*; and see *Paul* v. *P.*, 20 Ch. D. 742, 744 (C. A.); *Hall* v. *H.*, L. R. 8 Ch. 430; *Re Pumptree*, [1910] 1 Ch. 609.

aside on the ground of fraud or undue influence (*n*), and the Court has jurisdiction to rectify such a settlement on the ground that it did not carry into effect the intention entertained by the settlor at the date of the settlement (*o*). In these cases no question of *common* mistake in the carrying out of a bargain arises.

A settlement will not be reformed to the prejudice of persons who have acted upon the faith of it, such as incumbrancers (*p*). Nor will a settlement be decreed as against purchasers for value without notice of the articles (*q*); *secus*, where a purchaser takes with notice (*r*). But, "after a lapse of time where there is anything so equivocal or ambiguous in the articles as to render it doubtful how they ought to be effectuated," a settlement will not be decreed (*s*).

Lapse of time, since it destroys or weakens the evidence, may be a bar to relief (*t*); but if the evidence is clear mere delay is not a bar to rectification (*u*).

Misrepresentation, amounting to fraud, on the part of the wife before marriage is no ground for setting aside a settlement, for the marriage was the sole consideration for the settlement, and could not be returned if the settlement were set aside (*x*).

The usual course is to direct the decree or declaration to be indorsed on the settlement, without directing any conveyance (*y*). The costs of all parties will, as a rule, come out of the corpus (*z*). A solicitor cannot be ordered to pay the costs of a suit for rectification, made necessary by his negligence (*a*).

(*n*) See Notes to *Huguenin* v. *Baseley*, Vol. I.

(*o*) *James* v. *Couchman*, 29 Ch. D. 212; *Bonhote* v. *Henderson*, [1895] 1 Ch. 742; 2 *ibid.* 202; *Lackersteen* v. *L.*, 30 L. J. Ch. 5; *Lister* v. *Hodgson*, 4 Eq. 34; *Dutton* v. *Thompson*, 23 Ch. D. 278.

(*p*) *Blackie* v. *Clark*, 15 B. 595.

(*q*) *West* v. *Errissey*, 2 P. W. 349; *Powell* v. *Price*, 2 P. W. 535; *Warrick* v *W.*, 3 Atk. 291.

(*r*) *Davies* v. *D.*, 4 B. 54.

(*s*) *Thompson* v. *Simpson*, 1 Dr. & W. 491; *Abbott* v. *Geraghty*, 4 Ir. Ch. R. 15, 24, 25.

(*t*) *Lloyd* v. *Cocker*, 19 B. p. 145; *Bentley* v. *Mackay*, 31 B. p. 153; *Tucker* v. *Bennett*, 34 Ch. D. p. 761; 38 Ch. D. p. 15.

(*u*) *Wolterbeek* v. *Barrow*, 23 B. p. 431; *Re Morse's Sett.*, 21 B. 174.

(*x*) *Johnston* v. *J.*, 33 W. R. 239 (C. A.).

(*y*) *White* v. *W.*, 15 Eq. 247; *Hanley* v. *Pearson*, 13 Ch. D. 545; Seton (7th ed.), pp. 1644—5, and see forms, pp. 1639—1642.

(*z*) *Stock* v. *Vining*, 25 B. 235.

(*a*) *Clark* v. *Girdwood*, 7 Ch. D. 9 (C. A.).

TRUSTS (RESULTING).

DYER *v.* DYER.

1788. 2 Cox, 92; 2 R. R. 14 (*a*).

Purchase in the name of a Son—Advancement—Resulting Trust (*b*).

Copyhold granted to A and B his wife, and C his elder son, to take in succession for their lives and the life of the survivor. The purchase-money was all paid by A. C is not a trustee of his life interest for A; but takes it beneficially as an advancement from his father. Resulting trust.

In 1737, certain copyhold premises, holden of the manor of Heytesbury, in the county of Wilts, were granted by the lord, according to the custom of that manor, to Simon Dyer (the plaintiff's father) and Mary his wife, and the defendant William his other son, to take in succession for their lives and to the longest liver of them. The purchase-money was paid by Simon Dyer, the father. He survived his wife, and lived until 1785, and then died, having made his will, and thereby devised all his interest in these copyhold premises (amongst others) to the plaintiff, his younger son. The present bill stated these circumstances, and insisted that the whole purchase-money being paid by the father, although, by the form of the grant, the wife and the defendant had the legal interest in the premises for their lives in succession, yet in a Court of equity they were but trustees for the father, and the bill therefore prayed that the plaintiff, as devisee of the father, might be quieted in the possession of the premises during the life of the defendant.

The defendant insisted that the insertion of his name in the grant operated as an advancement to him from his father to

(*a*) In the Exchequer, before Lord Chief Baron Eyre, Baron Hotham, Baron Thompson.

(*b*) As to a trust resulting on failure of the purposes for which conversion has been directed, see *Ackroyd* v. *Smithson*, Vol. I.

the extent of the legal interest thereby given to him. And this was the whole question in the cause.

This case was very fully argued by Mr. Solicitor-General and Ainge, for the plaintiff, and by Burton and Morris, for the defendant.

Eyre, C.B., delivered the judgment of the Court:

The question between the parties in this cause is, whether the defendant is to be considered as a trustee for his father in respect of his succession to the legal interest of the copyhold premises in question, and whether the plaintiff, as representative of the father, is now entitled to the benefit of that trust. I intimated my opinion of the question on the hearing of the cause; and I then indeed entertained very little doubt upon the rule of a Court of equity, as applied to this subject; but as so many cases have been cited, some of which are not in print, we thought it convenient to take an opportunity of looking more fully into them, in order that the ground of our decision may be put in as clear a light as possible, especially in a case in which so great a difference of opinion seems to have prevailed at the bar. And I have met with a case, in addition to those cited, which is that of *Rumboll* v. *R.* (*c*), on April 20, 1761.

The clear result of all the cases, without a single exception, is that the *trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successivè—results to the man who advances the purchase-money.* This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a Court of equity, that this resulting trust *may be rebutted* by circumstances in evidence.

The cases go one step further, and prove that *the circumstance of one or more of the nominees being a child or*

(*c*) 2 Eden, 15.

children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law. Surely, then, it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides.

In the most simple case of all, which is that of a father purchasing in the name of his son, it is said that this shows that the father intended an advancement; and, therefore, the resulting trust is rebutted; but then a circumstance is added to this, namely, that the son happened to be provided for. Then the question is, did the father intend to advance a son already provided for? Lord Nottingham (*d*) could not get over this; and he ruled that in such a case the resulting trust was not rebutted; and in *Pole* v. *P.* (*e*), Lord Hardwicke thought so too; and yet the rule, in a Court of equity, as recognised in other cases, is, that the father is the only judge as to the question of a son's provision; that distinction, therefore, of the son being provided for or not, is not very solidly taken or uniformly adhered to (*f*). It is then said, that a *purchase in the name of a son is a prima facie* advancement (and, indeed, it seems difficult to put it in any other way). In some of the cases, some circum-

(*d*) *Grey* v. *G.*, 2 Swans. 600; *Commissioner of Stamp Duties* v. *Byrnes*, [1911] A. C. 386 (P. C.).

(*e*) 1 Ves. Sen. 76.

(*f*) See *Redington* v. *R.*, 3 Ridg. 190; *Sidmouth* v. *S.*, 2 B. 456.

stances have appeared which go pretty much against that presumption: as where the father has entered and kept possession and taken the rents, or where he has surrendered or devised the estate, or where the son has given receipts in the name of the father; the answer given is, that the father took the rents as guardian of his son. Now, would the Court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered, that these are subsequent acts; whereas the intention of the father in taking the purchase in the son's name must be proved by concomitant acts; yet these are pretty strong acts of ownership, and assert the right and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that the son being under age, he could not give receipts in any other manner; but I own this reasoning does not satisfy me.

In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be, that the first taker might surrender the whole lease, that shall make the other lessees trustees for him; but this custom operates on the legal estate, not on the equitable interest; and, therefore, this is not a very solid argument. When the lessees are to take *successivè*, it is said, that, as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father; and, to be sure, if the circumstance of a child being the nominee is not decisive the other way, there is a great deal of weight in this observation. There may be many prudential reasons for putting in the life of a child in preference to that of any other person; and if in that case it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea: to be sure, taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent; but where the estate must necessarily be taken to lives in succession, the inference is very different. These are difficulties which occur from considering the purchase in the son's name as a circumstance of evidence only. Now,

if it were once laid down that the son was to be taken as a purchaser for a valuable consideration, all these matters of presumption would be avoided.

It must be admitted, that the case of *Dickenson* v. *Shaw* is a case very strong to support the present plaintiff's claim. That came on in Chancery on May 22, 1770. A copyhold was granted to three lives to take in succession, the father, son, and daughter; the father paid the fine; there was no custom stated; the question was, whether the daughter and her husband were trustees during the life of the son, who survived the father. At the time of the purchase the son was nine, and the daughter seven years old. It appeared that the father had leased the premises from three years to three years to the extent of nine years. On this case, Lords Commissioners Smythe and Aston were of opinion that, as the father had paid the purchase-money, the children were trustees for him. To the note I have of this case it is added, that this determination was contrary to the general opinion of the bar, and also to a case of *Taylor* v. *Alston* in this Court. In *Dickenson* v. *Shaw* there was some little evidence to assist the idea of its being a trust, namely, that of the leases made by the father; if that made an ingredient in the determination, then that case is not quite in point to the present; but I rather think that the meaning of the Court was, that the burthen of proof lay on the child; and that the cases, which went the other way, were only those in which the estate was entirely purchased in the names of the children; if so, they certainly were not quite correct in that idea, for there had been cases in which the estates had been taken in the names of the father and son. I have been favoured with a note of *Rumboll* v. *R.* (*g*), before Lord Keeper Henley, on April 20, 1761, where a copyhold was taken for three lives in succession, the father, and two sons; the father paid the fine; and the custom was, that the first taker might dispose of the whole estate (and his Lordship then stated that case fully). Now, this case does not amount to more than an opinion of Lord Keeper Henley; but he agreed with me in considering a child as a *purchaser* for good consideration of an estate bought

(*g*) 2 Eden, 15.

by the father in his name, though a trust would result as against a stranger. It has been supposed that the case of *Taylor* v. *Alston* in this Court denied the authority of *Dickenson* v. *Shaw*. That cause was heard before Lord Chief Baron Smythe, myself, and Mr. Baron Burland, and was the case of an uncle purchasing in the names of himself and a nephew and niece: it was decided in favour of the nephew and niece, not on any general idea of their taking as relations, but on the result of much parol evidence, which was admitted on both sides; and the equity on the side of the nominees was thought to preponderate. Lord Kenyon was in that cause, and his argument went solely on the weight of the parol evidence; indeed, as far as the circumstance of the custom of the first taker's right to surrender, it was a strong case in favour of a trust; however, the Court determined the other way on the parol evidence: that case, therefore, is not material. Another case has been mentioned, which is not in print, and which was thought to be materially applicable to this (*Bedwell* v. *Froome*, before Sir T. Sewell); but that was materially distinguishable from the present; as far as the general doctrine went, it went against the opinion of the Lords Commissioners. His Honor there held, that the copyholds were part of the testator's personal estate, for that it was not a purchase in the name of the daughter; she was not to have the legal estate; it was only a contract to add the daughter's life in a new lease to be granted to the father himself; there could be no question about her being a trustee; for it was as a freehold in him for his daughter's life; but, in the course of the argument his Honor stated the common principles as applied to the present case; and ended by saying that, as *between father and child, the natural presumption was, that a provision was meant.* The anonymous case in 2 Freem. 123 corresponds very much with the doctrine laid down by Sir T. Sewell; and it observes, that an advancement to a child is considered as done for valuable consideration, not only against the father, but against creditors. *Kingdon* v. *Bridges* is a strong case to this point: that is, the valuable nature of the consideration arising on a provision made for a wife or a child; for there the question arose as against creditors.

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I do not find that there are in print more than three cases which respect copyholds, where the grant is to take *successivè: Rundle* v. *R.* (*h*), which was a case perfectly clear; *Benger* v. *Drew* (*i*), where the purchase was made partly with the wife's money; and *Smith* v. *Baker* (*k*), where the general doctrine, as applied to strangers, was recognised; but the case turned on the question, whether the interest was well devised. Therefore, as far as respects this particular case, *Dickenson* v. *Shaw* is the only case quite in point; and then the question is, whether that case is to be abided by? With great reverence to the memory of those two Judges who decided it, we think that case cannot be followed; that it has not stood the test of time or the opinion of learned men; and Lord Kenyon has certainly intimated his opinion against it. On examination of its principles, they seem to rest on too narrow a foundation, namely, that the inference of a provision being intended did not arise, because the purchase could not have been taken wholly in the name of the purchaser. This, we think, is not sufficient to turn the presumption against the child. If it is meant to be a trust, the purchaser must show that intention by a declaration of trust; and we do not think it right to doubt whether an estate in succession is to be considered as an advancement when a moiety of an estate in possession certainly would be so. If we were to enter into all the reasons that might possibly influence the mind of the purchaser, many might perhaps occur in every case upon which it might be argued that an advancement was not intended; and I own it is not a very prudent conduct of a man just married to tie up his property for one child, and preclude himself from providing for the rest of his family; but this applies equally in case of a purchase in the name of the child only. Yet that case is admitted to be an advancement; indeed, if anything, the latter case is rather the strongest, for there it must be confined to one child only. We think, therefore, that these reasons partake of too great a degree of refinement, and should not prevail against a rule of property which is so well established as to become a landmark, and which, whether right or wrong, should be carried throughout.

(*h*) 2 Vern. 264.
(*i*) 1 P. W. 781.
(*k*) 1 Atk. 385.

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This bill must, therefore, be dismissed; but, after stating that the only case in point on the subject is against our present opinion, it certainly will be proper to dismiss it without costs.

NOTES.

1. Purchases made in the name of strangers.—Resulting trust. Voluntary conveyance or transfer, 762.
2. How resulting trusts may be rebutted, 763.
3. Purchase in name of child, wife, etc.—Advancement, p. 765.
4. Evidence to rebut or support the presumption of advancement, p. 772.
5. When purchases in names of third parties are void or voidable, p. 777.
6. Purchase with trust money. Following it, p. 777.

1. Purchases made in the name of Strangers.—Resulting Trust.

The leading case deals with resulting trusts arising on purchases in the names of third persons, and with the exception from the general rule in favour of wives and children. The foundation of the doctrine is the desire of Courts of equity to give effect to the intention of the parties, for "trusts are . . . created, or implied, or held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, express or implied (*a*). Where a trust results merely by implication of law, in cases where no intention to create a trust has been expressed, it may be rebutted by parol evidence (*b*), in other cases of resulting trusts that evidence is inadmissible (*c*).

"The clear result," said Eyre, C.B., in the principal case "of all the cases, without a single exception, is, that *the trust* of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others, jointly, or in the names of others without that of the purchaser; whether in one name or several, whether jointly or *successivè, results to the man who advances the purchase-money;* and it goes on a strict analogy to the rule of common law, that, where a feoffment is made without consideration, the use results to the feoffor."

And the principle applies to personal as well as real estate, to a

(*a*) *Per* Lindley, L.J., *Standing* v. *Bowring*, 31 Ch. D., p. 289.
(*b*) See Note 2, *infra*.
(*c*) Where a person is constituted trustee in terms but no trusts are declared, or when trusts are declared but fail, see Lewin (13th ed.), pp. 163-4.

bond (*d*), to an annuity (*e*), to a policy of insurance (*f*), to a yacht (*g*), or other chattel interest (*h*). The same rule applies whether the conveyance is taken in one name or several jointly (*i*), or *successivè* (*k*).

The doctrine is applicable also to cases where two or more persons advance the purchase-money jointly, and take a conveyance to one of them (*l*); for "what is there applicable to an advance by a single individual, that is not equally applicable to a joint advance under similar circumstances?" (*m*). But the doctrine, being founded upon equitable presumption, may be rebutted, so that on a joint conveyance to A and B, A providing all the purchase-money, if there is clear evidence of A's intention, B surviving A will take beneficially (*n*).

If on a grant of copyholds to B, C, and D, *successivè* for their lives, the fine be paid by A, the equitable interest therein would result to A; and it was ultimately decided that upon his death intestate, the personal representative of A was entitled thereto (*o*).

Cases in which no Trust will Result.—Lord Hardwicke in *Crop* v. *Norton* (*p*), held, that since the consideration for the renewal, taken in the name of X, of a lease for lives, was partly the surrender of the old lease by X, and only partly a sum of money advanced by Y, there was no resulting trust for Y (*q*). There will be no resulting trust if the policy of an Act of Parliament would be thereby defeated. Thus, it was held that no trust resulted in favour of a person advancing the purchase-money of a ship registered in the name of another; for the register, according to the policy of the old Registry Acts, was conclusive evidence of ownership, both at law

(*d*) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.

(*e*) *Mortimer* v. *Davies*, cited *Rider* v. *Kidder*, 10 V. 365.

(*f*) *Re A Policy, etc.*, [1902] 1 Ch. 282; *Re Engelbach*, [1924] 2 Ch. 348.

(*g*) *The Venture*, [1908] P. 218, 229 (C. A.).

(*h*) *Loyd* v. *Read*, 1 P. W. 607; *Sidmouth* v. *S.*, 2 B. 447; *Garrick* v. *Taylor*, 29 B. 79; *Beecher* v. *Major*, 2 Dr. & Sm. 431; *Ex p. Houghton*, 17 V. 253; *James* v. *Holmes*, 4 De G. F. & J. 470.

(*i*) See *Ex p. Houghton*, 17 V. 253; 11 R. R. 73; *Rider* v. *Kidder*, 10 V. 360.

(*k*) See *Howe* v. *H.*, 1 Vern. 415; *Withers* v. *W.*, Amb. 151; *Smith* v. *Baker*, 1 Atk. 385.

(*l*) *Wray* v. *Steele*, 2 V. & B. 388; and see *The Venture*, [1908] P. 218.

(*m*) And see *Re Ryan*, 3 Ir. R. Eq. 237.

(*n*) *Garrick* v. *Taylor*, 4 De G. F. & J. 159; 10 W. R. 49.

(*o*) See *Howe* v. *H.*, 1 Vern. 415; *Rundle* v. *R.*, 2 Vern. 252, 264; *Withers* v. *W.*, Amb. 151; *Goodright* v. *Hodges*, Watk. Cop. 227; *Rumboll* v. *R.*, 2 Eden, 15.

(*p*) 9 Mod. 233, 235.

(*q*) Cf. *Aveling* v. *Knipe*, 19 V. 445.

and in equity. "The Registry Acts," says Eldon, L.C., "were drawn upon this policy: that it is for the public interest to secure evidence of the title to a ship, from her origin to the moment in which you look back to her history, how far throughout her existence she has been *British* built and *British* owned; and it is obvious, that, if where the title arises by act of the parties, the doctrine of implied trust in this Court is to be applied, the whole policy of these Acts may be defeated" (*r*). There were, however, some exceptions to the rule under the old Registry Acts, for instance, where a member of a firm registered a ship in his own name, he was a trustee for the firm (*s*); and where a person having no interest in a ship transferred it to a person, in whose name it was registered by mistake, the rightful owner was not deprived of his property therein (*t*). So, if letters of administration were obtained to the estate of a shipowner, and the administrator transferred the ship into his own name, and afterwards a will was discovered, and probate granted to the executor, it could not be contended that the executor was precluded from obtaining the ship, because another person had *bona fide*, but by mistake, been registered as owner (*u*).

Under the Merchant Shipping Act, 1894 (*x*), as under the repealed Acts, 1854—1880 (*y*), equities are recognised and may be enforced (*z*). So also are they under the Patents and Designs Act, 1907 (*a*). And by the Companies Act, 1862, s. 30, it was provided, and is now provided by the Companies (Consolidation) Act, 1908, s. 27, that no notice of any trust is to be entered in the register; nevertheless, as between the registered owner and third parties the equitable title will be duly recognised (*b*).

Illegality.—A trust will not, it seems, result in favour of a person who has purchased an estate in the name of another in order

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(*r*) *Ex p. Yallop*, 15 V. 68; 10 R. R. 24; see also *Ex p. Houghton*, 17 V. 251; 11 R. R. 73; *Curtis* v. *Perry*, 6 V. 739; 4 R. R. 28; *Slater* v. *Willis*, 1 B. 354.

(*s*) *Holderness* v. *Lamport*, 29 B. 129.

(*t*) *Ibid.*

(*u*) *Ibid.* See also and consider *Armstrong* v. *A.*, 21 B. 71, 78.

(*x*) 57 & 58 Vict. c. 60, ss. 56 and 57.

(*y*) 17 & 18 Vict. c. 104, s. 37, amended by 25 & 26 Vict. c. 63, s. 3; 43 & 44 Vict. c. 18, s. 2.

(*z*) See *Chasteauneuf* v. *Capeyron*, 7 A. C., p. 132. *The Venture*, [1908] P. 218, 229 (C. A.).

(*a*) 7 Edw. 7, c. 29, s. 71, sub-s. 3.

(*b*) *Shropshire Union, etc., Co.* v. *The Queen*, L. R. 7 H. L. 496; *G. E. Ry. Co.* v. *Turner*, L. R. 8 Ch. 149; and see Buckley (10th ed.), pp. 74 *et seq.* Cf. *Coleman* v. *L. C. and W. Bank*, [1916] 2 Ch. 353.

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to give him a vote in electing a member of Parliament (*c*). But in all cases in which the illegality of the transaction is set up in order to deprive a person of relief in equity, there must be such a degree of illegality in the transaction as to be free from all doubt (*d*). Thus in *Barton* v. *Muir* (*e*), a trust was held to result in favour of a person who had purchased lands in New South Wales in the name of a third party, such transaction being neither immoral nor contrary to public policy nor to the policy of the particular Act. But if the transaction is illegal or against conscience, then the Court may refuse to move in the matter, and the maxim *melior est conditio possidentis* will prevail (*f*). Thus in *Worthington* v. *Curtis* (*g*), a father insured the life of his son for £500 alleging that it had been agreed between himself and his son that he should make such assurance in consideration of his paying a legacy to his son. The policy was taken on the life of the son in favour of his executors and administrators. All the premiums on the policy were paid by the father out of his own money. The son died intestate; administration was granted to the father. The insurance company paid the £500 to the father. Creditors then commenced an action against him for administration, claiming that this policy money was an advancement to the son, or that if he claimed it for himself it was illegal, under 14 Geo. 3, c. 48. The Court of Appeal held that the evidence rebutted the presumption in favour of advancement, and that the statute was a defence which was available to the company only; but that if that were not so, and there was any illegality in the matter, then the maxim, *melior est conditio*, etc., applied (*h*). But if property is produced by the payments of A of which he has declared a trust in favour of B, and the trust in favour of B fails because by reason of B's criminal act it would be against public policy to enforce it, a resulting trust will arise in favour of A (*i*).

If a father takes a policy on his own life in the name of his son, paying the premiums thereon out of his own money, it will be, in the absence of evidence of a contrary intention, held to be an

(*c*) *Groves* v. *G.*, 3 Y. & J. 163, 175. Cf. *Crichton* v. *C.*, 13 R. 770.
(*d*) See *Cleaver* v. *Mutual Reserve Fund Life Ass.*, [1892] 1 Q. B. 147, 151.
(*e*) L. R. 6 P. C. 134, 145. Cf. *Tooth* v. *Power*, [1891] A. C. 284.
(*f*) *Brackenbury* v. *B.*, 2 J. & W. 391; *Ex p. Yallop*, 15 V. 71; 10 R. R. 24; *Worthington* v. *Curtis*, 1 Ch. D. 419; *Re Great Berlin, etc., Co.*, 26 Ch. D. 616.
(*g*) *Supra.*
(*h*) And see *Att.-Gen.* v. *Murray*, [1904] 1 K. B. 165.
(*i*) *Cleaver* v. *The Mutual, etc.* (*The Maybrick Insurance Case*), [1892] 1 Q. B. 147, 158.

advancement (*k*). In *Field* v. *Lonsdale* (*l*), which is not inconsistent with the principle of *Ex p. Yallop* (*m*), a person having deposited moneys in his own name in a savings bank to the full extent allowed by Act of Parliament, made further deposits to an account in his own name " in trust for " his sister, but no notice of the investment was given to her. By the terms of the Act he retained a control over the whole fund. Langdale, M.R., held that the only intention was to evade the provisions of the Act, and that on the death of the depositor his sister was not entitled. That is to say, it being the manifest intention of the depositor, as the Court held, not to create a trust, no trust could be presumed; or if there was anything against public policy in the transaction, which does not seem to have been suggested, then the Court held its hand, and left the money where it was.

Proving Payment of the Purchase-Money.—If the advance of the purchase-money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made. Thus, if A sold an estate to C, and *the consideration was expressed to be paid by B*, and the conveyance made to B, the Court would allow parol evidence to prove that the money was paid by C (*n*). We may, therefore, consider that these authorities overrule the older cases in which it was held that parol evidence could not be admitted to prove payment of purchase-money so as to raise a resulting trust, on the ground that the admission of such evidence would be contrary to the Statute of Frauds (*nn*), for the trust which results to the person paying the purchase-money and taking a conveyance in the name of another, is a trust resulting by operation of law, and trusts of that nature were expressly excepted from the statute (*o*).

Where the trust does not arise on the face of the deed itself, the parol evidence must prove the fact of the advance of the purchase-money very clearly (*p*); and in particular is this the case if the

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(*k*) *Re Richardson*, 47 L. T. 514. (*l*) 13 B. 78. (*m*) 15 V. 71.

(*n*) *Knight* v. *Pechey*, Dick. 327; Sug. V. & P. 910 (11th ed.); *Lench* v. *L.*, 10 V. 517; see also *Ryall* v. *R.*, 1 Atk. 59; *S. C.* Amb. 413; *Willis* v. *W.*, 2 Atk. 71; *Lane* v. *Dighton*, Amb. 409; *Groves* v. *G.*, 3 Y. & J. 163.

(*nn*) 29 Car. 2, c. 3, s. 7, replaced by section 53, sub-section 1 of the L. P. Act, 1925.

(*o*) Section 8; replaced by section 53, sub-section 2 of L. P. Act, 1925.

(*p*) *Newton* v. *Preston*, Pr. Ch. 103; *Gascoigne* v. *Thwing*, 1 Vern. 366; *Willis* v. *W.*, 2 Atk. 71; *Goodright* v. *Hodges*, Watk. Cop. 227; *Groves* v. *G.*, 3 Y. & J. 163.

trust is set up after the death of the nominal purchaser (*q*). If the nominal purchaser denies that the purchase-money was in fact paid by the real purchaser, parol evidence is admissible in contradiction of such denial (*r*).

In *Bartlett* v. *Pickersgill* (*s*), parol evidence was held inadmissible to prove a verbal agreement of an agent to purchase an estate for his principal, where the agent having purchased the estate for himself, *with his own money*, denied the agreement. But this case, which was decided before it had been established that the Statute of Frauds does not prevent the proof of a fraud, can no longer be considered law (*t*). In *Rochefoucauld* v. *Boustead* (*u*), the plaintiff's case was that the defendant had purchased estates as trustee for her subject to a lien for his advances. The defendant pleaded, *inter alia*, that the estates were conveyed to him as beneficial owner, and that the alleged trust was not evidenced by any writing signed by the defendant, and that the Statute of Frauds was a defence. Kekewich, J., held that no trust was proved, and dismissed the action on the first ground. The Court of Appeal were of opinion that the evidence completely proved that the defendant purchased as a trustee for the plaintiff, and held that even if certain letters signed by the defendant did not contain enough to satisfy the Statute of Frauds, parol evidence was admissible; and as the whole of the evidence taken together established that the defendant had purchased as a trustee, the plaintiff succeeded. Lindley, L.J., in delivering the judgment of the Court, said, " It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and

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(*q*) See Lewin (13th ed.), p. 181, *Lench* v. *L.*, 10 V. 511, 517; Sugd. (11th ed.), p. 910; *Mercier* v. *M.*, [1903] 2 Ch. 98.

(*r*) See *Gascoigne* v. *Thwing*, 1 Vern. 366; *Newton* v. *Preston*, Pr. Ch. 103; *Edwards* v. *Pike*, 1 Eden, 267; *Cooth* v. *Jackson*, 6 V. 39; 10 R. R. 10, 190, *nom. Innes* v. *I.*: *sed vide Skett* v. *Whitmore*, 2 Freem. 280.

(*s*) 1 Eden, 515; 1 R. R. 1.

(*t*) *Rochefoucauld* v. *Boustead*, [1897] 1 Ch., p. 206.

(*u*) [1897] 1 Ch. 196.

relying upon the form of conveyance and the statute, in order to keep the land himself."

Voluntary Conveyances and Transfers.—On a voluntary conveyance or transfer of the legal estate or interest in any property, whether real or personal, to a stranger (*x*), a resulting trust of the whole beneficial interest is *presumed* in favour of the grantor or transferor, in the absence of any expression of intention that the grantee or tranferee is to take beneficially; and the rule seems to be the same as to both real and personal estate.

Real Estate.—In *Duke of Norfolk* v. *Browne* (*y*), Lord Keeper Somers, held that on a voluntary grant of the next avoidance of a benefice there was a resulting trust to the grantor. No trusts were declared, and the grantee did not even know of the making of the grant. This decision is in accordance with the earlier decision of Nottingham, C., in *Elliot* v. *E.* (*z*), with his clearly expressed *dicta* in *Grey* v. *G.* (*a*), and with the decisions that contrary to the general rule a resulting trust would not arise when the voluntary conveyance was to a child unprovided for (*b*). On the other hand there are emphatic *dicta* to the contrary in the judgments of Hardwicke, C., in *Young* v. *Peachey* (*c*) and *Lloyd* v. *Spillet* (*d*); and his view is supported by a *dictum* of James, L.J., in *Fowkes* v. *Pascoe* (*e*).

It is to be observed that under section 60, sub-section 3 of the Law of Property Act, 1925, in the case of a voluntary conveyance (*f*) by an instrument executed after the commencement of the Act, a resulting trust for the grantor is not to be implied merely by

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(*x*) *I.e.*, to a person other than the wife or a child of the transferor.

(*y*) (1697), Pr. Ch. 80; and see (1735), *R.* v. *Williams*, Bunb. 342 (leaseholds).

(*z*) (1677), 2 Ch. Cas. 231.

(*a*) (1677), 2 Swans., at p. 598, extracted from Lord Nottingham's MSS.; and see also *per* Jessel, M.R., in *Strong* v. *Bird*, 18 Eq. 315, at p. 318; Lewin (12th ed.), p. 164.

(*b*) *Elliot* v. *E.*, 2 Ch. Cas. 231; *Jennings* v. *Selleck* (1687), 1 Vern. 467 (leasehold).

(*c*) (1741), 2 Atk. 254.

(*d*) (1740), 2 Atk. 148; Barn. C. 384.

(*e*) L. R. 10 Ch. 343, p. 348. Text-book writers differ greatly upon this question; see for the view adopted in the text, Lewin (13th ed.), p. 158; Williams, R. P. (21st ed.), pp. 183, 184; Maitland on Equity, p. 79, and see note, p. 413; against Sanders, Uses (5th ed.), 365, whose statement was accepted by the late Mr. Joshua Williams, see Williams, R. P. (15th ed.), p. 195; Underhill on Trusts (8th ed.), p. 159.

(*f*) The Act contains a very wide definition of the term "conveyance."

reason that the property (*ff*) is not expressed to be conveyed for the use or benefit of the grantee.

Personal Estate.—It is clear that a voluntary transfer of stock into the names of the transferor and a stranger makes that stranger a trustee by implication for the transferor. In *Standing* v. *Bowring* (*g*) the plaintiff *transferred* Consols into the joint names of herself and her godson, to whom she was not *in loco parentis*. It was held that there was *prima facie* a resulting trust, which was, however, displaced by evidence of intention.

Doubt has been expressed whether the same result would follow where the transfer is made to a stranger alone. In *George* v. *Howard* (*h*), Richards, C.B., said, "if I deliver over money or transfer stock to another, even although he should be a stranger, it would be *prima facie* a gift." In that case an intestate had transferred stock into the joint names of himself and the husband of one of his nieces, and, as it was found, with an expressed intention to give. In *Fowkes* v. *Pascoe* (*i*), a lady purchased stock in the names of herself and the son by a second marriage of her deceased son's widow. Jessel, M.R. (*j*), held that there was a resulting trust, and said that he "did not understand that the law of the Court made any difference between a transfer and a purchase—a purchase of stock in the joint names of the beneficial owner and another, or a transfer from that beneficial owner in the joint names of himself or herself, or a transfer to a third name from the beneficial owner into another name. In either case, in the absence of evidence to the contrary, there was a resulting trust in favour of the beneficial owner." The Court of Appeal reversed the decision of Jessel, M.R., on the facts, holding that the evidence rebutted any resulting trust, James, L.J., assuming for the purpose of his judgment that there was no distinction between a transfer and a purchase of stock.

2. How Resulting Trusts may be Rebutted.

All resulting trusts which arise simply from equitable presumption, may be rebutted by parol evidence: thus it may be shown that it was the *intention*, at the time of the purchase, of the person

(*ff*) "Property" includes property of every description; see section 205, subsection 1 (xx) of L. P. Act, 1925.

(*g*) 31 Ch. D. 282; see *Batstone* v. *Salter*, L. R. 10 Ch. 431; and cf. *Re Howes*, 21 T. L. R. 501.

(*h*) 7 Price, 646, at p. 651.

(*i*) L. R. 10 Ch. 343.

(*j*) *Ibid.*, at p. 345.

who advanced the purchase-money, that the person to whom the property was conveyed or transferred either solely or jointly with such person should take beneficially (*k*). And the person who paid the money cannot alter such intention at a subsequent period (*l*).

These trusts may be rebutted as to part, and prevail as to the remainder. Thus, where a person has advanced the purchase-money, and has taken a transfer of stock or the conveyance of an estate in the name of a stranger, upon proof of the intention of the person advancing the money to confer upon the nominee a life interest in the stock or estate, the resulting trust will be rebutted as to the life interest, but will prevail as to the remainder (*m*). And the resulting trust may prevail as to a life interest, but be rebutted as to the remainder. This is often the case when a purchase or transfer of stock has been made by the purchaser in or to the joint names of himself and a stranger (*n*). And in such cases, where the presumption in favour of a resulting trust is either wholly or partially rebutted by evidence, any subsequent purchase or transfer in the same name or names will be considered as made for the same purpose (*o*).

The mere receipt of the income of the property transferred is not of itself sufficient to show that the transferor did not intend to confer a beneficial interest on the transferee (*p*). And parol evidence of interested parties is admissible to rebut a resulting trust, for "where the Court of Chancery is asked, on an equitable assumption or presumption, to take away from a man that which by the common law of the land he is entitled to, he surely has a right to say, 'listen to my story as to how I came to have it, and judge that story with reference to all the surrounding facts and circumstances'" (*q*).

(*k*) *Goodright* v. *Hodges*, 1 Watk. Cop. 227; *Rider* v. *Kidder*, 10 V. 364; *Rundle* v. *R.*, 2 Vern. 252; see Order, n. (1), *ibid.*; *Redington* v. *R.*, 3 Ridg. P. C. 181; *Deacon* v. *Colquhoun*, 2 Dr. 21; *Wheeler* v. *Smith*, 1 Gif. 300; *Nicholson* v. *Mulligan*, 3 Ir. R. Eq. 308; *Re Rowe*, 58 L. J. Ch. 703; *Fowkes* v. *Pascoe*, *supra*; *Standing* v. *Bowring*, *supra*.

(*l*) *Groves* v. *G.*, 3 Y. & J. 163; *Redington* v. *R.*, 3 Ridg. P. C. 106; *Gooch* v. *G.*, 62 L. T. 384.

(*m*) *Lane* v. *Dighton*, Amb. 409; *Rider* v. *Kidder*, 10 V. 368; *Benbow* v. *Townsend*, 1 My. & K. 506.

(*n*) See *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343; *Standing* v. *Bowring*, 31 Ch. D. 282; and see *Re Shields*, [1912] 1 Ch. 591.

(*o*) See *Fowkes* v. *Pascoe*, L. R. 10 Ch., at p. 354, judgment of Mellish, L.J.

(*p*) *George* v. *Howard*, 7 Price, 646; *Christy* v. *Courtenay*, 13 B. 96; *Batstone* v. *Salter*, 19 Eq. 250; L. R. 10 Ch. 431.

(*q*) *Per* James, L.J., in *Fowkes* v. *Pascoe*, L. R. 10 Ch., at p. 349; cf. *Re Scott*, [1903] 1 Ch. 1; *Re Shields*, *supra*.

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The presumption of a resulting trust will not be raised, after acquiescence for a great length of time in the enjoyment of the property by the person in whose name it was purchased, by the person advancing the purchase-money (*r*).

Where there is an express trust declared, upon a purchase made in the name of strangers (*s*), though but by parol, there can be no resulting trust; for resulting trusts, though saved by the Statute of Frauds (*t*), are only saved and left as they were before the statute, and a bare declaration by parol, before then, would have prevented any resulting trust (*u*).

3. Purchase in Name of Child, Wife, etc.—Advancement.

A purchase by a father in the name of his child (*x*), of a husband in the name of a wife (*y*), is a *circumstance of evidence* (see the principal case) which displaces the equitable presumption of a resulting trust. It is evidence of an *intention* to benefit the wife or child, and may be met with other evidence tending to show a contrary intention. It would thus seem more accurate to say that such a relationship between the donor and the donee is *evidence prima facie* of an intention to make a gift, rather than that it raises a *presumption* of advancement; for presumption of law, or resulting trust, arises only where there is no other explanation or evidence of what was intended by the transaction (*z*). "I remember," says Lord Eldon, "the case of *Dyer* v. *D.*, which was very fully considered; and the Court meant to establish this principle, *viz.*, admitting the clear rule that, where A purchases in the name of B, A paying the consideration, B is a trustee, notwithstanding the Statute of Frauds, that rule does not obtain where the purchase *is in the name of a son; that purchase is an advancement prima facie;* and in this sense, that this principle of law and presumption is not to be frittered away by nice refinements. Therefore, if the

(*r*) *Delane* v. *D.*, 7 Bro. P. C. 279. See also, *Groves* v. *G.*, 3 Y. & J. 172; *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

(*s*) *Ayerst* v. *Jenkins*, 16 Eq. 275, distinguished in *Phillips* v. *Probyn*, [1899] 1 Ch. 811.

(*t*) 29 Car. 2, c. 3, s. 8; replaced by section 53, sub-s. 2 of the L. P. Act, 1925.

(*u*) See *Bellasis* v. *Compton*, 2 Vern. 294; Lewin (13th ed.), p. 44.

(*x*) *Dyer* v. *D.*, *l.c.*

(*y*) *Kingdon* v. *Bridges*, 2 Vern. 67; *Rider* v. *Kidder*, 10 V. 360; *Re Eykyn's Trusts*, 6 Ch. D. 115.

(*z*) See judgment of Eyre, C.B., in the principal case, of Cairns, C., in *Batstone* v. *Salter*, L. R. 10 Ch. 431, at p. 433; and of Jessel, M.R., in *Bennet* v. *B.*, 10 Ch. D., p. 476.

purchase was of a fee-simple immediately, *prima facie* the son would take; so, if it was the purchase of a reversion; and it is very difficult, upon the mere circumstance of the proximity or possible remoteness of possession, to do that away. Nothing could be stronger than the circumstance in *Dyer* v. *D.*, that the purchaser had actually devised it. *He certainly took it to be his own; but he happened to mistake the rule* " (*a*).

The presumption also arises *prima facie* in favour of any person with regard to whom the person advancing the money has placed himself *in loco parentis* (*b*); and for a definition of this term, see the judgment of Jessel, M.R., in *Bennet* v. *B.* (*c*), and of James, L.J., in *Fowkes* v. *Pascoe* (*d*). Thus in *Beckford* v. *B.* (*e*), an illegitimate son; in *Ebrand* v. *Dancer* (*f*), a grandchild; and in *Currant* v. *Jago* (*g*), the nephew of a wife, were held entitled to property purchased in their names, on the ground that an *advancement* was intended. In *Standing* v. *Bowring* (*h*), a lady was held not to stand *in loco parentis* to a person who was the nephew of her first husband and her godson, but the resulting trust was there displaced by evidence establishing a gift.

But the mere fact that a grandfather has placed himself *in loco parentis* towards his *illegitimate* grandson during the life of his father, will not of itself alone raise a presumption that a purchase in the name of such illegitimate grandson was intended for his advancement (*i*).

The presumption of advancement also arises upon the purchase in the name of a wife (*k*); or when there is a purchase by a husband in the joint names of himself and his wife (*l*); or in the joint names

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(*a*) *Finch* v. *F.*, 15 V. 50; see also *Murless* v. *Franklin*, 1 Swans. 17, 18; *Grey* v. *G.*, 2 Swans. 597; *Sidmouth* v. *S.*, 2 B. 454; *Christy* v. *Courtenay*, 13 B. 96; *Williams* v. *W.*, 32 B. 370; *Tucker* v. *Burrow*, 2 Hem. & M. 515, 524.

(*b*) See notes to *Ex p. Pye*, *ante*. *Re Orme*, 50 L. T. 54.

(*c*) 10 Ch. D., p. 477.

(*d*) L. R. 10 Ch., at p. 350.

(*e*) Lofft. 490.

(*f*) 2 Ch. Ca. 26.

(*g*) 1 Coll. Ch. R. 261.

(*h*) 31 Ch. D. 282, 287.

(*i*) *Tucker* v. *Burrow*, 2 Hem. & M. 515; and see *Forrest* v. *F.*, 13 W. R. 380; *Hart* v. *H.*, [1877] W. N. 184; and cf. *Powys* v. *Mansfield*, 3 My. & C. 359.

(*k*) *Kingdon* v. *Bridges*, 2 Vern. 67; *Christ's Hospital* v. *Budgin*, 2 Vern. 683; *Back* v. *Andrew*, 2 Vern. 120; *Glaister* v. *Hewer*, 8 V. 199; *Rider* v. *Kidder*, 10 V. 367; *Low* v. *Carter*, 1 B. 426; *Bone* v. *Pollard*, 24 B. 283; *Hepworth* v. *H.*, 11 Eq. 10; and see *Gosling* v. *G.*, 3 Dr. 335; *Hoyes* v. *Kindersley*, 2 Sm. & G. 195.

(*l*) *Re Gadbury*, 11 W. R. 895.

Dyer v. Dyer.

of himself and his wife and child (*m*). In *Re Eykyn's Trusts* (*n*), by a marriage settlement made in 1847 (*o*), certain funds were vested in A, B, and C upon trust for the wife for life, then to the husband for life, and after the death of both for the children of the marriage. In 1851 the husband invested £4,000 in the purchase of certain railway debentures in the joint names of himself, his wife and A; and he purchased some shares in the joint names of himself, his wife, A and B. The dividends were received by the husband during his life. He died in 1858. It was held that there was no resulting trust in respect of the shares or debentures; nor were they to be deemed an accretion to the marriage settlement funds, but that the same belonged as an advancement to the widow absolutely.

Where the husband makes an investment, such as money or stock, in the names of himself and his wife, it is an advancement for the benefit of the wife absolutely if she survives her husband (*p*), but if he survives her, then it reverts to him as joint tenant with his wife (*q*). Where the investment is in the name of the husband, wife, *and a stranger*, the stranger must be a trustee for the survivor of the husband and wife (*r*).

Although "any moralist would say that a man was bound to make provision for the woman with whom he had cohabited" (*s*), equity does not raise the presumption of advancement when the purchaser makes the purchase in the names of himself and a woman with whom he was cohabiting (*t*), or with whom he had gone through the mere form of marriage, as in the case of a marriage with a person within the prohibited degrees (*u*).

It seems formerly that the *presumption* of advancement would not arise from the purchase by a *married woman* out of her separate estate in the names of her children, because a married woman was

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(*m*) *Devoy* v. *D.*, 3 Sm. & Gif. 403; cf. *Smith* v. *Warde*, 15 Si. 56.

(*n*) 6 Ch. D. 115.

(*o*) In the report in the Law Reports the date of the marriage settlement is erroneously given as 1874.

(*p*) *Re Young*, 28 Ch. D. 705.

(*q*) *Re Eykyn's Trusts*, 6 Ch. D., p. 118; *Dummer* v. *Pitcher*, 2 My. & K. 262.

(*r*) *Re Eykyn's Trusts*, 6 Ch. D., p. 119. See also *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343.

(*s*) *Per* Page Wood, V.-C., in *Soar* v. *Foster*, 4 K. & J., p. 161.

(*t*) *Rider* v. *Kidder*, 10 V. 360.

(*u*) See, *e.g.*, *Soar* v. *Foster*, 4 K. & J. 152, a case arising before the Deceased Wife's Sister's Marriage Act, 1907.

under no legal obligation to provide for her children (*x*). But upon proof of the *intention* to advance by a married woman making a purchase out of her separate estate in the name of her niece, the niece was held to be absolutely entitled to the property (*y*).

A widowed mother is, it seems, a person standing in such a relation to her child as to raise the presumption in favour of her child : see *Sayre* v. *Hughes* (*z*). There Susannah Barling, widow, after making her will in favour of her two daughters, transferred East India Stock, which had stood in her own name, into the names of herself and her unmarried daughter, and died. Stuart, V.-C., held that there was a presumption of intended benefit to the unmarried daughter, which was unrebutted, and that the stock belonged absolutely to her, and after referring to *Re De Visme* (*a*), said : " But maternal affection, as a motive of bounty is, perhaps, the strongest of all, although the duty is not so strong as in the case of a father, inasmuch as it is the duty of a father to advance his child. That, however, is a moral obligation and not a legal one. In *Dyer* v. *D.*, Eyre, C.B., showed that the relationship between parent and child is only a circumstance of evidence * * * The word ' father ' does not occur in Lord Chief Baron Eyre's judgment, and it is not easy to understand why a mother should be presumed to be less disposed to benefit her child in a transaction of this kind than a father." And see *Garrett* v. *Wilkinson* (*b*), where Shadwell, V.-C., assumes that the rule between mother and son is the same as that between father and son.

A like decision was come to in *Batstone* v. *Salter* (*c*), where a widow transferred stock into the names of herself, her daughter, and defendant (the daughter's husband), and it was held by Hall, V.-C., upon the evidence—which consisted of the statement of the defendant in his answer, unsupported by any other evidence, that the transferor intended to benefit him (*d*)—that the son-in-law was entitled to the stock; and on appeal the decision was upheld, Lord Cairns observing : " Whatever presumption there is in favour of an unmarried daughter in the case of a transfer to her, the same

(*x*) *Re De Visme*, 2 De G. J. & S. 17.
(*y*) *Beecher* v. *Major*, 2 Dr. & Sm. 431; 13 W. R. 1054.
(*z*) 5 Eq. 376, commented on in *Bennet* v. *B.*, 10 Ch. D. 474; and discussed in *Re Orme*, 50 L. T. 51.
(*a*) 2 De G. J. & S. 17.
(*b*) 2 De G. & Sm., p. 246.
(*c*) 19 Eq. 250; L. R. 10 Ch. 431.
(*d*) See L. R. 10 Ch., p. 432.

presumption arises in this case, where the transfer was to a married daughter and her husband."

In *Fowkes* v. *Pascoe* (*e*), a testatrix, a widow, purchased stock in the name of herself and the son by a second marriage of her deceased son's widow. On evidence which very clearly established the fact that the testatrix looked upon her daughter-in-law and her children as if they were her own, it was held by James and Mellish, L.JJ., overruling Jessel, M.R., that the evidence in favour of gift, and against trust, was conclusive.

In the case, however, of *Bennet* v. *B.* (*f*), a widowed mother who had a jointure of £1,000 a year agreed with her son, who was entitled to the income of the estate upon which the jointure was charged, to apply to an insurance office for a loan of £3,000 upon a mortgage of her jointure and a policy on her life. This loan was made for the son's benefit, and was handed over to him. He predeceased his mother, and she had to pay the premiums. She claimed, as a creditor, against his estate for £3,000. Jessel, M.R., held that there was strong evidence to show that a loan, and not a gift, was intended, and therefore the presumption that it was a gift did not exist (*g*); and referring to *Sayre* v. *Hughes* (*h*), the learned Judge said, " I should have had no hesitation in deciding that case in the same way as the Vice-Chancellor did, having regard to the evidence; I should *not* have arrived at the same conclusion *irrespective of the evidence.* We then arrive at this conclusion: that in the case of a mother—this is the case of a *widowed* mother—it is easier to prove a gift than in the case of a stranger; in the case of a mother very little evidence beyond the relationship is wanted, there being very little additional motive required to induce a mother to make a gift to her child."

In a previous case the same Judge decided that the presumption of a gift does not arise in the case of a *stepmother*, but he seems there to have been of opinion that it did so in the case of a mother (*i*).

The alteration in the law by the Married Women's Property Act, 1882, by which a married woman having separate property is rendered liable to the maintenance of her children (section 21), may

(*e*) L. R. 10 Ch. 343.
(*f*) 10 Ch. D. 474.
(*g*) *Ibid.*, p. 480.
(*h*) 5 Eq. 376, *supra*, p. 768.
(*i*) *Todd* v. *Moorhouse*, 19 Eq. 69, 71.

make it easier, in the case of a purchase by a married woman in the name of her child, to infer an intention of advancement.

Where a contract is entered into to purchase real property in the name of a wife or child, although the wife or child as volunteers could not file a bill for specific performance of the contract, nevertheless if the vendor enforces the contract, the conveyance must be made to the wife or child (*k*). In *Drew* v. *Martin* (*l*), an agreement for the purchase of land was entered into in the names of the husband and wife, and the husband died before the whole of the purchase-money was paid. Upon an inquiry in an administration suit as to the real property of the husband, it was held by Page Wood, V.-C., that it did not include the purchased estate, that the purchase enured for the benefit of the widow, and that the unpaid purchase-money was payable out of the husband's personal estate (*m*). In such cases as those last cited, a direction for payment of the unpaid purchase-money out of the testator's general estate would not seem to be affected by Locke King's Acts (now section 35 of the Administration of Estates Act, 1925), since the property would not be one to which, in equity, the testator was entitled at the time of his death.

In *Re Whitehouse* (*n*), G. W. during his father's lifetime contracted in March, 1885, with C. to purchase a business for £1,500; £300 was to be paid in cash down, the residue by instalments, secured by the joint and several promissory notes of G. W. and his father. The father lent G. W. the £300, and joined with him in giving the notes, all of which were dated January, 1885. G. W. took possession and carried on the business, and the father paid £144 for principal and interest due on the first note, which was payable six months after date. By his will dated October, 1885, the father settled one-fifth share of his estate on G. W. for life, remainder to his children, and directed that before participating in his share under the will G. W. should repay all sums advanced to him during his lifetime, or should have such sums deducted from his share. In May, 1886, the father died and a claim for the balance of the purchase-money was carried in against his estate and paid. It was contended, *inter alia*, that the sums paid by the father

(*k*) *Redington* v. *R.*, 3 Ridg. P. C. 106; *Skidmore* v. *Bradford*, 8 Eq. 134; and see *Hohler* v. *Ashton*, [1920] 2 Ch. 420.

(*l*) 2 Hem. & M. 130.

(*m*) See *Vance* v. *V.*, 1 B. 605; *Bailey* v. *Collett*, 18 B. 181; *Harrison* v. *Asher*, 2 De G. & Sm. 436; *Hohler* v. *Ashton*, [1920] 2 Ch. 420.

(*n*) 37 Ch. D. 683.

and his executors were "advances" by the father to the son, but the Court held that the case differed from *Redington* v. *R.* (*o*) and *Drew* v. *Martin* (*p*), inasmuch as in these cases there was a contract by the testator himself that the purchase-money should be paid by himself or out of his estate, whereas in this case the testator was not a party to the contract of purchase, as in *Drew* v. *Martin*, nor was there any evidence that there was a contract by the father to indemnify his son, as in *Redington* v. *R.*, and that looking at the whole circumstances (*q*), they showed that no gift to the son was intended.

The presumption of advancement also arises where a husband takes a deposit receipt at a bank in the names of himself and his wife, or alters a deposit receipt from his own name to the names of himself and his wife (*r*).

And it seems if a father effects a policy of assurance on the life of his son, a presumption, liable to be rebutted by evidence, would arise, that he intended it to be for his son's benefit: *Worthington* v. *Curtis* (*s*), in which case, however, the evidence showed that the father effected the policy for his own benefit; and compare *Re Richardson* (*t*).

Where a father of a family, upon a purchase of an estate being made by the trustees of his marriage settlements, pays them a further sum in order to enable them to complete such purchase, it will be presumed that he did so for the benefit of all persons interested under the settlements (*u*).

In *Doyle* v. *Cream* (*x*), a father, on his daughter's marriage, paid £800 to her settlement trustees, on trust for the husband and wife for their lives and the survivor for life, with remainder to their children; and if the husband *survived* the wife and there were no children then for the husband absolutely. He also covenanted to leave a share of his residuary estate upon the same trusts. In the event of the husband *not* surviving his wife, the settlor's daughter, and there being no issue (which happened) there was no trust expressly declared in the settlement. *Held*, that the £800 was a

(*o*) *Supra.*
(*p*) *Supra.*
(*q*) See *Marshal* v. *Crutwell*, 20 Eq., p. 329.
(*r*) *Talbot* v. *Cody*, 10 Ir. R. Eq. 138, 146; *Gosling* v. *G.*, 3 Dr. 335.
(*s*) 1 Ch. D. 419, 423. See *Att.-Gen.* v. *Murray*, [1904] 1 K. B. 165.
(*t*) 47 L. T. 514.
(*u*) *Ouseley* v. *Anstruther*, 10 B. 461; *Re Curteis' Trusts*, 14 Eq. 217.
(*x*) [1905] 1 Ir. R. 252, following *Ward* v. *Dyas*, Ll. & G. temp. Sugden, 177; and see *Sweetman* v. *Butler*, [1908] 1 Ir. R. 517.

marriage portion, given by father to daughter, as a provision for her, and that she took both the £800 and the share of residue absolutely, there being a resulting trust in her favour.

Solicitor and Client.—The circumstances in which the parties stand to each other may of themselves rebut the presumption of advancement, and throw the onus on the child of proving a gift, as where a son acted as solicitor of his mother (*y*).

4. Evidence to rebut or to support the Presumption of Advancement.

Purchase in the name of a child, etc., is, as we have seen, merely a *circumstance of evidence* of an intention to make a gift to the child, etc., and *prima facie*, therefore, it displaces the equitable presumption of a resulting trust. But such evidence may be strengthened or opposed by other evidence, for the object of the Court is to discover, upon a review of all the circumstances, the true explanation of the transaction. Many other circumstances of evidence have, therefore, been taken into consideration by different equity Judges in determining the question of intent, with the result predicted by Eyre, C.B., in the principal case, of "getting into a very wide sea without very certain guides." At one time, it was thought that the *infancy* of a child, in whose name a purchase was made, was a circumstance of evidence against its being considered a gift by way of advancement; but it is now considered a strong circumstance in favour of advancement being intended (*z*), nor will a partial provision be considered as evidence against an intention to advance (*a*). The argument that the reversionary character of the property purchased by the parent showed that it could not be intended as a provision for the child, will not now prevail (*b*).

It has been repeatedly held, that a purchase by a parent in the joint names of himself and his child, or by a husband in the joint names of himself and his wife, will be held to amount to evidence of an intention to advance the child or wife to the extent of the interest vested in them respectively, or absolutely if either of them respectively survive him; but if they predecease the husband, he

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(*y*) *Garrett* v. *Wilkinson*, 2 De G. & Sm. 246.

(*z*) *Lamplugh* v. *L.*, 1 P. W. 111; *Mumma* v. *M.*, 2 Vern. 19; *Finch* v. *F.*, 15 V. 43; *Christy* v. *Courtenay*, 13 B. 96; *Skeats* v. *S.*, 2 Y. & C. Ch. 9.

(*a*) *Redington* v. *R.*, 3 Ridg. P. C. 106.

(*b*) *Rumboll* v. *R.*, 2 Eden, 17; *Finch* v. *F.*, 15 V. 43; 10 R. R. 12; *Murless* v. *Franklin*, 1 Swans. 13; 18 R. R. 3; see *Pilsworth* v. *Mosse*, 14 Ir. Ch. R. 163.

will take as surviving joint tenant (*c*). A stranger, however, on a purchase by a husband, taking jointly with the husband and wife, must hold the estate vested in him in trust for the survivor of the husband and wife (*d*). The principal case decided that a grant of copyholds, taken by a father in the names of himself and his sons, was an advancement for the sons, although, according to the custom of the manor, grants were made for lives *successivè* (*e*).

A circumstance of evidence in favour of a trust and against a gift has been admitted, namely, that the child has been already *fully advanced:* in that case he *may*, it seems, be held a trustee for the father (*f*); especially if the father also enters into possession and receipt of the property (*g*). The observation, however, of Eyre, C.B., in the principal case would, at the present day, probably be considered a sufficient answer to such an objection to the presumption of advancement. "The rule of equity," observes his Lordship, "as recognised in other cases, is, that the father is the only judge on the question of a son's provision; and, therefore, the distinction of the son's being provided for or not is not very solidly taken" (*h*).

Another circumstance is mentioned in the principal case, as evidence against a gift to a child by way of advancement, *viz.*, the father's entering into, and keeping possession, and taking the rents and profits of the purchased property, or the son's giving receipts in the name of the father, If, however, the son is an infant, such acts on the part of the father will plainly not be evidence of any trust for him (*i*). In *Grey* v. *G.* (*k*), the purchase was made by a father in

(*c*) See *Scroope* v. *S.*, 1 Ch. Ca. 27; *Back* v. *Andrew*, 2 Vern. 120; *Grey* v. *G.*, 2 Swans. 599; *Lamplugh* v. *L.*, 1 P. W. 111; *Crabb* v. *C.*, 1 My. & K. 511; *Dummer* v. *Pitcher*, 2 My. & K. 272; *Fox* v. *F.*, 15 Ir. Ch. R. 89.

(*d*) *Re Eykyn's Trusts*, 6 Ch. D. 115; and see *Kingdon* v. *Bridges*, 2 Vern. 67; *Rumboll* v. *R.*, 2 Eden, 17.

(*e*) See *Murless* v. *Franklin*, *supra*; *Swift* v. *Davis*, 8 East, 354, n.; *Finch* v. *F.*, 15 V. 43; *Skeats* v. *S.*, 2 Y. & C. Ch. 9; *Jeans* v. *Cooke*, 24 B. 513, decided upon the authority of the principal case.

(*f*) *Elliot* v. *E.*, 2 Ch. Ca. 231; *Pole* v. *P.*, 1 Ves. Sen. 76.

(*g*) *Grey* v. *G.*, 2 Swans. 600; *Loyd* v. *Read*, 1 P. W. 608; *Redington* v. *R.*, 3 Ridg. P. C. 190.

(*h*) See *Redington* v. *R.*, 3 Ridg. P. C. 190; *Sidmouth* v. *S.*, 2 B. 456. See also *Hepworth* v. *H.*, 11 Eq. 10; *Gooch* v. *G.*, 62 L. T. 384; *Bone* v. *Pollard*, 24 B. 283; *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244.

(*i*) *Loyd* v. *Read*, 1 P. W. 608; *Mumma* v. *M.*, 2 Vern. 19; *Alleyne* v. *A.*, 2 Jo. & Lat. 544; *Lamplugh* v. *L.*, 1 P. W. 111; *Stileman* v. *Ashdown*, 2 Atk. 480; *Taylor* v. *T.*, 1 Atk. 386; *Gorge's Case*, cited 2 Swans. 600; and see *Devoy* v. *D.*, 3 Sm. & G. 403; *Christy* v. *Courtenay*, 13 B. 96; *Fox* v. *F.*, 15 Ir. Ch. R. 89.

(*k*) 1 Ch. Ca. 296; 2 Swans. (App.), p. 594; and see *Commissioners of Stamp Duties* v. *Byrnes*, [1911] A. C. 386, 392—3.

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the name of his adult son. Very strong evidence was adduced to show that the purchase was really in trust for the father, namely that the father received the profits of the estate purchased in the name of his son for twenty years, made leases, took fines, inclosed part of the estate in a park, built much, and provided materials for more buildings, gave directions for a settlement, and treated for a sale of the estate, yet, after all this, it was decided by Lord Nottingham, after much consideration, that the purchase by the father in the son's name was *an advancement*. Upon the same principle, in *Sidmouth* v. *S.* (*l*), where moneys were invested in the funds by a father in the name of the son, the dividends of which were received by the father during his life, under a power of attorney from his son, it was held, after his death, that this was an advancement, and that the funds belonged to the son.

But where there is an immediate formal and unmistakable act of taking possession on the part of the father, as, for instance, if a man bought a shop in his son's name, and immediately took possession and put his own name over the door, that would be an ostensible taking possession sufficient to show ownership in the father, and trusteeship in the son (*m*).

And where a father, soon after a purchase in the name of his son, called on the tenant and gave him notice to quit, although he ultimately allowed him to remain, it was held by Wickens, V.-C., that " although that circumstance could not, perhaps, be taken as an unmistakable act of taking possession by the father, sufficient to establish that he purchased for himself, nevertheless it was a circumstance of great weight, and *looking at that and the rest of the evidence*, he was of opinion that it was a trust and not an advancement " (*n*).

The facts relied upon as evidence of an intention to create a trust must have taken place *antecedently to, or contemporaneously with* the purchase, or else so shortly after it as to form, in fact, part of the transaction (*o*).

(*l*) 2 B. 447.

(*m*) *Per* Wickens, V.-C., in *Stock* v. *M'Avoy*, 15 Eq., p. 59.

(*n*) *Ibid.*, 55, 59.

(*o*) *Grey* v. *G.*, 2 Swans. 594; *Redington* v. *R.*, 3 Ridg. P. C. 106, 177, 194; *Murless* v. *Franklin*, 1 Swans. 17, 19; 18 R. R. 3; *Sidmouth* v. *S.*, 2 B. 447; *Seawin* v. *S.*, 1 Y. & C. Ch. 65; *Prankerd* v. *P.*, 1 S. & S. 1; *Christy* v. *Courtenay*, 13 B. 96; *Collinson* v. *C.*, 3 De G. M. & G. 409; *Bone* v. *Pollard*, 24 B. 283; *Devoy* v. *D.*, 3 Sm. & G. 403; *Swift* v. *Davis*, 8 East, 354, n.; *Childers* v. *C.*, 1 De G. & J. 482; *Dumper* v. *D.*, 3 Gif. 583; *Down* v. *Ellis*, 35 B. 578; *Stock* v. *M'Avoy*, 15 Eq. 55.

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In *Gooch* v. *G.* (*p*), a father took in his son's name 100 £10 shares in the A company (the necessary qualification as a director), and 50 £100 shares in the B company (10 shares being the qualification for a director), and transferred into his son's name 500 shares in the C company (100 shares being a director's qualification). The son became a director in each of the three companies and received the director's fees, but he sent the dividend warrants, when received, to the father. The certificates were handed to the father and were kept by him in three separate envelopes, on two of which he had written the words "belonging to me." It was held by Kay, J. (who considered that he was entitled to look at the writing on the envelopes), that the shares were taken and placed in the name of the son merely for the purpose of qualifying him as a director, and that the presumption of advancement as to any of the shares was rebutted.

But *subsequent* acts of the father will not be admissible in evidence to show his intention at the time of the purchase. Thus a devise of the property, as in the principal case (*q*), or a mortgage (*r*), or a demise in the name of the child (*s*) will be ineffectual. So also, evidence of *parol declarations of the father* contemporaneous with the purchase is admissible, but not his declarations (in his own favour), made subsequent thereto (*t*). And, of course, parol evidence may be given by the son to show the intention of the father to advance him; for such evidence is in support both of the legal interest of the son and of the equitable presumption (*u*). The acts and declarations of the father *subsequent* to the purchase may be used in evidence *against* him by the son, although they could not be used by the father against the son (*x*); and it seems

(*p*) 62 L. T. 384.

(*q*) *Mumma* v. *M.*, 2 Vern. 19; *Crabb* v. *C.*, 1 My. & K. 511; *Skeats* v. *S.*, 2 Y. & C. Ch. 9; *Jeans* v. *Cooke*, 24 B. 513; *Dumper* v. *D.*, 3 Gif. 583; *Williams* v. *W.*, 32 B. 370.

(*r*) *Pack* v. *Andrew*, 2 Vern. 110.

(*s*) *Murless* v. *Franklin*, 1 Swans. 13; 18 R. R. 3.

(*t*) *Elliot* v. *E.*, 2 Ch. Ca. 231; *Woodman* v. *Morrell*, 2 Freem. 33; *Birch* v. *Blagrave*, Amb. 266; *Finch* v. *F.*, 15 V. 51; *Redington* v. *R.*, 3 Ridg. P. C. 106; *Sidmouth* v. *S.*, 2 B. 456; *Devoy* v. *D.*, 2 Sm. & Gif. 403; *Forrest* v. *F.*, 13 W. R. 380; see also *Stone* v. *S.*, 3 Jur. (N.S.) 708; and the remarks on these cases in *O'Brien* v. *Sheil*, Ir. R. 7 Eq. 255. See also *Williams* v. *W.*, 32 B. 370; *Worthington* v. *Curtis*, 1 Ch. D. 419.

(*u*) *Fowkes* v. *Pascoe*, L. R. 10 Ch. 350. See *Lamplugh* v. *L.*, 1 P. W. 113; *Redington* v. *R.*, 3 Ridg. P. C. 182, 195; *Taylor* v. *T.*, 1 Atk. 386. But see *Ravenscroft* v. *Jones*, 4 De G. J. & S. 228.

(*x*) *Redington* v. *R.*, 3 Ridg. P. C. 195, 197; *Sidmouth* v. *S.*, 2 B. 455; *Stock* v. *M'Avoy*, 15 Eq., p. 59.

that the subsequent acts and declarations of the son, as being in the nature of admissions, can be used against him by the father.

Illegality.—Where the object of the evidence is to show that the person who made the transfer intended it to take effect in fraud of the law, such evidence will not be received : see *Childers* v. *C.* (*y*), where a father conveyed by registered deed 900 acres of land in the Bedford Level to his son in order to make him eligible as a bailiff. The son shortly afterwards died, without being aware of the conveyance, and without having been elected bailiff. It was held by Wood, V.-C., that the gift was irrevocable, and that the heir of the son was entitled to it for his own benefit. " I cannot," said his Honour, " allow the plaintiff to say, ' I intended this deed to operate in fraud of the law ' "; but upon the discovery of fresh evidence the order of the V.-C. was discharged, and leave was given to amend the bill, whereupon it was held, upon the evidence, that the father had not intended or considered the transaction to have the effect of making the son beneficial owner; that on the construction of the Act, a dry legal estate was a sufficient qualification; that, as there was nothing illegal in the father's design, and no intention to represent the son as beneficial owner, the father was entitled on the ground *of trust or mistake or both* to have a reconveyance from the heir of the son (*z*).

Husband and Wife.—Where it appears from the evidence that a husband has paid money into a bank to an account opened in his wife's name as a mere agency account, for the purpose of convenience, and without any contract or intention to give the wife any interest in such money, it will be the property of the husband and not of the wife (*a*). And the surrounding circumstances may be taken into consideration (*b*). And so in the case of a purchase by a husband of stock in the joint names of the husband and wife, as to which see *Smith* v. *Warde* (*c*); *Hoyes* v. *Kindersley* (*d*).

In *Re Gadbury* (*e*), a sum of money was invested in the funds in the joint names of a husband and wife, and she, by power of

(*y*) 3 K. & J. 310.

(*z*) 1 De G. & J. 482; and see *May* v. *M.*, 33 B. 81; *Davies* v. *Otty*, 35 B. 208; *Manning* v. *Gill*, 13 Eq. 485; *Haigh* v. *Kaye*, L. R. 7 Ch. 469; *Crichton* v. *C.* (1895), 13 Rep. 770.

(*a*) See *Lloyd* v. *Pughe*, L. R. 8 Ch. 88; cf. *Smith* v. *Warde*, 15 Si. 56; *Hoyes* v. *Kindersley*, 2 Sm. & G. 195, cases of the purchase of stock.

(*b*) *Marshal* v. *Crutwell*, 20 Eq. 328; *Re Young*, 28 Ch. D. 705.

(*c*) 15 Si. 56.

(*d*) 2 Sm. & G. 195.

(*e*) 11 W. R. 895.

attorney from him, sold out a portion, and with his knowledge kept it locked up in her own special custody until his death. Kindersley, V.-C., held, that the portion which remained in the funds in the joint names of the husband and wife survived to the wife, but that the other portion, which was sold out by her and kept in her custody, formed, on the husband's death, a part of his general personal estate.

A husband cannot rebut the presumption of advancement, in respect of property transferred by him into his wife's name, by giving evidence that this was done merely for the purpose of defeating his creditors; and the position is not altered by the fact that the wife was a party to the fraudulent attempt (*f*).

5. When Purchases in names of Third Parties are void or voidable.

Where an advancement is made by a person indebted beyond his means at the time, it will be deemed fraudulent (*g*), and will be void under section 172, sub-section 1 of the Law of Property Act, 1925 (which replaces 13 Eliz. c. 5), as against creditors (*h*).

It has been made a question whether a purchase by a man in the name of a child, wife, or other person, solely or jointly with himself, is voluntary within 27 Eliz. c. 4 (which is now replaced by section 173 of the Law of Property Act, 1925) (*i*).

A transfer of shares to an infant is not void but voidable only (*k*). Where a father transfers shares in an incorporated company to his infant son, although the son might claim the shares as an advancement, nevertheless the Court will, on the part of the infant, repudiate the shares, if the company be wound up, and the father will be a contributory (*l*).

6. Purchase with Trust Money. Following it.

Parol evidence is admissible to prove that a purchase of land has been made by a trustee with trust money, notwithstanding

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(*f*) *Gascoigne* v. *G.*, [1918] 1 K. B. 223.

(*g*) *Holmes* v. *Penney*, 3 K. & J. 90.

(*h*) *Christy* v. *Courtenay*, 13 B. 96, 101; *Barrack* v. *M'Culloch*, 3 K. & J. 110; and see Bankruptcy Act, 1914, s. 1, sub-s. 1 (b), and s. 42; notes to *Ellison* v. *E.*, *post*.

(*i*) See *Drew* v. *Martin*, 2 Hem. & M. 130, 133; and notes to *Ellison* v. *E.*, *post*.

(*k*) *Lumsden's Case*, L. R. 4 Ch. 31; *Gooch's Case*, L. R. 8 Ch. 266.

(*l*) *Reid's Case*, 24 B. 318; *Richardson's Case*, 19 Eq. 588; *Weston's Case*,

section 53, sub-section 1 of the Law of Property Act, 1925 (replacing section 7 of the Statute of Frauds) (*m*), because resulting, implied or constructive trusts are excepted by sub-section 2; and upon such a purchase being proved, a trust will result in favour of the *cestui que trust*, the real owner of the money. Thus, Grant, M.R., in *Lench* v. *L.* (*n*), speaking of a purchase alleged to have been made with trust money, said, " All depends upon the proof of the facts; for, whatever doubts may have been formerly entertained upon this subject, it is now settled that money may, in this manner, be followed into the land in which it is invested; and a claim of this sort may be supported by parol evidence " (*o*).

The result will be the same where the money, subject to an express or implied trust, has been invested by the trustee, or person standing in a fiduciary position, in the purchase of goods, money, notes, bills, and other chattels, or paid into a bank, *if it can be traced* (*p*).

In such a case the beneficial owner is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust money (*q*). Where, however, a trustee has mixed the trust money with his own there is this distinction, that the *cestui que trust*, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust money simply and purely, but with a mixed fund. He is, however, still entitled to a *charge* on the property purchased, for the amount of

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L. R. 5 Ch. 614; *Mitchell's Case*, 9 Eq. 363; Simpson, Infants (4th ed.), pp. 37—8.

(*m*) 29 Car. 2, c. 3.

(*n*) 10 V. 517.

(*o*) See also *Anon.*, Sel. Ch. Ca. 57; *Ryall* v. *R.*, 1 Atk. 59; *S. C.*, Amb. 413; *Lane* v. *Dighton*, Amb. 409; *Balgney* v. *Hamilton*, cited Amb. 414; *Hughes* v. *Wells*, 9 Ha. 749; *Harford* v. *Lloyd*, 20 B. 310; *Bridgman* v. *Gill*, 24 B. 302; *Birds* v. *Askey*, 24 B. 618; *Trench* v. *Harrison*, 17 Si. 111; *Wadham* v. *Rigg*, 1 Dr. & Sm. 216; *Williams* v. *Thomas*, *ibid.*, 417; *Rolfe* v. *Gregory*, 13 W. R. 355; *Frith* v. *Cartland*, 2 Hem. & M. 417; *Hopper* v. *Conyers*, 2 Eq. 549; *Brown* v. *Adams*, L. R. 4 Ch. 764; *Middleton* v. *Pollock*, 4 Ch. D. 49; *G. E. Ry. Co.* v. *Turner*, L. R. 8 Ch. 149; *Ex p. Cooke*, 4 Ch. D. 123; *Birt* v. *Burt*, 11 Ch. D. 773, n.; and see *Crichton* v. *C.*, [1895] 2 Ch. 853; [1896] 1 Ch. 870; Underhill on Trusts (8th ed.), pp. 523—4.

(*p*) *Re Hallett's Estate*, 13 Ch. D. 696; *Collins* v. *Stimson*, 11 Q. B. D. 142; *Re Murray*, 57 L. T. 223; *Coburn* v. *Collins*, 35 Ch. D. 373; *Ex p. Broad*, 13 Q. B. D. 740; *Smethurst* v. *Hastings*, 30 Ch. D. 490; *Taylor* v. *Blakelock*, 32 Ch. D. 560; *Re Hallett & Co.*, [1894] 2 Q. B. 237; *Sinclair* v. *Brougham*, [1914] A. C. 398, 442, 447.

(*q*) *Re Hallett's Estate*, 13 Ch. D. 709.

the trust money laid out in the purchase (*r*). To follow trust money, there must be *specific* property, capable of being identified, into which the money has been converted (*s*).

Money also held by a person in a fiduciary character, if paid by him to an account at his banker's, may be followed by the person for whom he held the money, who has a charge on the balance in the banker's hands (*t*). Hence if a person who holds money as a trustee or in a fiduciary character, pays it to his account at his banker's, and mixes it with his own money, and draws out sums by cheques in the ordinary manner, the rule in *Clayton's Case* (*u*), attributing the first drawings out to the first payments in does not apply, so that the drawer must be taken to have drawn out his own money in preference to the trust money (*x*). But where a trustee having paid trust money into his banking account, so that the same became mixed with his own money, drew out a sum, which he invested, and subsequently drew out the balance, which he spent, it was held that the investment must be treated as having been made out of the money of the trust (*y*).

It seems, however, that as between two *cestuis que trust* whose money the trustee has paid into his own account at his banker's, the rule in *Clayton's Case* will apply, so that the first sum paid in will be held to have been first drawn out (*z*).

A trustee as well as a *cestui que trust* may follow property in which a trust fund has been wrongly invested, though he has actively concurred in the breach of trust (*a*).

The Partnership Act, 1890, s. 13, provides that if a partner being a trustee improperly employ trust property in the partnership business, the other partners who have no notice of the breach of

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(*r*) *Re Hallett's Estate, supra*; *Re Oatway*, [1903] 2 Ch. 356; *Sinclair* v. *Brougham*, [1914] A. C., p. 442; *Banque Belge* v. *Hambrouck*, [1920] 1 K. B. 321, 328, 333, 335; Underhill on Trusts (8th ed.), p. 482.

(*s*) *Re Hallett & Co.*, [1894] 2 Q. B., p. 244; and see *Ex p. Hardcastle*, 29 W. R. 615; *Sharp* v. *Jackson*, [1899] A. C. 419.

(*t*) *Re Hallett's Estate*, 13 Ch. D. 696; *Sinclair* v. *Brougham, supra*; *Banque Belge* v. *Hambrouck*, *supra*.

(*u*) 1 Mer. 572.

(*x*) *Re Hallett's Estate*, 13 Ch. D. 696; *Re Oatway*, [1903] 2 Ch. 356, p. 360; and see *Sinclair* v. *Brougham*, [1914] A. C., pp. 420—423, 442.

(*y*) *Re Oatway*, [1903] 2 Ch. 356.

(*z*) *Re Hallett's Estate*, 13 Ch. D. 696; *Re Stenning*, [1895] 2 Ch. 433; cf. *Blackburn B. B. Soc.* v. *Cunliffe*, 22 Ch. D. 61; *Wenlock* v. *River Dee Co.*, 19 Q. B. D. 155; *Re Miller*, [1893] 1 Q. B. 338.

(*a*) *Carson* v. *Sloane*, 13 L. R. Ir. 139; *Price* v. *Blakemore*, 6 B. 507; and see *Taylor* v. *Blakelock*, 32 Ch. D. 560.

trust are not to be affected thereby, but the section is not to prevent trust money from being followed and recovered if in the possession of the firm.

Trust money cannot be followed, if paid to a third person *bona fide*, as for instance to a tradesman in part payment of a debt (*b*); to an auctioneer as a deposit afterwards forfeited for non-completion of the contract (*c*); to a landlord in payment of rent by an uncertificated bankrupt (*d*). So also, if securities belonging to trust X are, on an appointment of new trustees A and B of trust Y, transferred by C (a trustee of both trusts) to A and B, who take without notice of the breach of trust, those securities cannot be followed by the beneficiaries under trust X. The transfer in that case is for consideration, for A and B by accepting the transfer give up their right to sue C as a debtor to the trust (*e*). Again, if a person in a fiduciary position pays trust moneys into his banking account which is overdrawn at the time of the payment in, the bankers, if they have no notice of the trust, will be entitled to retain so much of the moneys paid in as may be necessary to discharge the debt due to them (*f*).

The rules as to following trust money have no application (if the property in the money has passed (*g*)), where there is no fiduciary relation between the person bound to pay and the person entitled to receive moneys and they stand simply in the relation of debtor and creditor (*h*). Thus, an agent receiving a bribe from a third person becomes simply a debtor of, not a trustee for, his principal (*i*).

Where a person under an obligation to settle all his *personal estate* afterwards bought land in his own name, partly with

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(*b*) *Collins* v. *Stimson*, 11 Q. B. D. 142, 144; and see *Northern Counties, etc., Insurance Co.* v. *Whipp*, 26 Ch. D., at p. 495.

(*c*) *Collins* v. *Stimson*, *supra*.

(*d*) *Ex p. Dewhurst*, L. R. 7 Ch. 185; *Ex p. Payne*, 15 Q. B. D. 616; cf. *Ex p. Minor*, [1893] 1 Q. B. 175, 455.

(*e*) *Thorndike* v. *Hunt*, 3 De G. & J. 563; *Taylor* v. *Blakelock*, 32 Ch. D. 560; *Taylor* v. *L. & C. Banking Co.*, [1901] 2 Ch. 233.

(*f*) *Thomson* v. *Clydesdale Bank, Ltd.*, [1893] A. C. 282; *Coleman* v. *Bucks, etc., Bank*, [1897] 2 Ch. 243; in which case, however, the bank had notice that the moneys were affected by some trust, and the decision would therefore seem open to question.

(*g*) See *Sinclair* v. *Brougham*, [1914] A. C., p. 420.

(*h*) *Lister & Co.* v. *Stubbs*, 45 Ch. D. 1; *New Zealand, etc., Co.* v. *Watson*, 7 Q. B. D. 374, pp. 383, 384; *Re Hallett & Co.*, [1894] 2 Q. B. 237.

(*i*) *Lister & Co.* v. *Stubbs*, *supra*; *Powell* v. *Jones*, [1905] 1 K. B. 11; and see *Re Thorpe*, [1891] 2 Ch. 360; *Ellis* v. *Goulton*, [1893] 1 Q. B. 350; *Re Stenning*, [1895] 2 Ch. 433; cf. *Hay's Case*, L. R. 10 Ch. 593.

borrowed money, although upon his death intestate there was held to be a resulting trust of the estate which descended to his heir, all his personal estate which could be traced as having been employed in the purchase of the estate, in paying off the borrowed money, or in lasting improvements on the estate, was held to be a charge upon the land so purchased in the hands of the heir for the benefit of the *cestui que trusts* under the settlement (*k*).

(*k*) *Lewis* v. *Madocks*, 17 V. 48; and see *Denton* v. *Davies*, 18 V. 499.

ELLISON *v.* ELLISON.

1802. 6 V. 656; 6 R. R. 19.

Voluntary Trusts. Distinction as to Volunteers.

The assistance of the Court cannot be had without consideration, to constitute a party *cestui que trust*, as upon a voluntary covenant to transfer stock, etc.; but if the legal conveyance is actually made, constituting the relation of trustee and *cestui que trust*, as if the stock is actually transferred, etc., though without consideration, the equitable interest will be enforced.

Settlement of leasehold estates not revoked by a subsequent assignment by the trustee to the settlor entitled for life, or by the will of the latter; no intention to revoke appearing; and the terms of a power of revocation not being complied with.

By indenture, dated July 1, 1791, reciting a lease, dated June 6 preceding, of collieries at Hebburn and Jarrowwood, in the county of Durham, for thirty-one years, to Charles Wren and others; and that the name of Wren was used in trust for Nathaniel Ellison and Wren, in equal shares; it was declared that Wren, his executors and administrators, would stand possessed of the lease, in trust as to one moiety for Ellison, his executors, etc.

By another indenture, dated June 18, 1796, reciting, that Ellison was interested in and entitled to one undivided eighth part of certain collieries at Hebburn and Jarrow, held by two separate leases for terms of thirty-one years, and that he was desirous of settling his interest, he assigned and transferred all his interest in the said collieries, and all the stock, etc., to Wren, his executors, administrators, and assigns, in trust for Nathaniel Ellison and his assigns during his life; and, after his decease, in trust to manage and carry on the same, in like manner as Wren should carry on his own share; and upon further trust, out of the profits, to pay to Margaret Clavering, during the remainder of the term, in case she should so long live, the yearly sum of £103 2s. 8d., which sum is thereby mentioned to be secured to her by an indenture, dated May 14 last; and, subject

thereto, in trust to pay thereout to Jane Ellison, in case she should survive Nathaniel Ellison, during the remainder of the term, during the joint lives of Jane Ellison and Anne Furye, the clear yearly sum of £180; and after the decease of Anne Furye, then the yearly sum of £90, during the remainder of the term, in case Jane Ellison should so long live; and, subject as aforesaid, upon trust to pay thereout, to each of the children of Nathaniel Ellison that should be living at his decease, during the remainder of the term, during the joint lives of Jane Ellison and Anne Furye, and the life of the survivor, the yearly sum of £30 apiece; and after the decease of the survivor the yearly sum of £15; and upon further trust to pay the residue of the profits arising from the collieries to the eldest son of Nathaniel Ellison, who should attain the age of twenty-one; and upon the death of Margaret Clavering, then upon trust to pay to each of the children of Nathaniel Ellison the further yearly sum of £10; with survivorship, in case any of the children should die before twenty-one, or marriage of daughters, provided none except the eldest should be entitled to a greater annuity than £50; and upon further trust to pay the residue to the eldest son; provided further, in case all the children die before twenty-one, or the marriage of daughters, upon trust to pay the whole to such only child at twenty-one, or marriage of a daughter; provided further, in case the profits to arise from the collieries should not be sufficient to pay all the annuities, the annuitants, except Margaret Clavering, should abate, to be made up whenever the profits should be sufficient; and upon further trust, in case Wren, his executors or administrators, should think it more beneficial for the family to sell and dispose of the collieries, upon trust to sell and dispose of the same for the most money that could reasonably be got, and to apply the money, in the first place, in payment of all debts due from the collieries, in respect of the share of Ellison; and, subject thereto, to place out the residue on real securities, and apply the interest, in the first place, in payment of the annuity of £103 2s. 8d. to Margaret Clavering; then to the annuities of £180 or £90; then to pay all the children of Ellison, during the life of Margaret Clavering, the yearly sum of £22 10s., and to pay the residue of the dividends and interest

to the eldest son of Ellison, in manner aforesaid; and if the dividends, etc., should not be sufficient for the annuities, the two annuitants, except Margaret Clavering, to abate; and, after her death, to pay to each of the children of Nathaniel Ellison the further yearly sum of £2 10s. for their lives; and, after the decease of Margaret Clavering and Jane Ellison, upon trust to pay to each of the children of Nathaniel Ellison the sum of £500, in case the money arising from the sale should be sufficient; then upon trust to divide the same equally among all the children, share and share alike; and, subject as aforesaid, to pay over the residue to the eldest son on his attaining twenty-one; and it was declared, that the portions of the children should be paid to the sons at twenty-one, to the daughters at twenty-one or marriage; and in case of the death of any before such period, to pay that share to the eldest son at twenty-one; and if only one child should survive, to pay the whole to such one at twenty-one or marriage, if a daughter; and in case all die before twenty-one, etc., then the said Charles Wren, his executors and administrators, shall stand possessed of the said collieries, and the money to arise by sale thereof, subject as aforesaid, in trust for Nathaniel Ellison, his executors, administrators, and assigns. It was further declared, that the annuities should be paid half-yearly; and that, upon any such sale, the receipt of Wren, his executors or administrators, should be a sufficient discharge to purchasers. Then followed this proviso: "Provided always and it is hereby further declared, that it shall and may be lawful for the said Nathaniel Ellison, by any deed or deeds, writing or writings, to be by him signed, sealed, and delivered in the presence of and *attested by two or more credible witnesses*, to revoke, determine, and make void all and every the uses, trusts, limitations, and powers hereinbefore limited and created, of and concerning the said collieries and coal mines; and by the same deed or deeds, or by any other deed to be by him executed in like manner, to limit any new or other uses of the said collieries and coal mines, as he, the said Nathaniel Ellison, shall think fit."

By another indenture, dated July 3, 1797, *but not attested by two witnesses*, reciting the leases of the collieries, and that the

name of Charles Wren was used in trust for Nathaniel Ellison and himself, in equal shares, and that Ellison had advanced an equal share of the monies supplied for carrying on the collieries, amounting to £9,037 10s., it was witnessed, that, in consideration of £4,518 15s., Wren assigned to Nathaniel Ellison one undivided moiety or half part of all the said collieries, demised to him by the said several leases, with a like share of the stock; to have and to hold the said collieries to Ellison, his executors, administrators, and assigns, for the residue of the said terms, subject to the rents, covenants, and agreements in the said leases; and to have and to hold the stock unto Ellison, his executors, administrators, and assigns, to and for his and their own proper use for ever, with the usual covenants from Wren as to his title to assign, etc., and from Ellison to indemnify Wren, his executors, etc.

Nathaniel Ellison, by his will, dated June 22, 1796, after several specific and pecuniary legacies, gave all the rest and residue of his personal estate and effects, of what nature or kind so ever, not before disposed of, to his wife, and Wren, and the survivor, and the executors and administrators of such survivor, upon trust to call in and place the same out in the funds, or on real securities; and he directed that all sums of money which should come to the hands of his wife and Wren, or of the executors, etc., of either of them, under the said trusts, should be equally divided between all his children, sons and daughters, born and to be born, share and share alike; the shares to become vested and be payable upon marriage, with consent of their guardians, and not otherwise, until the age of twenty-one; such part of the interest in the meantime, as the guardians shall think proper, to be applied for maintenance; the residue to accumulate; with a direction for payment of part of the principal for advancement, and survivorship upon the death of any before the respective shares should be payable; and, in the case of the death of all under age and unmarried, he gave the dividends and interest to his wife for life; and, upon her death, he gave the principal and a sum of £3,000, charged upon her estates, to his sister, Margaret Clavering, and his nephew. Then, after some further dispositions of stock in favour of his children, he gave a legacy

of twenty guineas to Wren, and appointed his wife and Wren executors and guardians.

The testator died in 1798, leaving his widow and ten children surviving; one of whom, Charles Ellison, died in 1799, an infant. Wren also died in that year.

The bill was filed by the testator's widow and Margaret Clavering, praying, that the trusts of the deed of June, 1796, may be established, and that new trustees may be appointed.

The younger children, by their answer, submitted whether the trusts of that deed were not varied or revoked by the deed of July, 1797.

Mr. Romilly and Mr. Bell, for the plaintiffs, insisted, that the subsequent deed, not reciting or taking any notice of the prior settlement, could not revoke it; that it was not the object of the latter deed to revoke the former; and that it was not attested by two witnesses, as, in order to effect a revocation, it ought to be.

Mr. Richards, for the eldest son, defendant, claiming also under the deed of 1796, declined to argue the case.

Mr. Steele and Mr. W. Agar, for the other defendants, the younger children,— * * * There is no instance in which a voluntary deed, defective, and not effectual at law, has been aided in this Court; and though this is, in some respects, in favour of a wife and children, one of the parties claiming under it is a volunteer; and it is opposed by nine out of ten children. This deed, like that in *Colman* v. *Sarrel* (*a*), cannot be proceeded upon at law. But if the trust was originally well created, yet if the subject gets back, and is vested in the author of the trust, the objection lies.

Mr. Romilly, in reply.

Eldon, C.—I had no doubt, that, from the moment of executing the first deed, supposing it not to have been for a wife

(*a*) 1 V. 50; 1 R. R. 83.

and children, but for pure volunteers, those volunteers might have filed a bill in equity, on the ground of their interests in that instrument, making the trustees and the author of the deed parties. *I take the distinction to be, that, if you want the assistance of the Court to constitute you* cestui que trust, *and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you* cestui que trust: *as, upon a covenant to transfer stock, etc., if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant. But if the party has completely transferred stock, etc., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court.* That distinction was clearly taken in *Colman* v. *Sarrel* (*supra*), independent of the vicious consideration. I stated the objection, that the deed was voluntary; and the Lord Chancellor went with me so far as to consider it a good objection to executing what remained in covenant. But if the actual transfer is made, that constitutes the relation between trustee and *cestui que trust,* though voluntary, and without good or *meritorious* consideration; and it is clear, in that case, that, if the stock had been actually transferred, unless the transaction was affected by the turpitude of the consideration, the Court would have executed it against the trustee and the author of the trust.

In this case, therefore, the person claiming under the settlement might maintain a suit notwithstanding any objection made to it as being voluntary, if that could apply to the case of a wife and children; considering, also, that Mrs. Clavering was an annuitant, and not a mere volunteer. But it was put for the defendants thus—that though the instrument would have been executed originally, if the subject got back by accident into the author of the trust, and was vested in him, then the objection would lie in the same manner as if the instrument was voluntary. I doubt that, for many reasons—the trust being once well created, and whether it would apply at all where the trust was originally well created, and did not rest merely in engagement to create it. Suppose Wren had died, and had made Ellison his executor, it would be extraordinary to hold, that though an

execution would be decreed against him as executor, yet, happening to be also author of the trust, therefore an end was to be put to the interest of the *cestui que trust*. But it does not rest there; for Ellison clothes the legal estate remaining in Wren with the equitable interests declared by the first deed, making him, therefore, a trustee for Ellison himself first, and, after his death, for several other persons; and he has said, he puts that restraint upon his own power, not only that he shall not have a power of revocation whenever he changes his intention, but that he shall not execute that power, nor be supposed to have that change of intention, unless manifested by an instrument executed with certain given ceremonies. My opinion is, that if there is nothing more in this transaction than taking out of Wren the estate clothed with a trust for others with present interests, though future in enjoyment, and that was done by an instrument with no witness, or only one witness, it is hardly possible to contend that such an instrument would be a revocation according to the intention of the party, the evidence of whose intentions is made subject to restrictions that are not complied with. The only difficulty is, that the declaration of the trusts in the first instrument could not be executed, the second instrument being allowed to have effect. It is said, a power was placed in Wren, his executors, and administrators, not his assigns, if in sound discretion thought fit, to sell and to give a larger interest to the younger children than they otherwise would take. If Wren had not, after the re-assignment, that discretion still vested in him, I think it would not be in the executors of Ellison, and it could not be exercised by the Court, though, *in general cases, trusts will not fail by the failure of the trustee*. But, though the effect would be to destroy the power of Wren, which I strongly doubt, attending to the requisition of two witnesses, I do not know that it would destroy the other interests. I think, therefore, upon the whole, this trust does remain, notwithstanding this re-assignment of the legal estate to Ellison. I do not think, consistently with the intention expressed in the first instrument, and the necessity imposed upon himself of declaring a different intention under certain restrictions, that, if a different intention appeared clearly upon the

face of the instrument, the latter would have controlled the former. But I do not think his acts do manifest a different intention. Supposing one witness sufficient, the second deed does not sufficiently manifest an intention to revoke all the benefits given by the first deed to the children; and it is not inconsistent that he might intend to revoke some, and not all.

As to the will, it is impossible to maintain that the will is a writing within the meaning of the power, considering how the subject is described. The word "residue" there means that estate of which he had the power of disposing, not engaged by contracts, declarations of trusts, etc. It was necessary for him to describe the subject in such a way that there could be no doubt he meant to embrace that property. Upon the whole, therefore, this relief must be granted; *though I agree, that, if it rested in covenant, the personal representative might have put them to their legal remedies*, he cannot, where the character of trust attached upon the estate while in Wren; which character of trust, therefore, should adhere to the estate in Ellison, unless a contrary intention was declared; and the circumstance of one witness only, when the power reserved required two witnesses, is also a circumstance of evidence that he had not the intention of destroying those trusts which had attached, and were then vested in the person of Wren.

The ordering part of the decree, extracted from the Registrar's Book, is thus (*b*): "Whereupon, etc., his lordship doth declare that the trusts of the said deed, bearing date June 18, 1796, ought to be performed and carried into execution, and doth order and decree the same accordingly. And it is further ordered and decreed, that it be referred to Mr. Ord, one of the Masters of this Court, to appoint a new trustee or trustees of the premises comprised in the said trust deed, and that the share of the said Nathaniel Ellison of and in the said collieries, and the stock and effects belonging thereto comprised in the said deed, be assigned to such new trustee or trustees so to be appointed, upon the trusts and upon and for the intents and purposes declared by the said deed concerning the same, and

(*b*) Taken from the judgment of Knight-Bruce, L.J., in *Kekewich* v. *Manning*, 1 De G. M. & G. 191.

such new trustee or trustees is or are to declare the trusts thereof accordingly, and the said Master is to settle such assignment; and it is ordered that the said Master do tax all parties their costs of this suit, and that such costs, when taxed, be paid out of the estate of the said testator, and any of the parties are to be at liberty to apply to this Court as there shall be occasion."

NOTES.

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1. Voluntary Agreements.

Generally.—Equity will not interfere to perfect or carry into effect a purely voluntary intention, covenant or agreement to give or settle property as against either the settlor (*c*), or his executors (*d*).

And though the voluntary agreement, contract, or covenant to transfer property, be under seal, and, therefore, on the face thereof carrying a consideration such as would support an action at law, it will not be specifically executed in favour of volunteers (*e*).

(*c*) *Milroy* v. *Lord*, 4 De G. F. & J. 264, at p. 274; 60 L. J. Ch. 241; Underhill on Trusts (8th ed.), p. 40.

(*d*) *Cotteen* v. *Missing*, 1 Madd. 176; *Hooper* v. *Goodwin*, 1 Swans. 485; 18 R. R. 125; *Searle* v. *Law*, 15 Si. 95; *Callaghan* v. *C.*, 8 Cl. & F. 374. As to aiding defective execution of powers, see notes to *Tollett* v. *T.*, *ante*.

(*e*) *Colman* v. *Sarrel*, 1 V. 50; 1 R. R. 83; *Meek* v. *Kettlewell*, 1 Ha. 474; *Dillon* v. *Coppin*, 4 My. & Cr. 647; *Jefferys* v. *J.*, Cr. & Ph. 138; *Dening* v. *Ware*, 22 B. 184; *Cheale* v. *Kenward*, 6 W. R. 494, 810; *Marler* v. *Tommas*, 17 Eq. 8; *Re Lucan*, 45 Ch. D. 470, *infra*; *Re Ellenborough*, [1903] 1 Ch. 697; Lewin (13th ed.), p. 70; Underhill (8th ed.), p. 40.

Ellison v. Ellison.

Mere voluntary promises to release debts, or not to sue upon them (*f*), or to confer a benefit (*g*), will not be enforced.

Cases within the doctrine of equitable estoppel are not exceptions to this rule. "The doctrine of estoppel by representation is applicable only to representations, as to *some state of facts alleged to be at the time actually in existence*, and not to promises *de futuro*, which, if binding at all, must be binding as contracts" (*h*); "The person making [such] representations shall, so far as the powers of a Court of equity extend, be treated as if the representations were true, and shall be compelled to make them good" (*i*). The doctrine applied by Lord Cottenham in *Hammersley* v. *De Biel* (*k*), of making representations good in respect of future conduct, independently of contract, has been exploded (*l*).

A voluntary covenant to surrender copyholds could not be enforced (*m*), but if the settlor covenanted that until surrender he would stand seised of the copyholds in trust for the surrenderee, that is a declaration of trust to which effect will be given (*n*).

An agreement founded upon merely *meritorious consideration*, such for instance as a provision for a wife or children, *after* marriage, will not be enforced as against the settlor (*o*), or against persons claiming as volunteers under the settlor (*p*).

And it has never been doubted that parties claiming on a merely

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(*f*) *Tufnell* v. *Constable*, 8 Si. 69; *Cross* v. *Sprigg*, 6 Ha. 552; *Cross* v. *C.*, 1 L. R. Ir. 389; cf. *Flower* v. *Marten*, 2 My. & C. 459; *Strong* v. *Bird*, 18 Eq. 315; *Peace* v. *Hains*, 11 Ha. 151.

(*g*) *Dipple* v. *Corles*, 11 Ha. 183; *Dashwood* v. *Jermyn*, 12 Ch. D. 776; *Alderson* v. *Maddison*, 8 A. C. 467.

(*h*) *Per* Selborne, L.C., in *Maddison* v. *Alderson*, 8 A. C. 467, at p. 473; and see *Rawlinson* v. *Ames*, [1925] 1 Ch. 96, 111—114.

(*i*) *Per* Selborne, C., in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, L. R. 6 H. L. 352, at p. 360; see *Maunsell* v. *Hedges White*, 4 H. L. Cas. 1039; *Jorden* v. *Money*, 5 H. L. Cas. 185, 212 *et seq.*; *Warden* v. *Jones*, 23 B. 487, at p. 493; *Yeomans* v. *Williams*, 1 Eq. 184; *Taylor* v. *Manners*, L. R. 1 Ch. 48; *Dillwyn* v. *Llewellyn*, 4 De G. F. & J. 517.

(*k*) Sitting on appeal from the M.R., and reported 12 Cl. & F., at p. 61, n. (*c*), at p. 62; and see *Prole* v. *Soady*, 2 Giff. 1; *Loffus* v. *Maw*, 3 Giff. 592; *Coverdale* v. *Eastwood*, 15 Eq. 121; *Dashwood* v. *Jermyn*, 12 Ch. D. 776.

(*l*) See judgments of House of Lords in *Hammersley* v. *De Biel*, 12 Cl. & F. 45; *Jorden* v. *Money*, *supra*; *Maddison* v. *Alderson*, *supra*; *Re Fickus*, [1900] 1 Ch. 331, at p. 335, and see the whole question discussed in Pollock on Contract (9th ed.), note 1, and see notes to *Savage* v. *Foster*, vol. 1, *supra*.

(*m*) *Jefferys* v. *J.*, Cr. & Ph. 138.

(*n*) *Steele* v. *Waller*, 28 B. 466; *Carter* v. *C.*, [1896] 1 Ch. 62.

(*o*) *Antrobus* v. *Smith*, 12 V. 39, 46; *Holloway* v. *Headington*, 8 Si. 324; *Walrond* v. *W.*, Johnson, 25; cf. *Green* v. *Paterson*, 32 Ch. D. 95.

(*p*) *Antrobus* v. *Smith*, 12 V. 39, 47; 8 R. R. 278; see *Jefferys* v. *J.*, C. & P. 138; *Dillon* v. *Coppin*, 4 My. & C. 647; *Evelyn* v. *Templar*, 2 Bro. Ch. 148; *Joyce* v. *Hutton*, 11 Ir. Ch. R. 123.

meritorious consideration could not enforce an agreement or covenant to settle as against creditors or a purchaser from the settlor (*q*).

Development of Voluntary Agreement into Perfect Trust.—When a purely voluntary agreement, or intention to benefit, is developed into a *perfect trust*, whereby the relation of trustee and *cestui que trust* is established without the aid or interference of the Court, that trust will be enforced against the trustee, the settlor, and all claiming under him (*r*). The point is, is it necessary to come to the Court for aid in *perfecting* a gift or trust (*s*)? There must be an intention to create a trust and to part with dominion over the property (*t*). And a mere executory intention to create a trust, or even a voluntary agreement to do so, is insufficient (*u*). There must be an intention to create, completely executed by some act creating a perfect trust, for until such completion there is a *locus pœnitentiæ* (*x*). A voluntary covenant with trustees may, however, create a trust which will be enforceable by the *cestui que trust* (*y*).

A perfect and irrevocable *trust* in favour of volunteers may be created :

(1) By transfer of the property, whether legal or equitable, to a trustee for the purposes of the settlement;

(2) By declaration of trust without transfer, either by the owner declaring himself a trustee for the object of his bounty, of property in his possession; or by his directing the trustee of property of which he is beneficial owner to hold it in trust for such object.

If at the date of execution of a voluntary deed the property which it purports to assign is a mere expectancy, the deed will be

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(*q*) *Finch* v. *Winchelsea*, 1 P. W. 277; *Garrard* v. *Lauderdale*, 2 Russ. & M. 451, 453, 454.

(*r*) See the principal case, and *Pulvertoft* v. *P.*, 18 V. 84, at p. 99; 11 R. R. 151; *Paul* v. *P.*, 20 Ch. D. 743; and *Re Lucan*, 45 Ch. D. 470; *Re Plumptre's Marriage Settlement*, [1910] 1 Ch. 609.

(*s*) *Jefferys* v. *J.*, Cr. & Ph. 138.

(*t*) *Gaskel* v. *G.*, 2 Y. & J. 502; *Hughes* v. *Stubbs*, 1 Ha. 476; *Field* v. *Lonsdale*, 13 B. 78; *Richards* v. *Delbridge*, 18 Eq. 11; Lewin (13th ed.), pp. 68-9.

(*u*) *Jones* v. *Lock*, L. R. 1 Ch. 25; *Dipple* v. *Corles*, 11 Ha. 183; *Heartley* v. *Nicholson*, 19 Eq. 233; *Milroy* v. *Lord*, 4 De G. F. & J. 274; *Re Breton*, 17 Ch. D. 416.

(*x*) *Antrobus* v. *Smith*, 12 V. 39, 46; *Searle* v. *Law*, 15 Si. 95; *Green* v. *Paterson*, 32 Ch. D., p. 105; *Re Ridgway*, 15 Q. B. D. 447; *Cochrane* v. *Moore*, 25 Q. B. D. 57, 60, 61.

(*y*) See *Clough* v. *Lambert*, 10 Si. 174; *Fletcher* v. *F.*, 4 Ha. 67; *Gandy* v. *G.*, 30 Ch. D. 57; Underhill on Trusts (8th ed.), p. 39.

inoperative in equity as well as at law, for a possibility is incapable of voluntary assignment (*z*).

Voluntary trusts are within section 53, sub-section 1 (b) of the Law of Property Act, 1925, which re-enacts section 7 of the Statute of Frauds. If the trust is of land, or of any interest in land, it must be evidenced by writing signed by the settlor (*a*), but if it be a trust of pure personalty a parol declaration is sufficient (*b*). A trust relating to land may, however, be proved by parol, where the statute is sought to be used as a cover to fraud (*c*).

Bonds and Covenants for Payment of Money to Volunteers.—Where a bond is executed (*d*) in favour of a volunteer, he may prove the debt against the assets of the debtor; but in the old practice of the Court of Chancery he was postponed in equity to creditors for value (*e*). Now, under section 34, sub-section 1, and First Schedule, Part I, of the Administration of Estates Act, 1925, re-enacting section 10 of the Judicature Act, 1875, in the administration of an insolvent estate in the Chancery Division, the bankruptcy rule applies, under which all provable debts (other than debts to which a statutory priority is given), whether contracted for value or not, rank *pari passu* (*f*). But the gift of a voluntary promissory note cannot be treated in equity as giving the holder a claim in the nature of a debt (*g*). In *Re Whitaker* (*h*), a person who afterwards became a lunatic gave a promissory note for £50,000 in discharge of a moral obligation. A claim was made by the holder against his estate after he had been found lunatic. Payment was claimed on the footing of a debt. The Court of Appeal held that

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(*z*) *Re Ellenborough*, [1903] 1 Ch. 697; *Meek* v. *Kettlewell*, 1 Ha. 464; *Re Tilt*, 74 L. T. 163.

(*a*) *Kronheim* v. *Johnson*, 7 Ch. D. 60; *Tierney* v. *Wood*, 19 B. 330; 23 L. J. Ch. 895; *Withers* v. *W.*, Amb. 152; *Forster* v. *Hale*, 3 V. 696.

(*b*) *McFadden* v. *Jenkyns*, 1 Ha. 461; *Middleton* v. *Pollock*, 4 Ch. D. 49; *New, etc.* v. *Hunting*, [1897] 2 Q. B. 19; Lewin (13th ed.), p. 47; Underhill (8th ed.), p. 39.

(*c*) *Haigh* v. *Kaye*, L. R. 7 Ch. 469; *Marlborough* v. *Whitehead*, [1894] 2 Ch. 133; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*d*) *Hall* v. *Palmer*, 3 Ha. 532.

(*e*) *Ramsden* v. *Jackson*, 1 Atk. 294; *Watson* v. *Parker*, 6 B. 283; and see *Re Whitaker*, 42 Ch. D., p. 124 (C. A.); *Re Lucan*, 45 Ch. D. 470.

(*f*) *Re Whitaker*, [1901] 1 Ch. 9; Bankruptcy Act, 1914, section 33, sub-section 7.

(*g*) *Re Whitaker*, 42 Ch. D., p. 124, *per* Cotton, L.J., dissenting from *Dawson* v. *Kearton*, 3 Sm. & G. 186; *Lloyd* v. *Chune*, 2 Gif. 441; *Arthur* v. *Clarkson*, 35 B. 458; and *Re Richards*, 36 Ch. D. 541.

(*h*) 42 Ch. D. 119 (C. A.).

neither at law, nor in equity, could the payee of a voluntary note have any claim as a creditor, for the holder of such a note is not in the same position as the holder of a voluntary bond, as the former could not maintain an action at law, whilst the latter could. A voluntary bond has been preferred to interest upon debts not by law carrying interest (*i*), and also to legacies, even where they were specific (*k*). And an assignee for value of an equitable interest in money payable under a voluntary bond has been held entitled to rank as a specialty creditor for value against the assets of the obligor (*l*).

Where a person *without consideration covenants to pay a sum* of money, if the covenant is complete, and the Court is not called upon to do any act to make it perfect, it will give effect to a trust declared upon the covenant. Thus, in *Clough* v. *Lambert* (*m*), a person, by a voluntary deed, to which his wife and a trustee were parties, covenanted to pay an annuity to the trustee, upon trust for his wife for her life, Shadwell, V.-C., held that the covenant might be enforced by the wife against the executors of her husband, though not as against his creditors, and that the mere intervention of a trustee made no difference (*n*).

And in the event of the trustees refusing or declining to sue on the covenant, equity will assist the *cestui que trust*, by enabling him to use the names of his trustees and sue on the deed at law (*o*). But where a covenant for further assurance was given in respect of an assignment which was voluntary and imperfect, it was held that the assignor could not be compelled to allow the assignee to use his name in an action (*p*).

2. Perfect Trust Created.

By Actual Transfer of Legal Interest.—If there be a conveyance or assignment of land passing the legal estate, as is laid down in the

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(*i*) *Garrard* v. *Dinorben*, 5 Ha. 213.

(*k*) *Patch* v. *Shore*, 2 Dr. & Sm. 589.

(*l*) *Payne* v. *Mortimer*, 4 De G. & J. 447; 1 Gif. 118.

(*m*) 10 Si. 174.

(*n*) And see *Fletcher* v. *F.*, 4 Ha. 67, at p. 75, distinguished in *Re Plumptre*, [1910] 1 Ch. 609; *Bridge* v. *B.*, 16 B. 315, at p. 321; *Alexander* v. *Brame*, 19 B. 436; *Johnstone* v. *Mappin*, 64 L. T. 48; *Re Lucan*, 45 Ch. D. 470, and see *per* Lindley, L.J., in *Re Patrick*, [1891] 1 Ch. 82, at p. 88.

(*o*) *Fletcher* v. *F.*, 4 Ha. 67; *Meldrum* v. *Scorer*, 56 L. T. 471; *Gandy* v. *G.*, 30 Ch. D. 57.

(*p*) *Ward* v. *Audland*, 8 B. 211, but see *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Re Lucan*, 45 Ch. D. 470; cf. *Cox* v. *Barnard*, 8 Ha. 310.

principal case (*q*); or (before 1926) a covenant to surrender copyholds followed by a legal surrender (*r*); or an assignment of leaseholds (*s*); or of debts or other legal choses in action (*t*); as of money at bankers (*u*); or of securities transferable by delivery (*x*); or in the case of chattels capable of delivery, an assignment by deed, or actual delivery (*y*); or a complete transfer of stock (*z*); or a complete transfer of shares or stock in accordance with the requirements of the company (*a*); or an assignment in writing duly stamped of a policy of insurance (*b*) : in all such cases, though the conveyance, assignment, delivery or transfer be voluntary, yet the legal conveyance being effectually made, the equitable rights will be enforced by the Court (*c*). It has been held that a gift *per verba de præsenti* is sufficient to pass the property in chattels already in the possession of the donee (*d*). The giving of a promissory note to a trustee with directions as to its disposition after the donor's death was held in one case to create a perfect trust (*e*).

And the Court will enforce the equitable interest even although, as in the principal case, the trust property by accident *gets back into the hands of the donor* (*f*); to whom, if it were transferred by the trustees, they would commit a breach of trust (*g*).

It is not essential to the creation of a trust in favour of volun-

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(*q*) Cf. *Woodford* v. *Charnley*, 28 B. 96; and see *Re Patrick*, [1891] 1 Ch. 82, 87.

(*r*) *Green* v. *Paterson*, 32 Ch. D., p. 103.

(*s*) *Re Lulham*, 33 W. R. 788 (C. A.).

(*t*) See section 136 of the Law of Property Act, 1925, replacing section 25, subsection 6 of the Judicature Act, 1873; and see notes to *Ryall* v. *Rowles*, vol. 1, *supra*; *Re Patrick*, [1891] 1 Ch. 82.

(*u*) *Bridge* v. *B.*, 16 B. 315; *Walker* v. *Bradford Bank*, 12 Q. B. D. 511.

(*x*) *Langley* v. *Thomas*, 26 L. J. Ch. 609.

(*y*) See *Re Ridgway*, 15 Q. B. D. 447; *Cochrane* v. *Moore*, 25 Q. B. D. 57; *Re Seymour*, [1913] 1 Ch. 475.

(*z*) See *Mackie* v. *Herbertson*, 9 A. C. 303; *De Mestre* v. *West*, [1891] A. C., p. 271.

(*a*) See *Société Générale de Paris* v. *Walker*, 11 A. C., at p. 28; *Nanney* v. *Morgan*, 37 Ch. D. 346, at p. 352.

(*b*) *Fortescue* v. *Barnett*, 3 My. & K. 36; *Re King*, 14 Ch. D. 179; *Howes* v. *Prudential, etc.*, 49 L. T. 133; *Re Young*, 25 L. R. Ir. 372; *Re Turcan*, 40 Ch. D. 5.

(*c*) See also *Colman* v. *Sarrel*, 1 V. 50; 1 R. R. 83; *Pulvertoft* v. *P.*, 18 V. 84, 99; *Bill* v. *Cureton*, 2 My. & K. 503; *Jefferys* v. *J.*, C. & P. 138, 141; *Dening* v. *Ware*, 22 B. 184; *Muggeridge* v. *Stanton*, 7 W. R. 638; *Dilrow* v. *Bone*, 3 Gif. 538.

(*d*) *Re Stoneham*, [1919] 1 Ch. 149. Cf. *Cochrane* v. *Moore*, 25 Q. B. D. 57.

(*e*) *Re Richards*, 36 Ch. D. 541, but *quære*; see *Re Whitaker*, 42 Ch. D. 119, 124-5.

(*f*) *Smith* v. *Lyne*, 2 Y. & C. Ch. 345; *Lanham* v. *Pirie*, 3 Jur. (N.S.) 704; *Gilbert* v. *Overton*, 2 Hem. & M. 117.

(*g*) *M'Donnell* v. *Hesilrige*, 16 B. 346.

teers that the trustees should accept the trust (*h*), and if a trustee to whom the legal interest has been transferred disclaim, the Court will hold the settlor, to whom the estate reverts on the disclaimer, bound by the trust, and will if necessary appoint new trustees (*i*).

Where there is a *clear intention* on the part of the donor of making a gift, a legal transfer of the subject-matter of the gift to the donee will be valid, although it was not knowingly made to him for the purpose of carrying out the gift. " For instance, suppose this occurred, that a person made a memorandum on the title deeds of an estate to this effect : ' I give Blackacre to A. B.' and afterwards conveyed that estate to A. B. by a general description, not intending in any way to change the previous gift, would there be any equity to make the person who had so obtained the legal estate a trustee for the donor? The answer would be, that there is no resulting trust; that is rebutted by showing that the person who conveyed did not intend the person taking the conveyance to be a trustee; and although the person conveying actually thought that that was not one of the estates conveyed, because that person thought that he had well given the estate before, still the estate would pass at law notwithstanding that idea, and there being no intention to revoke the gift, surely it would get rid of any resulting trust. On the same principle, where a testator makes his debtor executor, and thereby releases the debt at law, he is no longer liable at law " (*k*). But the principle adopted by Jessel, M.R., in *Strong* v. *Bird* (*l*), will not be extended to promises of *future* gifts, so as to make the same binding by the donor's appointment of the intended donee as executor (*m*).

Where, although there has been a transfer to trustees, the trusts have not been finally determined upon by the settlor, he has a *locus pœnitentiæ*, and may call for a re-transfer (*n*).

By assignment of the Equitable Estate or Interest.—Where the assignor has done all in his power at the time (*o*) to make the

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(*h*) *Tierney* v. *Wood*, 19 B. 330; *Donohue* v. *Conrahy*, 2 Jo. & Lat. 689.

(*i*) *Mallott* v. *Wilson*, [1903] 2 Ch. 494; *Jones* v. *J.*, [1874] W. N. 190.

(*k*) *Per* Jessel, M.R., in *Strong* v. *Bird*, 18 Eq., pp. 318, 319; and see *Re Pink*, [1912] 2 Ch. 528; *Carter* v. *Hungerford*, [1917] 1 Ch. 260.

(*l*) 18 Eq. 315.

(*m*) *Re Innes*, [1910] 1 Ch. 188, 193-4. Cf. *Re Stewart*, [1908] 2 Ch. 251.

(*n*) *Re Sykes' Trusts*, 2 John. & H. 415; and see *Gason* v. *Rich*, 19 L. R. Ir. 396.

(*o*) *Nanney* v. *Morgan*, 37 Ch. D. 346, 352; *Re Griffin*, [1899] 1 Ch. 408.

assignment perfect, such assignment is binding on him, although voluntary. Thus, if the subject of the trust be an equitable interest and the owner executes an absolute assignment of it, then such assignment passes the equitable estate. In *Sloane* v. *Cadogan* (*p*), C having an equitable reversionary interest in a fund vested in trustees, assigned it to other trustees upon trust for volunteers. It was contended by Sir Edward Sugden, in his argument, that in order to constitute an actual settlement, so as to enable a volunteer to claim the benefit of it, it is absolutely necessary that the relation of trustee and *cestui que trust* should be established; that C did all he could; but that was not enough: that he could not make an actual transfer; that the trustees in whom it was vested would not have been authorised in transferring it of their own authority to the trustees of the settlement made by C; Grant, M.R., however, held that the equitable assignment created a perfect trust. "The Court," he said, "will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees: C had an equitable reversionary interest in that fund, and he assigned it to certain trustees, and then the first trustees are trustees for the assigns, and they may come here; for when the trust is created, no consideration is essential, and the Court will execute it, though voluntary."

In *Fortescue* v. *Barnett* (*q*), J. B. voluntarily assigned by deed a policy of insurance on his own life to trustees for his sister. The grantor kept the policy, and the trustees did not give notice of the assignment. J. B. afterwards surrendered the policy for valuable consideration. Leach, M.R., held, that the gift of the policy was complete without delivery, that nothing remained to be done by the grantor, and that the omission of the trustees to give notice could not affect the *cestuis que trust* (*r*). And so in *Blakely* v. *Brady* (*s*), where a debt was equitably assigned by A to B to hold as trustee upon certain trusts, by deed containing a power of attorney to get it in, the administrator of A was held a trustee for B.

The question does not turn upon any distinction between a legal and an equitable title, but simply upon *whether any act remains to*

(*p*) Sugd. V. & P., App. No. xxiv (11th ed.).

(*q*) 3 My. & K. 36.

(*r*) See *Re King*, 14 Ch. D. 179; *Johnstone* v. *Mappin*, 64 L. T. 48; *Donaldson* v. *D.*, Kay, 711; *Re Lucan*, 45 Ch. D. 470; *Re Patrick*, [1891] 1 Ch. 82.

(*s*) 2 Dr. & Wal. 311.

be done by the grantor which, to assist a volunteer, the Court will not compel him to do (*t*).

In *Kekewich* v. *Manning* (*u*), a lady entitled absolutely to the reversion in stock, subject to the life interest of her mother therein, which stock was standing in the joint names of herself and her mother, assigned her interest in this stock on her marriage to trustees in trust for herself for life, remainder to her husband for life, and after their decease, in trust for her niece, and for the issue of the marriage and the issue of the niece according to appointment; and in default of issue of the marriage, in trust for the niece. No transfer of the fund took place, but the mother had notice of the settlement. There was no issue of the marriage. It was held by Knight-Bruce and Cranworth, L.JJ., that even if the settlement were voluntary as regarded the niece and not supported by the marriage consideration (which point, however, the Court did not decide), the assignment *being complete* would be enforced by the Court. The present case, said Knight-Bruce, L.J. (*x*), raises the question, often discussed, " whether an act or intended act of bounty, whether a gift, or a promised or intended gift, was in truth a perfect act, a completed gift, resting neither in promise merely, nor merely in unfulfilled intention, or was incomplete, was imperfect, and rested merely in promise or unfulfilled intention. * * * It is upon legal and equitable principles clear that a person *sui juris*, acting freely, fairly, and with sufficient knowledge ought to have, and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary or howsoever circumstanced. * * * Suppose stock or money to be legally vested in A as trustee for B for life, and subject to B's life interest, for C absolutely; surely it must be competent to C in B's lifetime, with or without the consent of A, to make an effectual gift of his, C's, interest to D by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. * * * If so, can C do this better or more effectually than by executing an assignment to D?" But the voluntary

(*t*) See judgment of Leach, M.R., in *Fortescue* v. *Barnett*, *supra*; see also *Godsal* v. *Webb*, 2 Keen, 99; *Pearson* v. *Amicable, etc., Office*, 27 B. 229; *Pedder* v. *Mosely*, 31 B. 159; *Re King*, 14 Ch. D. 179; *Edwards* v. *Jones*, 1 My. & C. 238; *Re Griffin*, [1899] 1 Ch. 408.

(*u*) 1 De G. M. & G. 176.

(*x*) *Ibid.*, pp. 187-9.

assignment of a mere *expectancy*, even though under seal, will not be enforced in equity (*y*).

In *Re Lucan* (*z*), L., by indenture between himself and C., granted C. an annuity of £300, issuing out of and chargeable upon certain hereditaments and upon a reversionary interest of £12,000 standing in the names of trustees. The deed contained a covenant for payment, and for further assurance. Chitty, J., held that the charge was effectual on the real estate, but that as to the reversionary interest there was no gift or assignment of the thing, but at most a charge, which rested upon *contract*, and C., being a volunteer, could receive no assistance from the Court.

Equitable assignment where the donor has the legal interest.—In two cases, *Bridge* v. *B.* (*a*) and *Beech* v. *Keep* (*b*), Romilly, M.R., proceeded upon the principle that a voluntary assignment of the equitable interest where the assignor had power to assign or compel a transfer of the legal interest was inoperative. But in *Gilbert* v. *Overton* (*c*), G., who had an agreement for a lease subject to rent and covenants, by voluntary deed assigned it to trustees upon trusts therein declared. The following year a lease was granted to G., but he did not assign it to the trustees. Wood, V.-C., held the settlement to be complete, and in commenting upon *Bridge* v. *B.*, said that the points there dealt with would require much consideration, that a man who conveys his equitable interest may well be considered to do all that can be required, and that it would be a great extension of the established doctrine on these subjects to hold that if a legal estate is discovered, perhaps many years afterwards, to have been outstanding at the date of a voluntary settlement, the settlement itself is to be deprived of effect. In *Nanney* v. *Morgan* (*d*), the settlor, who had an equitable interest in stock, settled it, but did not compel a transfer of the legal interest, which apparently he might have done, and the Court of Appeal held the settlement effectual, Cotton, L.J., saying, " The law as regards voluntary settlements is this : if the settlor transfers *all the interest that he is in a position to transfer at the time*, then it is effectual " (*e*).

(*y*) See *Re Tilt*, 74 L. T. 163; *Meek* v. *Kettlewell*, 1 Ha. 464; *Re Ellenborough*, [1903] 1 Ch. 697; *Re Mudge*, [1914] 1 Ch. 115, 124.

(*z*) 45 Ch. D. 470. (*a*) 16 B. 315. (*b*) 18 B. 285.

(*c*) 2 Hem. & M. 110, and see *Donaldson* v. *D.*, Kay, 711 (V.-C. W.).

(*d*) 37 Ch. D. 346, p. 352. See *Re King*, 14 Ch. D. 179.

(*e*) And see *Société Générale de Paris*, 11 A. C. 20, 28; *Moore* v. *North-Western Bank*, [1891] 2 Ch. 599; Underhill on Trusts (8th ed.), p. 43.

Ellison v. Ellison.

Though a legal chose in action is now legally assignable (*f*), it appears that a voluntary assignment not complying with that section but valid in equity, will operate as a perfect gift. In *Re Patrick* (*g*), P., by voluntary indenture of settlement, assigned certain debts to trustees on certain trusts, and gave them power to sue for and collect such debts. But he did not assign the securities for the debts, or give them up to the trustees. No *notice* was given to the debtors. P. received payment of all the debts and died. The Court of Appeal held that the assignment was complete, and that the trustees might prove for the debts in the administration of P.'s estate (*h*). In *Re Griffin* (*i*), it was held that the indorsement and delivery of a banker's deposit receipt, by way of gift, operated as a good equitable assignment of the amount on deposit, and that the gift of the amount was perfect. The fact that the assignee was appointed executor by the assignor was, however, relied on as removing all doubt.

Notice.—Since the Judicature Act, 1873, s. 25, sub-s. 6 (*k*), now replaced by the Law of Property Act, 1925, s. 136, it would seem that until notice is given in pursuance of the enactment, the *legal* right to a *legal* chose in action which is assigned remains in the assignor (*l*).

It is well established that notice of the voluntary assignment of an equitable interest or of a chose in action, *to the trustees or debtor*, is not essential to its validity as against the settlor, but if the trustees or debtor, before notice, transferred the property or paid the debt, the donee would have no remedy against them. Thus in *Donaldson* v. *D.* (*m*), the settlor having assigned stock standing in the names of trustees, to other trustees in favour of volunteers, Wood, V.-C., held that as between the donees under the assignment and the representatives of the assignor, the title of the former was complete, although no notice of the assignment had

(*f*) Section 136 of Law of Property Act, 1925, replacing section 25, sub-section 6 of Judicature Act, 1873.

(*g*) [1891] 1 Ch. 82. Cf. *Re Seaman*, [1896] 1 Q. B. 412.

(*h*) *Woodford* v. *Charnley*, 28 B. 96, and *Bizzey* v. *Flight*, 24 W. R. 957, were considered in the judgment of Lindley, L.J.

(*i*) [1899] 1 Ch. 408. Cf. *Re Richardson*, 30 Ch. D. 396; *Re Dillon*, 44 Ch. D. 76; Cf. *Re Innes*, [1910] 1 Ch. 188.

(*k*) Notes to *Ryall* v. *Rowles*, vol. 1, *ante*.

(*l*) See *Lee* v. *Magrath*, 10 L. R. Ir. 313; *Harding* v. *H.*, 17 Q. B. D. 442. And see *Bennett* v. *White*, [1910] 2 K. B. 643; *Mathieson's Trustee* v. *Burrup, Mathieson & Co.*, [1927] 1 Ch. 562.

(*m*) Kay, 711, discussed in *Re Lucan*, 45 Ch. D. 470, *supra*, p. 799; *Re Griffin*, [1899] 1 Ch. 408.

been given to the trustees in whose names the stock was standing. "The question," said his Honour, "is, whether, notice not having been given to the trustee, the gift could be enforced. As to that, it has been said in some cases that the gift is complete when no further act is required to be done by the donor or donee : and that seems to imply a doubt, whether, if there were any act to be done by the donee, the gift could be treated as complete. But the assignment has completely passed the interest of the donor. It is true that, if no notice of it were given to the trustees, they would be justified in transferring the stock to the original *cestui que trust* for whom they held it; and if they did so, there would be no remedy against them; and it is possible that the donee might not be able to recover the stock; but all that the donee has to do is, at any time he thinks fit, to give notice to the trustee before the stock is transferred; and when he has given such notice his title is complete : and unless the donor or his executors actually obtain possession of the fund, the donee does not require the aid of the Court against them" (*n*). Notice does not affect the priorities between volunteers (*o*). Notice to the donee or *cestui que trust* is not necessary for the completion of the assignment (*p*). Notice of assignment to the debtors is not necessary to render a gift of the debt complete in equity (*q*).

There appear to be certain statutory exceptions to the rule that an imperfect gift will not be construed as a declaration of trust. Under the Settled Land Act, 1925, s. 27, sub-s. 1, a conveyance purported to be made to an infant alone, or to several persons, all infants, operates only as an agreement for value to execute a settlement by means of a principal vesting deed and a trust instrument in favour of the infant or infants and in the meantime to hold the land in trust for him or them. And by section 9, subsection 1 (iii), any instrument *inter vivos* intended to create a settlement of a legal estate in land which is executed after the commencement of the Act, and does not comply with the require-

(*n*) See *Re Way's Trusts*, 2 De G. J. & S. 365; *Gorringe* v. *Irwell, etc.*, 34 Ch. D., p. 132 (C. A.); *Re Lucan*, 45 Ch. D., p. 474; *Re Patrick*, [1891] 1 Ch., p. 87; *Re Seaman*, [1896] 1 Q. B. 412; Lewin (13th ed.), pp. 68-9.

(*o*) *Justice* v. *Wynne*, 12 Ir. Ch. R. 289; *Newman* v. *N.*, 28 Ch. D. 674; cf. *Re Ford*, 63 L. T. 557; and see notes to *Ryall* v. *Rowles*, vol. i, *ante*.

(*p*) *Tate* v. *Leithead*, Kay, 658; *Paterson* v. *Murphy*, 11 Ha. 88-91; *Standing* v. *Bowring*, 31 Ch. D. 282; *London County Banking Co.* v. *London River Plate*, 21 Q. B. D., p. 542; *Mallott* v. *Wilson*, [1903] 2 Ch. 494.

(*q*) See *Re Patrick*, [1891] 1 Ch. 82; and notes to *Ryall* v. *Rowles*, vol. i, *ante*; and see Lewin (13th ed.), p. 695.

ments of the Act with respect to the method of effecting such a settlement, is to be deemed a trust instrument.

By Declaration of Trust.—A declaration of trust has, in equity, the same effect as a transfer of the legal estate, or as the vesting of a legal interest has in a Court of law, and if the transaction by which the trust is created is *complete*, it will not be disturbed for want of consideration (*r*).

There must be a clear intention to create a trust, carried into effect and perfected by an act intended to give effect to such intention. For as long as the matter rests in intention only, there is a *locus pœnitentiæ* (*s*).

This intention to declare a trust may be effected in two ways : (1) Where a person having the legal estate or possession declares himself to be a trustee of it for another;

(2) Where the legal estate or possession being outstanding in another, the person entitled to the equitable interest therein constitutes such other person a trustee for volunteers (*t*).

If the declaration relates to hereditaments, it must, under section 53, sub-section 1 (b) of the Law of Property Act, 1925 (which takes the place of section 7 of the Statute of Frauds), be " manifested and proved by some writing signed by some person who is able to declare such trust " (*u*). An estate tail cannot be barred by a mere declaration of trust (*x*) But a declaration by parol is sufficient to create a trust of personal property (*y*).

In *Ex p. Pye* (*z*), M. had by letter directed an agent in Paris to purchase an annuity for a lady, which was accordingly purchased, but in the name of M., the lady being at that time married, and also deranged. M. afterwards sent to his agent a power of attorney authorising him to transfer the annuity into the lady's name, but

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(*r*) *Collinson* v. *Pattrick*, 2 Keen, 123.

(*s*) *Re Sykes' Trusts*, 2 John. & H. 415; *Dipple* v. *Corles*, 11 Ha. 183; *Re Mills*, 7 W. R. 372; *Penfold* v. *Mould*, 4 Eq. 562; *Forbes* v. *F.*, 6 W. R. 92; *Gason* v. *Rich*, 19 L. R. Ir. 396; *Johnstone* v. *Mappin*, 69 L. J. Ch. 241; *Antrobus* v. *Smith*, 12 V., p. 47.

(*t*) *Richards* v. *Delbridge*, 18 Eq. 11.

(*u*) See *Forster* v. *Hale*, 5 V. 308; *Tierney* v. *Wood*, 19 B. 330; *Kronheim* v. *Johnson*, 7 Ch. D. 60; *Caton* v. *C.*, L. R. 2 H. L. 127. As to agreements in consideration of marriage, see 29 Car. 2, c. 3, s. 4; *Johnstone* v. *Mappin*, 64 L. T. 48; *Ex p. Whitehead*, 14 Q. B. D. 419.

(*x*) See *Green* v. *Paterson*, 32 Ch. D. 95; and see section 130 of the L. P. Act, 1925.

(*y*) *M'Fadden* v. *Jenkyns*, 1 Ha. 458.

(*z*) 18 V. 140; 11 R. R. 173.

died before the transfer was made. Eldon, C., held, that although the legal interest remained in M., he had *constituted himself a trustee* for the lady. The question involved the point, "whether the power of attorney amounts to a declaration of trust? It is clear that this Court will not assist a volunteer; yet, if the act is completed, though voluntary, the Court will act upon it. It has been decided, *that, upon an agreement to transfer stock, this Court will not interpose;* but, *if the party had declared himself to be the trustee of that stock, it becomes the property of the cestui que trust without more*, and the Court will act upon it. . . . Upon the *documents* before me, it does appear, that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what *seems to me a sufficient declaration that he held this part of the estate in trust for the* annuitant" (*a*).

In *Wheatley* v. *Purr* (*b*), H. O. directed her bankers to place £2,000 in the joint names of her children, J. R. W., M. W., and H. W., and her own as trustee for her children. That sum was accordingly entered in the books of the bankers to the account of H. O. as trustee for J. R. W., M.W., and H. W. The bankers gave H. O., as trustee for J. R. W., M. W., and H. W., a promissory note for the amount, with interest at 2½ per cent., and she gave the bankers a receipt for the promissory note. Langdale, M.R., held that she had *constituted herself a trustee* for the plaintiffs, her children, and that a trust was completely declared, so as to give them a title to relief. But in order that a trust may be established the control retained by the settlor over the fund must be a control for the purposes of the trust, and not a control inconsistent with the intention to create a trust (*c*).

It is not necessary to use the words, "I declare myself a trustee," but there must exist in the transaction that which is the equivalent of those words (*d*); for instance, the giving of a power of attorney (*e*); a simple memorandum that money in hands of the

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(*a*) *Ibid.*, at pp. 149 and 150. Cf. *Price* v. *P.*, 14 B. 598; *Warriner* v. *Rogers*, 16 Eq. 340, 350.

(*b*) 1 Keen, 551.

(*c*) *Vandenberg* v. *Palmer*, 4 K. & J. 204; *Gaskell* v. *G.*, 2 Y. & J. 502; *Stapleton* v. *S.*, 14 Si. 186; *Evans* v. *Jennings*, 6 W. R. 610; *Bill* v. *Cureton*, 2 My. & K. 511; *Crabb* v. *C.*, 1 My. & K. 511; *Kelpen* v. *K.*, 1 My. & K. 520.

(*d*) *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Richards* v. *Delbridge*, 18 Eq. 11; *Dipple* v. *Corles*, 11 Ha., p. 184; Underhill on Trusts (8th ed.), p. 42.

(*e*) *Ex p. Pye*, 18 V. 140, *supra*, but see *Milroy* v. *Lord*, *infra*, p. 808; *Pearson* v. *Amicable, etc.*, 27 B. 229.

holder was trust money (*f*); admission, by answers to questions in letters, that the holder of money was a trustee (*g*). Where a husband invested moneys subject to the trusts of his settlement, in the purchase of an estate, adding thereto £500 of his own, it was held he had devoted this money to the trusts of the settlement (*h*); where an equitable mortgagee, by deposit, signed a memorandum accompanying the deposit, by which she declared that the mortgagor should pay the debt by instalments, some of which were to be invested by him in consols for the benefit of the children of A, this was held an irrevocable declaration of trust (*i*); so where D lent £100 to C and took a receipt in the following terms, "Received of D for the use of A £100, to be paid to A at D's death, but interest at 4 per cent. to be paid to D," which receipt was signed as approved by D; it was held that C was a trustee for A on the death of D (*k*). A testator gave a promissory note to G., saying he wished to provide for L.; he then made his will and appointed G. his executor: held G. was a trustee for L. (*l*). A covenant to surrender copyholds, and meantime to stand possessed of them as trustees for volunteers, is a valid trust for them (*m*). In *Brewster* v. *Prior* (*n*), a residuary account contained an item, "Retained to pay outstanding legacy to W. G., £500," this, coupled with payment of interest, was held to be equivalent to a declaration of trust *by admission or acknowledgment* (*o*).

Papers of a testamentary character.—"If the character of the paper is testamentary, then of course it is impossible to enlarge or convert it into a declaration of trust. The danger is great if such an attempt were to succeed: because, then, the result of such a transaction as this would be that the solemn disposition of property which the law requires to be made in the shape of a will would

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(*f*) *James* v. *Bydder*, 4 B. 605; and see *Middleton* v. *Pollock*, 2 Ch. D. 104; 4 Ch. D. 49. See *New, etc., Trustee* v. *Hunting, etc.*, [1897] 2 Q. B. 19, S. C.; *Sharp* v. *Jackson*, [1899] A. C. 419; cf. *Wigan* v. *English and Scottish, etc., Assurance Assoc.*, [1909] 1 Ch. 291.

(*g*) *Thorpe* v. *Owen*, 5 B. 225.

(*h*) *Ouseley* v. *Anstruther*, 10 B. 461.

(*i*) *Paterson* v. *Murphy*, 11 Ha. 88.

(*k*) *Moore* v. *Darton*, 4 De G. & Sm. 517.

(*l*) *Lloyd* v. *Chune*, 2 Gif. 441; which with *Arthur* v. *Clarkson*, 35 B. 458, and *Re Richards*, 36 Ch. D. 541, are criticised in *Re Whitaker*, 42 Ch. D. 119.

(*m*) *Steele* v. *Waller*, 28 B. 466; *Donaldson* v. *D.*, Kay, 711.

(*n*) 25 W. R. 251.

(*o*) *Scott* v. *Bentley*, 1 K. & J. 221; *Re Bennett*, 17 L. T. 438; *Morton* v. *Tewart*, 2 Y. & C. Ch. 67; see further *Stapleton* v. *S.*, 14 Si. 186; *Donaldson* v. *D.*, Kay, 716; *Gray* v. *G.*, 2 Si. (N.S.) 273.

be entirely lost sight of " (*p*). An imperfect settlement may be confirmed by a will, but in such case it takes effect as a testamentary instrument (*q*).

Husband and Wife.—Before the Married Women's Property Act, 1882, it was doubtful whether a husband could make a good gift to his wife except by constituting himself a trustee for her. If he attempted to give and the gift was held imperfect, then it was in danger of failing as a declaration of trust. In *Baddeley* v. *B.* (*r*), Malins, V.-C., held that an assignment of a leasehold to a wife by her husband although void as a gift by a husband of chattels to his wife, operated as a declaration of trust; but a different view was taken by Hall, V.-C., in *Re Breton* (*s*).

Declaration of trust of equitable interest vested in trustees.—If the equitable owner of property vested in trustees directs them to apply in trust in favour of volunteers (*t*), such trust will be enforced in equity. A direction to trustees, even verbal (*u*), is equivalent to an equitable assignment (*x*). In *Rycroft* v. *Christy* (*y*), Mrs. Rycroft, being entitled to the dividends of money in the hands of a trustee, by deed without consideration directed the trustee to pay part of the said dividends weekly to E. The trustee accepted this trust and acted upon it; Langdale, M.R., held that as Mrs. Rycroft had, *so far as she had the power*, transferred the trust from herself to E., and as there was no further instrument or formality to be executed, and the trustee had accepted and acted on the trust, such trust was binding on Mrs. Rycroft. He also held that a trust once executed, as this was, could not be rendered executory by anything which subsequently happened to the fund, as by a transfer into Court. In *Bentley* v. *Mackay*, (*z*), a father entitled during the life of his son to dividends

(*p*) *Per* Bacon, V.-C., in *Warriner* v. *Rogers*, 16 Eq., p. 353; *Milroy* v. *Lord*, 4 De G. F. & J. 274; *Re Fleetwood*, 15 Ch. D. 594; *Re Boyes*, 26 Ch. D. 531; *Towers* v. *Hogan*, 23 L. R. Ir. 53; *Re Smith*, 64 L. T. 13; *Re Shield*, 53 L. T. 5; *Johnson* v. *Ball*, 5 De G. & Sm. 85; *Re Hetley*, [1902] 2 Ch. 866; Underhill on Trusts (8th ed.), p. 45.

(*q*) *Bizzey* v. *Flight*, 3 Ch. D. 269.

(*r*) 9 Ch. D. 113; and see *Fox* v. *Hawke*, 13 Ch. D. 822.

(*s*) 17 Ch. D. 416. See *Re Whittaker*, 21 Ch. D. 657, 666.

(*t*) *Semble*, acceptance by the trustees is not necessary; *Tierney* v. *Wood*, 19 B 330; *Harding* v. *H.*, 17 Q. B. D. 444; *Mallott* v. *Wilson*, [1903] 2 Ch. 494.

(*u*) *M'Fadden* v. *Jenkyns*, 1 Ha. 458; on appeal, 1 Ph. 153; *Meek* v. *Kettlewell*, 1 Ha. 471.

(*x*) See *Lambe* v. *Orton*, 1 Dr. & Sm. 125; *Harding* v. *H.*, 17 Q. B. D. 443; cf. *Re Lucan*, 45 Ch. D. 470. (*y*) 3 B. 238.

(*z*) 15 B. 12; and see *Bridge* v. *B.*, 16 B. 315; and cf. *Collinson* v. *Pattrick*, 2 Keen, 123.

on funds in the names of himself and three other trustees, directed two of the trustees to pay the dividends to his son, and they acted upon such direction; the Court held that there was a valid declaration of trust. In *Tierney* v. *Wood* (*a*), the legal fee in lands was vested in A in trust for B. B signed a document addressed to A directing him to hold the lands after his death on trust for certain persons, and this was held a good declaration of trust within section 7 of the Statute of Frauds (*b*).

3. An Imperfect Gift or Transfer will not be Construed as a Declaration of Trust.

The clearest intention to create an irrevocable trust in favour of a volunteer, will not be sufficient unless the settlor does some act in confirmation of his intention. The gift or assignment in pursuance of such intention must be complete, or at all events the donor must have done all in his power to make it complete.

In *Antrobus* v. *Smith* (*c*), Gibbs Crawford made the following indorsement upon a receipt for one of the subscriptions in the Forth and Clyde Navigation : " I do *hereby assign* to my daughter, Anna Crawford, all my right, title, and interest of and in the enclosed call, and all other calls, of my subscription in the Clyde and Forth Navigation." This not being a legal assignment, it was argued, " that the father meant to make himself a trustee for his daughter of these shares." But Grant, M.R., observed, " Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed in his contemplation. He meant a *gift*. He says, he *assigns* the property. But it was *a gift not complete*. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which, in the mode of making it, he has left imperfect. There is *locus pœnitentiæ* as long as it is incomplete." So, in *Edwards* v. *Jones* (*d*), where the obligee of a bond signed a memorandum, not under seal, which was indorsed upon the bond, and which purported to be *an assignment* of the

(*a*) 19 B. 330.
(*b*) See *Kronheim* v. *Johnson*, 7 Ch. D. 60.
(*c*) 12 V. 39; 8 R. R. 278.
(*d*) 1 My. & C. 226; cf. *Re Patrick*, [1891] 1 Ch. 82.

bond, without consideration, to the person to whom the bond was at the same time delivered, Cottenham, C., upon the authority of the doctrine laid down in *Antrobus* v. *Smith*, which he said it was impossible to question, held that the *gift was incomplete*, and that, as it was without consideration, the Court could not give effect to it (*e*).

In *Searle* v. *Law* (*f*), A made a voluntary assignment of turnpike road bonds and shares in an insurance and in a banking company to B, in trust for himself for life, and after his death for his nephew. He delivered the bonds and shares to B, but did not observe the formalities required by the Turnpike Act, and the deeds by which the companies were formed, to make the assignment effectual. Shadwell, V.-C., held, that on A's death no interest in either the bonds or the shares passed by the assignment, and that B ought to deliver them to the executor of A. "If that gentleman," said his Honour, "*had not attempted to make any assignment of either the bonds or the shares, but had simply declared, in writing, that he would hold them upon the same trusts as are expressed in the deed*, that *declaration would have been binding upon him;* and whatever bound him, would have bound his personal representative. But it is evident that he had *no intention whatever of being himself a trustee for any one*, and that he meant all the persons named in the deed *as cestuis que trustent* to take the provisions intended for them through the operation of that deed. He omitted, however, to take the proper steps to make that deed an effectual assignment; and, therefore, both the legal and the beneficial interest in the bonds and shares remained vested in him at his death." And see *Jones* v. *Lock* (*g*), where a father put a cheque into his son's hand, saying, "I give this to baby for himself," and then took back the cheque; *Moore* v. *M.* (*h*), imperfect gift of debenture stock; *Heartley* v. *Nicholson* (*i*), where a gift of a share in a colliery company, notwithstanding expressions in letters, signature of minutes, and receipt of dividend, was held insufficient as a declaration of trust; *Ex p. Todd* (*k*), where by deed, in 1877, the settlor recited his intention to settle certain

(*e*) See *Re Richardson*, 30 Ch. D. 396, 404; and cf. *Kekewich* v. *Manning*, 1 De G. M. & G. 176.
(*f*) 15 Si. 95.
(*g*) L. R. 1 Ch. 25.
(*h*) 18 Eq. 474; and see *Re Shield*, 53 L. T. 8.
(*i*) 19 Eq. 233.
(*k*) 19 Q. B. D. 186.

shares and to transfer them to trustees, but the transfer was not made until 1886 and was held void against the trustee in bankruptcy, the settlor having become bankrupt shortly after the execution of the transfer; *Hayes* v. *Alliance, etc., Assoc. Co.* (*l*), an incomplete gift of a policy of assurance by husband to wife; *Re Breton* (*m*), where a husband by three letters purported to give furniture to his wife. In *Woodford* v. *Charnley* (*n*), a mortgagee in fee for £5,000 without any covenant for payment, assigned the sum of £5,000 to trustees by way of settlement and gave them a power of attorney to recover it, but did not convey to them the *legal estate*. It was held that the assignment was incomplete and was therefore not binding (*o*).

In *Milroy* v. *Lord* (*p*), T. M. executed a deed poll by which he purported to assign, for a nominal consideration, fifty shares in a bank to the defendant, Lord, in trust for the plaintiff, his niece. Both T. M. and Lord executed this deed. At this time Lord held a power of attorney from T. M. to transfer stock. After the execution of the deed T. M. gave him a further power to receive dividends, and handed him the scrip for the shares. Lord from time to time paid the dividends to the plaintiff. The fifty bank shares were transferable only by entry in the books of the company. No such transfer was ever made by T. M. or Lord. On the death of T. M., Lord handed over the certificates of the shares to his executor. Stuart, V.-C., held the shares were bound by the trusts of the deed poll, but Turner, L.J., on allowing the appeal, said, "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have *done everything, which, according to the nature of the property comprised in the settlement, was necessary to be done* in order to transfer the property and render the settlement binding upon him. He may of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those

(*l*) 8 L. R. Ir. 149.
(*m*) 17 Ch. D. 416.
(*n*) 28 B. 96.
(*o*) But see *Re Patrick*, [1891] 1 Ch. 82, 87—8; *Re Richardson*, 30 Ch. D. 396.
(*p*) 4 De G. F. & J. 264; *Re Griffin*, [1899] 1 Ch. 408; *Macedo* v. *Beatrice Stroud*, [1922] A. C. 330, 338.

purposes; and if the property be personal, the trust may, as I apprehend, be declared *either in writing or by parol;* but in order to render the settlement binding one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement *is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.* These are the principles by which, as I conceive, this case must be tried."

In the case of *Richards* v. *Delbridge* (*q*), J. Delbridge, who was possessed of leasehold business premises and stock in trade, shortly before his death purported to make a voluntary gift in favour of his grandson, E. B. Richards, who was an infant and assisted him in his business, by the following memorandum signed and endorsed on the lease : " This deed, and all thereto belonging, I give to E. B. Richards from this time forth, with all the stock in trade," signed, " J. Delbridge." J. Delbridge delivered the lease to the mother of his grandson. Jessel, M.R., following *Milroy* v. *Lord* (*supra*), held that there was no valid declaration of trust of the property in favour of E. B. Richards. " The principle is a very simple one," said the M.R. " A man may transfer his property, without valuable consideration, in one of two ways : he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property, takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. *It is true he need not use the words 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning:* for, however anxious the Court may be to carry out a man's

(*q*) 18 Eq. 11.

intention, it is not at liberty to construe words otherwise than according to their proper meaning." And after citing from the judgment of Turner, L.J., in *Milroy* v. *Lord* (*r*), the passage "If the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes," etc., Jessel, M.R., observed, "It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord Romilly and Vice-Chancellor Wood, *i.e.*, in *Morgan* v. *Malleson* and *Richardson* v. *R.* (*supra*), were right, there never could be a case where an expression of a present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases, in which words of present transfer *for valuable consideration* are held to be evidence of a contract which the Court will enforce. Applying that reasoning to cases of this kind, you only make the imperfect instrument evidence of a contract of a voluntary nature, which this Court will not enforce; so that, following out the principle even of those cases, you come to the same conclusion" (*s*).

Donatio mortis causa.—There is this difference between an incomplete voluntary gift *inter vivos*, and a *donatio mortis causa*. In the former case the Courts will not interfere to compel the donor or his executor to perfect it, but in the latter case the executors may be compelled to do so (*t*).

4. Rectification, Revocation and Avoidance of Voluntary Deeds, etc.

A Court of equity will not set aside a voluntary deed or agreement not obtained by fraud, by mistake, or against public policy, even if it be such as, according to the principles before laid down, it will not carry into effect. Equity stands neutral, and invariably

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(*r*) 4 De G. F. & J., p. 274.

(*s*) See also *Warriner* v. *Rogers*, 16 Eq. 340, gift of a box containing title deeds with a memorandum; *Lee* v. *Magrath*, 10 L. R. Ir. 313, a promissory note; *Re Caplen*, 45 L. J. Ch. 280, a promissory note; *Re Whittaker*, 21 Ch. D. 657, declaration of trust by husband; *Ex p. Todd*, 19 Q. B. D. 186, incomplete transfer of shares; *Green* v. *Paterson*, 32 Ch. D. 95, settlement of copyholds without surrender; *Re Richards*, 36 Ch. D. 541, promissory note; and cf. *Re Patrick*, [1891] 1 Ch. 82; *Macedo* v. *Beatrice Stroud*, [1922] A. C. 330, 338.

(*t*) See judgment of Cotton, L.J., in *Re Dillon*, 44 Ch. D., p. 82; cf. *Antrobus* v. *Smith*, 12 V. 39; 8 R. R. 278; *Re Weston*, [1902] 1 Ch. 680; *Re Beaumont*, [1902] 1 Ch. 889; *Re Andrews*, [1902] 2 Ch. 394; *Re Richards*, [1921] 1 Ch. 513, 521.

follows the rule thus quaintly laid down in an old case, " that if a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, a Court of equity will not loose the fetters he hath put upon himself, but he must lie down under his own folly " (*u*). When a settlement is impeached on the ground of undue influence, the absence of a power of revocation is not *in itself* a ground for setting the settlement aside (*x*). The settlor can in no wise invalidate his deed, though prior to the Voluntary Conveyances Act, 1893 (now replaced by section 173, sub-section 2 of the Law of Property Act, 1925), he could defeat it by a subsequent disposition by himself for value (*y*). And the rule is the same whether the interference of equity is invoked by the settlor himself, or by a person claiming through him (*z*). Where an instrument creating a valid and complete voluntary trust is duly sealed and delivered, the obligation is complete; the detention thereof by the settlor does not render it inoperative (*a*). Nor will the destruction of the instrument affect the trust (*b*).

Rectification.—As we have before seen, a deed for valuable consideration not carrying out the intention of the parties may be so modified as to carry out the same (*c*), and even at the suit of a volunteer *cestui que trust* (*d*). In the case of a *voluntary* deed it was formerly said that rectification was impossible, and that the deed could not be modified to suit former intentions (*e*). In certain cases, however, on proof that the effect of the absence of a power of revocation was not present to the mind of a voluntary settlor when he executed the settlement, the Court has rectified it, by inserting powers of disposition in default or failure of issue (*f*),

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(*u*) *Villers* v. *Beaumont*, 1 Vern. 101.

(*x*) *Phillips* v. *Mullings*, L. R. 7 Ch. 244; *Hall* v. *H.*, L. R. 8 Ch. 430.

(*y*) See *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; *Re Walhampton Estate*, 26 Ch. D. 391; *Godfrey* v. *Poole*, 13 A. C., p. 505; and see *Bill* v. *Cureton*, 2 My. & K. 503; *Petre* v. *Espinasse*, 2 My. & K. 496.

(*z*) *Dolphin* v. *Aylward*, *supra*.

(*a*) *Re Patrick*, *supra*; *Hall* v. *Palmer*, 3 Ha. 532; *Fletcher* v. *F.*, 4 Ha. 67; *Re Way's Trusts*, 2 De G. J. & S. 365; cf. *Xenos* v. *Wickham*, L. R. 2 H. L. 323.

(*b*) *Smith* v. *Lyne*, 2 Y. & C. Ch. 345.

(*c*) See *Glenorchy* v. *Bosville*, and notes thereto, *ante*.

(*d*) *Thompson* v. *Whitmore*, 1 J. & H. 268.

(*e*) *Phillipson* v. *Kerry*, 32 B. 628, 638; *Turner* v. *Collins*, L. R. 7 Ch. 329.

(*f*) See *James* v. *Couchman*, 29 Ch. D. 212; and see *Bonhote* v. *Henderson*, [1895] 1 Ch. 742; [1895] 2 Ch. 202; and cf. *Lady Hood of Avalon*, [1909] 1 Ch. 476.

and in one case adding a power of revocation (*g*). In this case, however, the Court with the consent of the plaintiff directed that a new settlement with all proper powers should be made under the directions of the Court.

Revocation.—A complete executed trust, either by actual transfer on assignment or declaration of trust, cannot in the absence of a power reserved for that purpose to the settlor, or in the absence of fraud, mistake, etc., be revoked by him (*h*). And it is immaterial that the legal estate by accident or breach of trust gets back into the hands of the settlor, as he would simply take it as a trustee (*i*).

In *M'Donnell* v. *Hesilrige* (*k*), a *feme sole*, in contemplation of her marriage with T., transferred property to trustees, upon trust for herself until marriage (if any), and then on trusts for her issue. She did not marry T., but M., and the trustees then handed over to her part of the fund. Held, that the settlement was irrevocable, and that the trustees were guilty of breach of trust. But if a settlement is executed with reference to a particular marriage, and the contract is definitely put an end to, the Court has jurisdiction to put an end to the settlement (*l*). If the trusts are for the settlor until marriage, and then upon other trusts, and the proposed marriage is such that by the law of this country it never can take place, the trust for the settlor remains in force (*m*).

Conveyances Fraudulent by Statute.—By 27 Eliz. c. 4, conveyances and leases of lands, made with intent to defraud and deceive purchasers, were made void against such purchasers. By the construction placed upon this statute, it was held that where a voluntary conveyance was followed by a conveyance for value of the same land by the same grantor (*n*), the voluntary conveyance was deemed fraudulent, within the meaning of the statute, as

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(*g*) *Welman* v. *W.*, 15 Ch. D. 570.

(*h*) *Villers* v. *Beaumont*, 1 Vern. 101; *Ogilvie* v. *Littleboy*, 13 T. L. R. 399; same case in House of Lords, *Ogilvie* v. *Allen*, 15 T. L. R. 294; *Bill* v. *Cureton*, 2 My. & K. 496; *Rycroft* v. *Christy*, 3 B. 238; *Newton* v. *Askew*, 11 B. 145; *Paul* v. *P.*, 20 Ch. D. 742 (C. A.); *Mackie* v. *Herbertson*, 9 A. C. 303.

(*i*) *Mallott* v. *Wilson*, [1903] 2 Ch. 494.

(*k*) 16 B. 346.

(*l*) *Essery* v. *Cowlard*, 26 Ch. D. 191; *Bond* v. *Walford*, 32 Ch. D. 238.

(*m*) *Chapman* v. *Bradley*, 4 De G. J. & S. 71; *Pawson* v. *Brown*, 13 Ch. D. 202.

(*n*) *Newman* v. *Rusham*, *infra*.

against the subsequent purchaser (*o*). As expressed by Lord Campbell, C.J., in *Newman* v. *Rusham* (*p*), the principle on which voluntary conveyances have been held fraudulent and void as against subsequent purchasers appears to be that "by selling the property for a valuable consideration the seller so entirely repudiates the former voluntary conveyance, and show his intention to sell, as that it shall be taken conclusively against him, and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser."

The fact that the purchaser had notice of the voluntary conveyance did not prevent the later deed operating to avoid the earlier one. But a voluntary conveyance was only defeated to the extent necessary to give effect to the conveyance or settlement for value (*q*). And a conveyance in its creation voluntary might be converted into an instrument for value by matter *ex post facto* (*r*).

The statute applied only to interests in *land*; and accordingly a voluntary settlement of chattels personal was not liable to be defeated by a subsequent sale (*s*).

The settlor could not generally enforce the specific performance of a contract for the sale of the estate entered into by him after having executed a voluntary settlement (*t*), for the vendor has no equity to defeat an act which he has done himself, and it can never be certain that matter *ex post facto* may not have made the settlement good (*u*). But a purchaser, even with notice of a previous voluntary settlement, could enforce the contract (*w*), or refuse the title, and sue for the deposit (*x*). A conveyance of leaseholds was held not to be voluntary within 27 Eliz. c. 4.

The Voluntary Conveyances Act, 1893, has been repealed by the

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(*o*) *Doe* v. *Manning*, 9 East, 59; *Clarke* v. *Wright*, 6 H. & N. 849; *Doe* v. *Rusham*, 17 Q. B. 724; *Trowell* v. *Shenton*, 8 Ch. D., p. 325.

(*p*) 17 Q. B., p. 724; *Godfrey* v. *Poole*, 13 A. C., p. 504.

(*q*) *Croker* v. *Martin*, 1 Bli. (N.S.) 573; *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; *Re Walhampton*, 26 Ch. D. 391; *Godfrey* v. *Poole*, 13 A. C., p. 505.

(*r*) *Brown* v. *Carter*, 5 V. 862; *George* v. *Milbanke*, 9 V. 190; *Clarke* v. *Willott*, L. R. 7 Ex. 313; *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776.

(*s*) *Sloane* v. *Cadogan*, 2 Sug. V. & P., App. xxiv (11th ed.); *Bill* v. *Cureton*, 2 My. & K. 502; *Barton* v. *Vanheythuysen*, 11 Ha. 126; *Re Walhampton Estate*, 26 Ch. D. 391.

(*t*) *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, T. & R. 294; *Clarke* v. *Willott*, L. R. 7 Ex. 313.

(*u*) Fry, Specific Performance (6th ed.), p. 193.

(*w*) *Buckle* v. *Mitchell*, 18 V. 100; 11 R. R. 155; *Rosher* v. *Williams*, 20 Eq. 210.

(*x*) *Clarke* v. *Willott*, *supra*; *Gen. Meat. etc.* v. *Bouffler*, 41 L. T. 719.

Law of Property Act, 1925, which, in section 173 (taking the place of the Act of 1893) provides as follows—

> " 173.—(1) Every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.
>
> " (2) For the purposes of this section, no voluntary disposition, whenever made, shall be deemed to have been made with intent to defraud by reason only that a subsequent conveyance for valuable consideration was made, if such subsequent conveyance was made after the twenty-eighth day of June, eighteen hundred and ninety-three " (*y*).

Conveyances Void against Creditors.—The statute, 13 Eliz. c. 5, has been repealed by the Law of Property Act, 1925, which, in section 172 (taking the place of 13 Eliz. c. 5), enacts—

> " 172.—(1) Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.
>
> " (2) This section does not affect the operation of a disentailing assurance, or the law of bankruptcy for the time being in force.
>
> " (3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors."

As to the general construction of 13 Eliz. c. 5 (now section 172 of the Law of Property Act, 1925), which was enacted for the protection of creditors, as 27 Eliz. c. 4 (now section 173 of the Law of Property Act, 1925), was for the protection of purchasers, see *Twyne's Case* (*z*).

What Property it includes.—It will be observed that section 172, like the statute it replaces, is not confined to interests in land. It extends to " every conveyance of property," made with the intent referred to; and " property," as used in the Act, includes " any thing in action, and any interest in real or personal property."

(*y*) This is the date when the Voluntary Conveyances Act, 1893, was passed and became operative.

(*z*) 3 Rep. 80; Smiths' Leading Cases, vol. i.

Ellison v. Ellison.

Intent to Defeat, etc.—The intent to delay, hinder, or defraud creditors may be actual (*a*), or may be inferred, as, for instance, by the creditor showing that the settlor was *indebted to the extent of insolvency*; or that he was *largely indebted* at the time of making the settlement, *and soon afterwards became insolvent* (*b*). And even if the settlor was not indebted at the time, but only subject to a liability—*e.g.*, a guarantee—which might never become a debt, yet if the circumstances are such that there is a reasonable probability of its being enforced, and if its enforcement would require the property settled for its satisfaction, the settlement will be taken as made with intent to defraud (*c*). The whole of the circumstances surrounding the transaction must be looked at to ascertain whether the guilty intent existed or not (*d*).

A man who makes a settlement without leaving himself enough property to pay his creditors must be considered to do it with *an intent* to defeat and delay them (*e*).

The principle established is this :—The language of the enactment being that any conveyance of property made *with intent* to defraud creditors is voidable at the instance of any person thereby prejudiced, the Court is to decide *in each particular case* whether, in all the circumstances, it can come to the conclusion that the intention of the settlor in making the settlement was to defraud his creditors (*f*). And although the various badges of fraud referred to in *Twyne's Case* (*g*) will be duly weighed, yet none of them will be considered as necessarily determining the matter.

The statute itself says nothing about voluntary deeds, and a deed for valuable consideration may, if made with intention to defraud creditors, be void under the statute (*h*). But where a transaction is *voluntary*, the Court may infer an intent to defeat

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(*a*) *Spirett* v. *Willows*, 3 De G. J. & S. 293.

(*b*) *Fletcher* v. *Sedley*, 2 Vern. 490, n.; *Taylor* v. *Jones*, 2 Atk. 600; *Skarf* v. *Soulby*, 1 Mac. & G. 364; *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Re Magawley's Trust*, 5 De G. & Sm. 1; *Holmes* v. *Penney*, 3 K. & J. 90; *French* v. *F.*, 6 De G. M. & G. 95; *Penhall* v. *Elwin*, 1 Sm. & Gif. 258; *Elsey* v. *Cox*, 26 B. 95; *Thompson* v. *Webster*, 4 De G. & J. 600; *Crossley* v. *Elworthy*, 12 Eq. 158; *Cornish* v. *Clark*, 14 Eq. 184; *Taylor* v. *Coenen*, 1 Ch. D. 636; May, Fraudulent Conveyances (3rd ed.), pp. 28—9.

(*c*) *Re Ridler*, 22 Ch. D. 74.

(*d*) *Re Holland*, [1902] 2 Ch. 360.

(*e*) *Re Ridler*, *supra*; *Green* v. *Paterson*, 32 Ch. D., p. 105; *Freeman* v. *Pope*, L. R. 5 Ch. 538, 541; *Smith* v. *Cherrill*, 4 Eq. 390, 396; *Re Fasey*, [1923] 2 Ch. 1.

(*f*) See *Thompson* v. *Webster*, 4 Drew. 632; *Re Johnson*, 20 Ch. D. 392; *Godfrey* v. *Poole*, 13 A. C. 503.

(*g*) 3 Rep. 80 b; Smith, L. C., vol. i.

(*h*) *Holmes* v. *Penney*, 3 K. & J. 90.

creditors from a variety of circumstances, whereas if it is founded on valuable consideration, then actual and express intent is necessary to be proved : *per* Giffard, L.J., in *Freeman* v. *Pope* (*i*), cited with approval by Fry, J., in *Re Johnson* (*k*).

Generally speaking, all voluntary transfers of property made by a person who at the date of such transfer is indebted beyond his means, are invalid under the statute (*m*). Actual insolvency need not be shown (*n*), but if it can be shown that the settlor at the time he made the settlement was indebted to the extent of insolvency, or became insolvent by reason of the transfer of the property comprised in the settlement, the settlement will be invalid (*o*). But if a settlor, although in embarrassed circumstances, has property not included in the settlement ample for the payment of debts owing by him at the time of making it, the settlement may be supported against creditors, although debts due at the date of it may to a considerable amount remain unpaid (*p*).

To sustain a voluntary settlement the settlor, at the date of it, must have property outside the settlement available to discharge or provide for all his debts or liabilities (*q*). In order to set aside a voluntary settlement it is not necessary to show that the settlor contemplated becoming actually indebted. If he contemplated a state of things which might result in bankruptcy or insolvency, that is sufficient (*r*). In estimating the debts of the settlor, future contingent *liabilities* must also be taken into account (*s*).

The burden of proving the existence of debts, etc., generally rests upon the person who seeks to avoid the settlement (*t*), unless the settlor becomes insolvent shortly after the date of settlement,

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(*i*) L. R. 5 Ch., p. 544.

(*k*) 20 Ch. D. 393; and see *Ex p. Mercer*, 17 Q. B. D. 290.

(*m*) *George* v. *Milbanke*, 9 V. 190; 7 R. R., p. 161; *Freeman* v. *Pope*, L. R. 5 Ch. 540; *Ex p. Mercer*, 17 Q. B. D. 290; *Re Holland*, [1902] 2 Ch. 360.

(*n*) *Townsend* v. *Westacott*, 2 B. 340; *Thompson* v. *Webster*, 4 Drew. 628.

(*o*) *Smith* v. *Cherrill*, 4 Eq. 390; *Freeman* v. *Pope*, L. R. 5 Ch., p. 545; *Re Fasey*, [1923] 2 Ch. 1.

(*p*) *Kent* v. *Riley*, 14 Eq. 190.

(*q*) *Ex p. Russell*, 19 Ch. D. 588; *Re Ridler*, 22 Ch. D. 74; *Halifax J. S. Banking Co.* v. *Gledhill*, [1891] 1 Ch. 31; cf. *Re Lowndes*, 18 Q. B. D. 677.

(*r*) *Stileman* v. *Ashdown*, 2 Atk. 477; *Mackay* v. *Douglas*, 14 Eq. 106.

(*s*) *Goodriche* v. *Taylor*, 2 De G. J. & S. 141; *Crossley* v. *Elworthy*, 12 Eq. 158; *Re Ridler*, 22 Ch. D. 74.

(*t*) *Richardson* v. *Smallwood*, Jac. 552; *Ex p. Mercer*, 17 Q. B. D. 290; *Re Holland*, [1902] 2 Ch. 360.

in which case the burden of proving that he was in a position to make such a settlement rests on him (*u*).

Where there is an actual intent to defraud creditors, it is immaterial whether, when the settlement was executed, the settlor was indebted or not indebted; as, for instance, where a person settles all his present and future property (*x*); and in the case of a trader engaged in trade it is immaterial that the settlement is of a trifling amount compared with the extent of his business (*y*).

The *dictum* of Westbury, C., to the effect that, " if the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement " (*z*), would appear to be expressed too broadly (*a*).

But it is not necessary that a man should be indebted at the time he enters into a voluntary settlement, for if a man does it with a view of being indebted at a future time it is equally fraudulent : *per* Hardwicke, C. (*b*).

If there be a creditor whose debt was incurred subsequently to the voluntary deed, and there is also at the time of instituting the proceedings an unpaid creditor whose debt was incurred prior to the deed, the subsequent creditor has the same right as the prior creditor to commence an action (*c*).

A voluntary settlement may be executed under such circumstances as to make it void as against *subsequent* creditors, although all antecedent creditors may have been paid (*d*), where, for instance, it has been executed in order to defeat the plaintiff in an action (*e*). In *Freeman* v. *Pope* (*f*), the settlor, *being solvent at*

(*u*) *Crossley* v. *Elworthy*, 12 Eq. 165; *Mackay* v. *Douglas*, 14 Eq. 106; *Ex p. Russell*, 19 Ch. D. 588.

(*x*) *Ware* v. *Gardner*, 7 Eq. 317, 321; *Spirett* v. *Willows*, 3 De G. J. & S. 293; *Taylor* v. *Coenen*, 1 Ch. D. 641; cf. *Re Reis*, [1904] 2 K. B. 769.

(*y*) *Taylor* v. *Coenen*, 1 Ch. D. 641; *Re Fasey*, [1923] 2 Ch. 1.

(*z*) *Spirett* v. *Willows*, 3 De G. J. & S. 302.

(*a*) See *Freeman* v. *Pope*, L. R. 5 Ch., p. 543.

(*b*) *Stileman* v. *Ashdown*, 2 Atk. 481; *Ware* v. *Gardner*, 7 Eq. 317; Vaizey, Sett., p. 1533; May, Fraudulent Conveyances (3rd ed.), p. 43.

(*c*) *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Freeman* v. *Pope*, L. R. 5 Ch. 538; but see *Re Kelleher*, [1911] 2 Ir. R. 1.

(*d*) *Richardson* v. *Smallwood*, Jac. 559; *Holmes* v. *Penney*, 3 K. & J. 90, 99.

(*e*) *Kidney* v. *Coussmaker*, 12 V. 138; *Barling* v. *Bishopp*, 29 B. 417; May, Fraudulent Conveyances (3rd ed.), p. 43.

(*f*) L. R. 5 Ch. 538.

the time, but having contracted a considerable debt, which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of his debts, after which he collected his assets and (apparently in a reckless manner) spent them. It was held that the settlement must be set aside.

In *Mackay* v. *Douglas* (*g*), a man, not insolvent at the time, made a voluntary settlement of the bulk of his property in contemplation of his going into trade of a hazardous character, and became insolvent a few months after, and it was held the onus lay upon him of showing that he was in a position to make a settlement (*h*).

The fact that a voluntary settlement contains a clause protecting the settlor's life interest is not conclusive to avoid the settlement under the statute of Elizabeth (*i*). A covenant by a husband in his marriage settlement to settle all his after-acquired property except business assets is not fraudulent within the statute (*k*).

In *Ex p. Russell* (*l*), a baker, who was solvent, purchased a grocery business, which he intended to carry on in addition to the bakery. He then made a voluntary settlement upon his wife and children of the bulk of his property. It was held that his object was to put his property out of the reach of his future creditors, and that the deed was void (*m*).

It is always difficult to impeach successfully a deed as being fraudulent against future creditors if it appears that there is no intention to defraud present creditors (*n*).

A voluntary deed executed, *pendente lite*, for the purpose of defeating any process in the nature of execution, will be set aside (*o*), or where a man knows that a decision is about to be pronounced against him (*p*).

(*g*) 14 Eq. 106. (*h*) And see *Re Cross*, 19 W. R. 153.

(*i*) 13 Eliz. c. 5, now section 172 of L. P. Act, 1925; *Re Holland*, [1902] 2 Ch. 360 (C. A.); overruling *Re Pearson*, 3 Ch. D. 807.

(*k*) *Re Reis*, [1904] 2 K. B. 769.

(*l*) 19 Ch. D. 588.

(*m*) And see *Ex p. Chaplin*, 26 Ch. D. 319; *Re Fasey*, [1923] 2 Ch. 1.

(*n*) *Jenkyn* v. *Vaughan*, 3 Drew. 425; *Smith* v. *Tatton*, 6 L. R. Ir. 32, 44; *Re Kelleher*, [1911] 2 Ir. R. 1.

(*o*) *Blenkinsopp* v. *B.*, 1 De G. M. & G. 495; and see *Gonville's Trustee* v. *Patent Caramel Co.*, [1912] 1 K. B. 599.

(*p*) *Barling* v. *Bishopp*, 29 B. 417; *Reese River Silver Mining Co.* v. *Atwell*, 7 Eq. 347.

Ellison v. Ellison.

In *Ex p. Mercer* (*q*), W., a mariner, was engaged to be married to V., but he married another. In 1881 V. commenced an action against him for breach of promise of marriage, and he was served with the writ at Hong Kong. A few days after, W. executed a voluntary assignment of a legacy of £500 in trust for his wife for life, and then for survivor and the children of the marriage. In July, 1882, V. obtained judgment in the action for £500 damages and costs. In November, 1882, W. became bankrupt. The Court, holding that there was no sufficient evidence of an *intent* on the part of the bankrupt to defeat or delay his creditors, upheld the settlement.

This note deals only with voluntary assurances, but it may be here remarked that *mala fides* supersedes all inquiry into consideration, for the question of consideration as regards *creditors* is only of importance where it is *bona fide*. Therefore, even the consideration of marriage, which is the highest known to the law, will not support a transaction unless there is *bona fides*. If the Court, therefore, in such cases finds that a marriage was merely resorted to as a cloak to defeat the rights of creditors, an ante-nuptial settlement will be set aside (*r*). To avoid an ante-nuptial settlement as a fraud upon creditors, it must be shown that both husband and wife are parties to the fraud (*s*).

An ante-nuptial settlement, so far as relates to limitations to *collaterals* is in the same position as a settlement made without consideration (*t*).

A *post-nuptial* settlement by a settlor, if *insolvent* at the time, though in pursuance of a verbal contract before marriage, is void against his creditors (*u*), but where there is some valuable consideration, such as the payment of the debts of the settlor, though he concealed one (*x*), or a loan to pay off other debts (*y*), the settlement will not be void. Conveyances on mere *meritorious* considerations, stand on the same footing, as regards this statute,

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(*q*) 17 Q. B. D. 290; cf. *Re Holland*, [1902] 2 Ch. 360.

(*r*) *Colombine* v. *Penhall*, 1 Sm. & G. 228; *Bulmer* v. *Hunter*, 8 Eq. 46; *Re Pennington*, 59 L. T. 774; *Re Home*, 54 L. T. 301; May, Fraudulent Conveyances (3rd ed.), pp. 64, 65.

(*s*) *Parnell* v. *Stedman*, 1 C. & E. 153.

(*t*) *Smith* v. *Cherrill*, 4 Eq. 390; *De Mestre* v. *West*, [1891] A. C. 264; and see *Re Plumptre's Marriage Settlement*, [1910] 1 Ch. 609.

(*u*) *Warden* v. *Jones*, 2 De G. & J. 76; *Barkworth* v. *Young*, 4 Drew. 1; and see *Trowell* v. *Shenton*, 8 Ch. D. 324; *Re Holland*, [1902] 2 Ch. 360.

(*x*) *Holmes* v. *Penney*, 3 K. & J. 90, 99.

(*y*) *Thompson* v. *Webster*, 4 De G. & J. 600.

as those which are voluntary (*z*), and a debt for advances by a parent, barred by the Statute of Limitations, is not sufficient to support a post-nuptial settlement against creditors (*a*).

Gifts in money or banknotes by a father to his children, the effect of which would be to defeat or delay his creditors, will now also be invalid (*b*). In *Cornish* v. *Clark* (*c*), where a debtor, in a weak state of mind and body, distributed the whole of his property, consisting of chattels, money in the bank, and money upon mortgage among his children partly in consideration of annuities for his life, partly by voluntary settlement, and partly by voluntary gifts, the transaction was held void as against creditors under the statute, the Court being satisfied upon the evidence that the children were aware at the time that the creditors' claims would be defeated, though it did not appear that the debtor had any such intention. So an annuity or bond given to secure an annuity for the wife of the settlor has been held void as against creditors under the statute (*d*).

Persons who rank as Creditors under the Statute.—The word "creditors" in the statute is wide enough to include any person who has a legal demand against the settlor, so that he may rank as a creditor, although at the date of the settlement he may have no legal right to enforce it. It is not necessary that the creditor should have any charge on the property (*e*); and the creditors' rights being under a positive enactment, their claim is *legal*, not equitable (*f*), and it follows that unless the delay in bringing an action to set aside the deed is such as to cause a statutory bar, the right to do so is not lost by mere delay (*g*). A mortgage debt adequately secured is not a debt for the purposes of the statute (*h*). A creditor of an ancestor is a creditor of an heir to whom lands have descended, and a voluntary conveyance by such heir will be invalid against the creditors of the ancestor; a like conveyance by a devisee (*i*), or by a legal personal representative is invalid against

(*z*) *Strong* v. *S.*, 18 B. 408; *Re Johnson*, 20 Ch. D., p. 393.

(*a*) *Penhall* v. *Elwin*, 1 Sm. & G. 258.

(*b*) *French* v. *F.*, 6 De G. M. & G. 95; *Sims* v. *Thomas*, 12 Ad. & E. 536; *Christy* v. *Courtenay*, 13 B. 96. (*c*) 14 Eq. 184.

(*d*) *French* v. *F.*, 6 De G. M. & G. 95; *Hue* v. *French*, 26 L. J. Ch. 317.

(*e*) *Reese River, etc., Co.* v. *Atwell*, 7 Eq. 347; May, Fraudulent Conveyances (3rd ed.), p. 310.

(*f*) *Halifax J. S. Banking Co.* v. *Gledhill*, [1891] 1 Ch., p. 37.

(*g*) *Re Maddever*, 27 Ch. D. 523.

(*h*) *Stephens* v. *Olive*, 2 Bro. Ch. 90; Vaizey, p. 1534.

(*i*) *Gooch's Case*, 5 Rep. 60; *Apharry* v. *Bodingham*, Cro. El. 350; *Richardson* v. *Horton*, 7 B. 112.

creditors of the testator (*k*). A purchaser for value from a volunteer under a deed invalid by the statute will be preferred to the general creditors of the settlor having no specific charge (*l*).

A creditor under a *voluntary* post-obit bond, is as much entitled to the benefit of the statute as any other creditor. Where, therefore, a testator, having executed a voluntary post-obit bond for securing an annuity of £100 to his daughter-in-law for her life, afterwards made a voluntary settlement, from and after his decease, in favour of his widow and child, comprising all his property (except about £300), and before his death acquired only about £1,000 more, it was held that the settlement was void under 13 Eliz. c. 5 as against the bond creditor (*m*). A voluntary assignee of a debt under section 136 of the Law of Property Act, 1925 (which takes the place of section 25, sub-section 6 of the Judicature Act, 1873), would now be deemed a creditor (*n*).

A voluntary settlement is invalid as against creditors to the extent only to which it may be necessary to deal with the estate for their satisfaction. To every other purpose it is good (*o*). A creditor, however, may by concurring or acquiescing in a deed voidable under the statute, preclude himself and his representatives from impeaching such deed (*p*), especially if he has been a party with the donees to instruments and transactions proceeding on the assumption of its validity (*q*). And an inquiry may be directed whether any and which of the creditors of the settlor had acquiesced in a voluntary deed (*r*).

Any creditor may commence an action to set aside a settlement under the statute, and if the settlor is alive and not a bankrupt the action ought to be on behalf of all the creditors of the debtor (*s*).

On the bankruptcy of the settlor the trustees in his bankruptcy are the proper parties to commence an action (*t*).

(*k*) *Doe* v. *Fallows*, 2 Tyr. 460; but see the note on this case, Williams' Exors. (11th ed.), p. 698.

(*l*) *George* v. *Milbanke*, 9 V. 190; 7 R. R. 157; *Halifax J. S. Banking Co.* v. *Gledhill*, [1891] 1 Ch. 31.

(*m*) *Adames* v. *Hallett*, 6 Eq. 468.

(*n*) See May, Fraudulent Conveyances (3rd ed.), p. 103.

(*o*) *Per* Grant, M.R., in *Curtis* v. *Price*, 12 V. 103, 106; *French* v. *F.*, 6 De G. M. & G., p. 103; *Smith* v. *Cherrill*, 4 Eq. 390; May, p. 319; Vaizey, Sett., 1535.

(*p*) *Olliver* v. *King*, 8 De G. M. & G. 110.

(*q*) *Ibid.*

(*r*) *Freeman* v. *Pope*, 9 Eq. 212; Seton (7th ed.), p. 2280.

(*s*) *Reese River S. M. Co.* v. *Atwell*, 7 Eq. 347.

(*t*) *Collins* v. *Burton*, 4 De G. & J. 612; *Goldsmith* v. *Russell*, 5 De G. M. & G. 547.

Ellison v. Ellison.

A subsequent creditor can maintain an action to set aside the deed on the ground that it is *voluntary*, if, at the time of the commencement of the action, a debt due at the date of the settlement remains unpaid (*u*), and an intent to delay, hinder, or defraud creditors can be shown (*x*). When a voluntary deed is set aside under the statute, creditors subsequent and antecedent to the deed are let in together (*y*).

Where in an administration action a voluntary settlement was held void as against creditors, and the trustees of the settlement paid the whole fund (being all the assets) into Court, it was held that the costs of the action were payable out of such part of the fund as was equal to the amount of the debts, and that the balance due to the trustees was payable to them (*z*).

The judgment usually declares the instrument impeached to be fraudulent and void as against creditors, with or without directions for cancellation (*a*).

If there is proof of one prior debt (*b*), or evidence that the settlor was in embarrassed circumstances (*c*), an inquiry will be ordered as to the amount of the settlor's debts, etc., and the value of his property at the date of the settlement (*d*).

Voluntary Deeds Void under Bankruptcy Act, 1914.—The Bankruptcy Act, 1914, s. 42, sub-s. 1 provides that any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration (*e*), or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void as against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time

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(*u*) *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Freeman* v. *Pope*, L. R. 5 Ch. 538; May, Fraudulent Conveyances (3rd ed.), p. 41.

(*x*) *Spirett* v. *Willows*, 3 De G. J. & S. 293; *Crossley* v. *Elworthy*, 12 Eq. 158; *Ex p. Russell*, 19 Ch. D. 588; *Re Kelleher*, [1911] 2 Ir. R. 1.

(*y*) *Barton* v. *Vanheythuysen*, 11 Ha. 126; *Strong* v. *S.*, 18 B. 408.

(*z*) *Re Turner's Estate*, [1884] W. N. 191; May, Fraudulent Conveyances (3rd ed.), pp. 335 to 340.

(*a*) Seton (7th ed.), p. 2283; and see forms, p. 2280.

(*b*) *Skarf* v. *Soulby*, 1 Mac. & G. 364; *Jenkyn* v. *Vaughan*, 3 Drew. 419.

(*c*) *Norcutt* v. *Dodd*, 1 Cr. & Ph. 100.

(*d*) May, Fraudulent Conveyances (3rd ed.), 33, 312, 313.

(*e*) See *Hance* v. *Harding*, 20 Q. B. D. 732; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; *Re Parry*, [1904] 1 K. B. 129; *Re Pope*, [1908] 2 K. B. 169.

within ten years after the date of the settlement, be void as against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

And sub-section 2 provides that any covenant or contract made by any person in consideration of his or her marriage, for the future payment of money or settlement of property, wherein the settlor had not at the date of his marriage any estate or interest, and not being money or property of or in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the commencement of such bankruptcy, be void against the trustee in bankruptcy, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the bankruptcy, but any such claim is to be postponed until all claims of the other creditors for value have been satisfied.

By sub-section 3 any payment of money (not being payment of premiums on a policy of life insurance) or any transfer of property made by the settlor in pursuance of such a covenant or contract is to be void against the trustee in the bankruptcy, unless the persons to whom the payment or transfer is made prove : (a) that the payment or transfer was made more than ten years before the commencement of the bankruptcy, *or* (b) that at the date of the payment or transfer the settlor was able to pay his debts without the aid of the money so paid or the property so transferred, *or* (c) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant or contract, and was made within three months after the money or property came into the possession or under the control of the settlor; but in the event of any such payment or transfer being declared void, the persons to whom it was made are to be entitled to claim for dividend in respect of such covenant or contract. The expression "settlement," as used in the section is to include any conveyance or *transfer of property* (*f*).

(*f*) Sub-section 4; and see *Re Player*, 15 Q. B. D. 682; *Re Plummer*, [1900] 2 Q. B. 790.

Ellison v. Ellison.

The meaning of the word " void " in this section is " voidable " (*g*), and a *bona fide* purchaser for value, whether he acquires before the act of bankruptcy (*h*), or after it but without notice of it (*i*), has a good title against the trustee in bankruptcy. In applying the section, the Court acts upon the equitable principle that relief must be refused against a *bona fide* purchaser for value without notice having the legal estate (*k*).

If a settlement is declared void against the trustee in bankruptcy, that does not place him in the position of the beneficiaries and so enable him to claim priority over subsequent incumbrancers, but apparently merely accelerates their rights (*l*). Further the avoidance of the settlement is only operative to the extent necessary to satisfy the debts of the bankrupt and the costs of the bankruptcy. The surplus, if any, reverts to the trustees of the settlement, subject to the trusts thereof (*m*).

Fraudulent Preference.—A conveyance or transfer of property involving a fraudulent preference is made void against the trustee in bankruptcy, under section 44 of the Bankruptcy Act, 1914.

5. When a Voluntary Settlement may be enforced by Persons not Parties thereto.

The rule appears to be that third persons who are not named as parties to a contract cannot sue either of the contracting parties unless they possess *an actual beneficial right*, putting them *in the position of cestuis que trust* under the contract (*n*).

In *Colyear* v. *Mulgrave* (*o*), a father having four natural daughters and a legitimate son, entered into an agreement with his son, whereby he covenanted to transfer the sum of £20,000 to a trustee, for the benefit of his four daughters, and the son

(*g*) See *Re Carter and Kenderdine*, [1897] 1 Ch. 776.

(*h*) *Re Carter and Kenderdine*, [1897] 1 Ch. 776, approving *Re Brall*, [1893] 2 Q. B. 381, and *Re Holden*, 20 Q. B. D. 43; overruling *Re Briggs and Spicer*, [1891] 2 Ch. 127.

(*i*) *Re Hart*, [1912] 3 K. B. 6.

(*k*) *Re Hart*, *supra*; cf. *Re Gunsbourg*, [1920] 2 K. B. 426.

(*l*) *Sanguinetti* v. *Stuckey's B. Co.*, [1895] 1 Ch. 177; Williams, Bankruptcy (13th ed.), p. 304.

(*m*) *Re Sims*, 45 W. R. 189; *Re Parry*, [1904] 1 K. B. 129; cf. *Jones* v. *Barker*, [1909] 1 Ch. 321.

(*n*) See Addison, Contracts (11th ed.), pp. 312—3; *Tweddle* v. *Atkinson*, 1 B. & S. 393; *Re Empress Engineering Co.*, 16 Ch. D. 125 (C. A.); *Gandy* v. *G.*, 30 Ch. D. 57; *Green* v. *Paterson*, 32 Ch. D. 95; *Tibbetts* v. *Engelbach*, [1924] 2 Ch. 348.

(*o*) 2 Keen, 81, 98.

covenanted to pay the debts of the father. The son paid some of the father's debts, and before the covenant on the part of the father was performed, died, having by his will given the whole of his property to his father, who became the son's personal representative. Upon a bill being filed by one of the natural daughters, praying to have the agreement executed against the estates of the father and the son, a demurrer thereto was allowed by Langdale, M.R., saying, "that when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, although each one might as against the other." There was nothing in this case to show that the trustee was to hold in trust for the daughters.

In *Fletcher* v. *F.* (*p*), E. F. by voluntary deed covenanted with trustees that in certain events, which happened, his executors should pay a sum to the trustees on trusts declared in favour of A and B. E. F. retained possession of the deed until his death, and did not communicate it to the trustees or to A or B. E. F. died, leaving all his property in trust for A, B, and others. The trustees declined to accept the trust or to sue on the covenant, but submitted to the Court. A filed a bill to establish the deed. Held that a trust for A was created, and that the covenant created a debt recoverable out of the assets of E. F. (*q*). In *Re Plumptre's Marriage Settlement* (*r*) it was held that the next-of-kin of a wife were not entitled to enforce a covenant contained in her marriage settlement by her and her husband for the settlement of her after-acquired property. *Fletcher* v. *F.*, *supra*, was distinguished on the ground that in that case there was a complete voluntary trust, while the covenant in question amounted merely to an executory contract to create a trust.

In *Gandy* v. *G.* (*s*), a separation deed, to which the husband, wife, and trustees were alone parties, provided that the husband should maintain the children. This he failed to do, and one of the children brought an action against the trustees and the husband, the trustees having declined to sue. The Court held that the covenant did not in fact give the plaintiff any beneficial right.

(*p*) 4 Ha. 67; *Clough* v. *Lambert*, 10 Si. 174.

(*q*) See also *Page* v. *Cox*, 10 Ha. 163, a trust founded on a contract in articles of partnership; *Re Flavell*, 25 Ch. D. 89 (C. A.); *Byrne* v. *Reid*, [1902] 2 Ch. 735; *Drimmie* v. *Davies*, [1899] 1 Ir. R. 176.

(*r*) [1910] 1 Ch. 609; and see *Re Pryce*, [1917] 1 Ch. 234.

(*s*) 30 Ch. D. 57 (C. A.); and see *Tibbetts* v. *Engelbach*, [1924] 2 Ch. 348.

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Marriage.—The rule above stated appears applicable to marriage settlements, for there is " no reason in principle why, because the instrument is a marriage settlement, it should not take effect according to the intention to be collected from its terms " (*t*), and if, therefore, upon the construction of such an instrument, it appears that there is a complete and perfect trust declared in favour of children of a former marriage, such children, although not parties, would have a right to sue upon it (*u*). But *prima facie* persons who are neither parties to a marriage settlement nor come within the marriage consideration cannot enforce a covenant therein contained (*x*).

6. Distinction between Mandate and Trust, Creditor's Deeds, etc.

Where there is no *intention* of constituting a perfect trust, and so parting with all control over the property, the deed will be revocable. In creditors' deeds the *intention* of the party executing the deed is generally to promote his own convenience and not to benefit his creditors. In that case the deed is revocable, although by subsequent events it may become an irrevocable trust (*y*), and the Court will examine the whole deed and the surrounding circumstances in order to discover the *intention* (*z*).

Where, therefore, a legal transfer of property has been made to trustees, for payment *of the debts* of the owner, *the creditors being neither parties nor privies thereto*, the creditors do not thereby become *cestuis que trust*, and the trustees are mere *mandatories*. Until the mandate has been acted upon the *owner* of the property, who alone stands towards the trustees in the relation of *cestui que trust*, can recall the money and authority at pleasure. It is an arrangement by the debtor for his own convenience only, and there is no privity between the agent and the creditors : see *Acton* v.

(*t*) *Per* Selborne, C., in *Mackie* v. *Herbertson*, *infra*, approved in *De Mestre* v. *West*, [1891] A. C. 264.

(*u*) *Mackie* v. *Herbertson*, 9 A. C. 303; and cf. *Davenport* v. *Bishopp*, 2 Y. & C. Ch. 451; *Gale* v. *G.*, 6 Ch. D. 144; *Re D'Angibau*, 15 Ch. D. 242; *Re Baker*, 20 Ch. D. 230; *Paul* v. *P.*, 20 Ch. D. 742; *Green* v. *Paterson*, 32 Ch. D. 95; *Johnstone* v. *Mappin*, 64 L. T. 48; *Tucker* v. *Bennett*, 38 Ch. D. 1; *De Mestre* v. *West*, [1891] A. C. 264; *Att.-Gen.* v. *Jacobs-Smith*, [1895] 2 Q. B. 342. Judgment of Lindley, L.J., p. 349.

(*x*) See *Re Plumptre's Marriage Settlement*, [1910] 1 Ch. 609.

(*y*) See *Smith* v. *Hurst*, 10 Ha. 30; *Simmonds* v. *Palles*, 2 Jo. & Lat. 489; *Johns* v. *James*, 8 Ch. D. 749; Underhill on Trusts (8th ed.), p. 37.

(*z*) See *New's Trustee* v. *Hunting*, [1897] 1 Q. B. 607; [1897] 2 Q. B. 19 (C. A.); *S. C.* in H. L. *nom. Sharp* v. *Jackson*, [1899] A. C. 419; *Smith* v. *Hurst*, *supra*; and cf. *Smith* v. *Cooke*, [1891] A. C. 297.

Woodgate (*a*), where the trustee was a creditor; *Walwyn* v. *Coutts* (*b*), where the creditors were scheduled to the deed; *Garrard* v. *Lauderdale* (*c*), where notice of the execution of the deed was sent to the creditors, although the receipt by them of such notice does not seem to have been proved.

//Where, however, a trust in favour of creditors has been *communicated* to the creditors—a fact, it seems, which must be clearly proved (*d*)—it can no longer be revoked by the settlor, because the creditors, being aware of such a trust, might have been thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised (*e*); and *a fortiori* will this be the case when the deed has been acted upon (*f*).// The communication may be proved by the creditors having executed the deed (*g*), by their having acted upon it (*h*), or being party or privy to it (*i*).

Where an assignment is made to a *creditor in trust for himself* and other creditors, it cannot be revoked by the assignor after it has been communicated to the assignee, unless he has done something to show his dissent (*k*). And where property had been conveyed by a mere deed of agency to a person who was *surety* for some of the debts, it was held that the person to whom the property had been so conveyed was entitled to retain it, until he should be discharged from his liability as surety (*l*).

Where a creditor is *party* to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debt due to that creditor, the deed is, as to that creditor, irrevocable. A

(*a*) 2 My. & K. 492; *Re Ashby*, [1892] 1 Q. B. 872.

(*b*) 3 Si. 14. See *Godfrey* v. *Poole*, 13 A. C., p. 502.

(*c*) 3 Si. 1. See judgment of James, L.J., in *Johns* v. *James*, 8 Ch. D. 744, at p. 748, explaining *Garrard* v. *Lauderdale*. See also *Synnot* v. *Simpson*, 5 H. L. C. 121; *Glegg* v. *Rees*, L. R. 7 Ch. 71; *Re Fitzgerald*, 37 Ch. D. 18; *Priestley* v. *Ellis*, [1897] 1 Ch. 489; *R.* v. *Humphris*, [1904] 2 K. B. 89; and cf. *Taylor* v. *London and County, etc.*, [1901] 2 Ch. 231 (C. A.).

(*d*) *Cornthwaite* v. *Frith*, 4 De G. & Sm. 552.

(*e*) *Acton* v. *Woodgate*, 2 My. & K. 495; *Browne* v. *Cavendish*, 1 Jo. & Lat. 635; *Simmonds* v. *Palles*, 2 Jo. & Lat. 504; *Kirwan* v. *Daniel*, 5 Ha. 499; *Harland* v. *Binks*, 15 Q. B. 713.

(*f*) *Cosser* v. *Radford*, 1 De G. J. & S. 585; but cf. *Cornthwaite* v. *Frith*, 4 De G. & Sm. 552; *Malcolm* v. *Scott*, 3 Ha. 39; Underhill (8th ed.), p. 37.

(*g*) *Glegg* v. *Rees*, L. R. 7 Ch. 71; *Johns* v. *James*, 8 Ch. D. 750.

(*h*) *Re Baber*, 10 Eq. 554.

(*i*) *Walwyn* v. *Coutts*, 3 Si. 14; *Garrard* v. *Lauderdale*, 3 Si. 1.

(*k*) *Siggers* v. *Evans*, 5 Ell. & B. 367, 380, 381; *Montefiore* v. *Browne*, 7 H. L. Cas. 241; *Lawrence* v. *Campbell*, 7 W. R. 170; *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642; *Johns* v. *James*, 8 Ch. D. 751, 753; cf. *Mallott* v. *Wilson*, [1903] 2 Ch. 494.

(*l*) *Wilding* v. *Richards*, 1 Coll. Ch. R. 655.

valid trust is created in his favour, and the relation between the debtor and trustee is no longer that of mere principal and agent (*m*). And that which is true where a single creditor is the *cestui que trust*, is at least equally so where there are many creditors (*n*).

It seems to be doubtful whether, after the trust has been communicated to one or some of the creditors, it can after satisfying them be revoked by the settlor as to the other creditors (*o*).

Nor does the creditor executing the deed become less a *cestui que trust*, because he gives nothing to the debtor, as a consideration for the trust created in his favour, or because it was the voluntary unsolicited act of the debtor to create the trust (*p*), or because he was party to the deed in another right (*q*).

In *Henderson* v. *Rothschild* (*r*), the plaintiff was the holder of a bond issued by a Government in respect of a loan, of which the defendants were the agents in England, and he sued the defendants as "trustees for the bondholders." The defendants, on the instructions of their principal, had issued notice that interest would be paid in a certain manner, and this alleged appropriation of the money was relied upon as taking the case out of the rule. Held, the defendants were merely agents.

Where a Trust for Creditors is perfectly created.—Where it is the *intention* of the assignor to create an irrevocable trust in favour of his creditors, the creditors are *cestuis que trust*, and can enforce the deed against the trustee and the settlor (*s*). The deed must be registered under the Deeds of Arrangement Acts, or it will be void (*t*), and, if it comprises land, it must also be registered under the Land Charges Act, 1925. As to whether a creditor who has become such after the execution of the deed can call for its execution, see *La Touche* v. *Lucan* (*u*).

The trust is to distribute amongst the creditors who have

(*m*) *Mackinnon* v. *Stewart*, 1 Si. (N.S.) 88; *Glegg* v. *Rees*, L. R. 7 Ch. 71; Underhill, p. 38.

(*n*) *Mackinnon* v. *Stewart*, 1 Si. (N.S.) 88; *Glegg* v. *Rees*, L. R. 7 Ch. 71.

(*o*) *Griffith* v. *Ricketts*, 7 Ha. 307; *Glegg* v. *Rees*, L. R. 7 Ch. 71; see also *Gurney* v. *Oranmore*, 5 Ir. Ch. R. 436.

(*p*) *Mackinnon* v. *Stewart*, *supra*; *Field* v. *Donoughmore*, 2 Dr. & Wal. 630; *Gurney* v. *Oranmore*, 5 Ir. Ch. R. 436.

(*q*) *Montefiore* v. *Browne*, 7 H. L. Cas. 241, 266.

(*r*) 33 Ch. D. 459.

(*s*) See *New's Trustee* v. *Hunting*, [1897] 2 Q. B. 19; *S. C. sub nom. Sharp* v. *Jackson*, [1899] A. C. 419.

(*t*) See Lawrance, Deeds of Arrangement (9th ed.), p. 6.

(*u*) 7 Cl. & Fin. 772.

executed the deed. If they do not execute it within the time limited, they will not be necessarily excluded, unless, perhaps, time is, or is made, of the essence (*x*). But execution is not necessary if the creditor has acted under the deed (*y*). The deed, if it comprise the whole of the debtor's property, is an act of bankruptcy (*z*). But it cannot be made use of as such by the creditors who are privy to it or have acquiesced in it (*a*). If the deed is avoided as an act of bankruptcy, the release contained in it is also avoided and the executing creditors must prove (*b*).

Where the assignor divests himself of all interest in the property, for the benefit of his creditors, and does not merely put the property in trust for a special and limited purpose, there is no resulting trust (*c*).

Where a debtor assigns property for the benefit of his creditors, although no creditor may be aware of the assignment, the assignee may, nevertheless, take proceedings in equity to recover the property (*d*). The trustees are the proper persons to bring actions in respect of the trust estate (*e*). But the debtor cannot bring an action for an account against the trustees unless the deed contains an ultimate trust in favour of the debtor (*f*). Accounts under the Deeds of Arrangement Acts are also to be furnished to the Board of Trade by the trustee (*g*).

Provisions in a settlement for the payment of creditors, which are to come into operation after the death of the settlor cannot, it seems, be determined by a person who becomes absolutely entitled under the settlement (*h*).

It is clear that, in cases in which creditors are not concerned, a person *not intending to give or part with the dominion over his property*, may retain such dominion, notwithstanding he may

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(*x*) *Dunch* v. *Kent*, 1 Vern. 260; *Spottiswoode* v. *Stockdale*, G. Coop. 102; *Whitmore* v. *Turquand*, 3 De G. F. & J. 107; *Re Baber*, 10 Eq. 554.

(*y*) *Field* v. *Donoughmore*, 2 Dr. & Wal. 630; and see *Drever* v. *Maudesley*, 16 Si. 511; *Forbes* v. *Simond*, 2 W. R. 70; *Re Meredith*, 29 Ch. D. 745.

(*z*) See Bankruptcy Act, 1914, s. 1 (a). *Re Hughes*, [1893] 1 Q. B. 595.

(*a*) Wace, Bankruptcy (1904), pp. 10, 22.

(*b*) *Re Stephenson*, 20 Q. B. D. 540.

(*c*) *Smith* v. *Cooke*, [1891] A. C., p. 303.

(*d*) *Glegg* v. *Rees*, L. R. 7 Ch. 71.

(*e*) *Doran* v. *Simpson*, 4 V. 651; *Troughton* v. *Binkes*, 6 V. 573; 5 R. R. 401; and see R. S. C. (1883), O. 16, r. 8; Annual Practice (1928), p. 234.

(*f*) See *Smith* v. *Cooke*, [1891] A. C. 303.

(*g*) Lawrance on Deeds of Arrangement (9th ed.), pp. 25—6.

(*h*) *Re Fitzgerald*, 37 Ch. D. 18; and see *Frewen* v. *Law Life, etc., Society*, [1896] 2 Ch. 511; *Priestley* v. *Ellis*, [1897] 1 Ch. 489; see Underhill on Trusts (8th ed.), p. 37, n. (*s*).

have vested the property in trustees, and declared a trust upon it in favour of third persons. Thus in *Hughes* v. *Stubbs* (*i*), a testatrix drew a cheque on her bankers for £150 in favour of A, and she verbally directed A to apply that sum, or so much of it as might be necessary, to make up to a legatee the difference in value between a legacy of £100 which the testatrix, by her will, had given to the legatee, and the price of a £100 share in a certain railway : the testatrix informing A that she intended to give the share instead of the legacy, but she did not think it necessary to alter her will. The bankers gave credit to A for the £150. The testatrix afterwards died. In a suit for the administration of her estate, Wigram, V.-C., held, that no trust was created for the benefit of the legatee in respect of the £150. " The cases," observed his Honour, " on this subject are necessarily of difficulty; but the conclusion to which I feel bound to come is, that the testatrix did not part with her property in the sum in question, or create any trust for the legatee (*k*). So in *Gason* v. *Rich* (*l*), it was held that although the acts of the donor might have amounted to an equitable assignment, the evidence showed that the assignor *did not intend* to make a present gift, but one which was to be ambulatory and revocable until his death (*m*).

Where a deed for the benefit of creditors contains an ultimate trust for other parties, the whole deed is irrevocable (*n*). It is doubtful whether a mere agency deed, not communicated to or acted upon by the creditors, is revoked by the death of the principal, the assignor (*o*).

Where the Crown, by warrant, " grants," as for instance, booty of war to an officer of state, even though it be " in trust " to distribute among certain persons found to be entitled thereto, such warrant will not operate as a transfer of property, or as creating a

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(*i*) 1 Ha. 476; and see *per* Page Wood, V.-C., in *Tate* v. *Leithead*, Kay, 658, at p. 659.

(*k*) See also *Gaskell* v. *G.*, 2 Y. & J. 502; *Paterson* v. *Murphy*, 11 Ha. 88; *Smith* v. *Warde*, 15 Si. 56; and the remarks of Wood, V.-C., in *Vandenberg* v. *Palmer*, 4 K. & J. 214, 218; *Field* v. *Lonsdale*, 13 B. 78; *Pedder* v. *Mosely*, 31 B. 159; *Davies* v. *Otty*, 33 B. 540. Cf. *Re Abbott Fund*, [1900] 2 Ch. 326; *Re Andrews*, [1905] 2 Ch. 48.

(*l*) 19 L. R. Ir. 396.

(*m*) And see *Warriner* v. *Rogers*, 16 Eq. 340; *Re Whittaker*, 21 Ch. D. 657. Cf. *O'Flaherty* v. *Browne*, [1907] 2 Ir. R. 446.

(*n*) *Godfrey* v. *Poole*, 13 A. C. 497.

(*o*) *Wilding* v. *Richards*, 1 Coll. Ch. R. 660. See also *Synnot* v. *Simpson*, 5 H. L. Cas. 121, 139, 141; *Montefiore* v. *Browne*, 7 H. L. Cas. 241, 266; *Burrowes* v. *Gore*, 6 H. L. Cas. 907.

trust cognizable in a Court of law, but will make such officer merely the agent of the Crown to distribute the fund, and from his decision there can be no appeal except to the Crown (*p*).

Where parties interested in a fund, by an arrangement between themselves, without any communication with a third party, transfer it by deed to trustees upon trust to pay the costs of the third party and divide the residue among themselves, *the third party*, as the deed was revocable by the parties executing it, cannot in his own favour compel an execution of the trusts (*q*).

(*p*) *Kinloch* v. *Secretary of State, etc.*, 7 A. C. 619; *Hughes* v. *Coles*, 27 Ch. D. 231; cf. *Te Teira Te Paea* v. *Te Roera Tareha*, [1902] A. C. 56.

(*q*) *Gibbs* v. *Glamis*, 11 Si. 584; *Simmonds* v. *Palles*, 2 Jo. & Lat. 489; *Synnot* v. *Simpson*, 5 H. L. Cas. 121.

VENDOR AND PURCHASER.

ELLIOT *v.* MERRYMAN.

1740. Barnardiston's Chy. Rep. 78.

Liability of Purchaser to see to the Application of his Purchase-Money.

A purchaser of personalty from an executor will not be held liable to see to the application of the purchase-money, except in cases of fraud.

It is a general rule, that, where real estate is devised to trustees, upon trust to sell for payment of debts generally, the purchaser is not bound to see that the money is rightly applied. The same rule applies where real estate is not devised to be sold for the payment of debts, but is only charged with such payment.

If real estate is devised upon trust to be sold for the payment of certain debts, mentioning to whom in particular those debts are owing, the purchaser is bound to see that the money is applied for the payment of those debts.

The facts of this case are sufficiently stated in the judgment.

Verney, M.R.—His Honour, after some preliminary remarks, proceeded as follows:—

The case is this:—Thomas Smith, being possessed of a real and personal estate, was indebted to several persons by bond, in three of which bonds Goodwin was bound with him as surety; and he had contracted likewise some other debts; and being thus indebted, he makes his will to the following effect. The will begins with this introduction:—"My will is, that all my debts be paid; and I do charge all my lands with the payment thereof. *Item*—I give all my real and personal estate to —— Goodwin, to hold to him, his heirs, executors, administrators, and assigns, chargeable, nevertheless, with the payment of my debts and legacies." 'Tis indeed true that these words do not amount to a devise of the lands to be sold for the payment of the debts;

and they only import a charge upon them for that purpose. However, this is such a devise as is within the meaning of the proviso of the Statute of Fraudulent Devises (*a*), and does interrupt the descent to the heir-at-law. By this will the devisee was made executor.

The testator died in 1724. Goodwin paid interest for the debts at £5 per cent. regularly till 1730. After the testator's death, three sales of this estate were made by Goodwin: one, of an estate which was entirely freehold; the other, of an estate entirely leasehold; and a third, consisting of freehold and leasehold both.

The bill in general is brought by the creditors of Smith against the purchasers, in order to have a payment of their debts out of the lands of Smith, which were sold to them by Goodwin.

With regard to the leasehold estate, the case is so extremely plain, that the sale of that must stand, and that the creditors cannot have a satisfaction out of it, that his Honour said it would be monstrous to call it in question. The executors are the proper persons that, by law, have a power to dispose of a testator's personal estate. 'Tis indeed true that personal estate may be clothed with such a *particular trust* (*b*) that it is possible the Court in some cases may require a purchaser of it to see the money rightly applied. But unless there is some such *particular trust* or a *fraud* in the case, it is impossible to say but the sale of a personal estate, when made by an executor, must stand; and that after the sale is made, the creditors cannot break in upon it.

His Honour said, he would now consider the other sales that have been made, and would examine those, first upon the general rules of the Court, and in the next place upon the particular circumstances which this case is attended with.

With regard to the first of these matters, the general rule is, that *if a trust directs that land should be sold for the payment of debts generally the purchaser is not bound to see that the money be rightly applied.* On the other hand, *if the trust*

(*a*) 3 W. & M. c. 14, repealed by 11 Geo. 4 and 1 Will. 4, c. 47.
(*b*) See *Bonney* v. *Ridgard*, 1 Cox, 145.

directs that lands should be sold for the payment of certain debts, mentioning, in particular, to whom those debts were owing, the purchaser is bound to see that the money be applied for the payment of those debts.

The present case, indeed, does not fall within either of these rules, because here lands are *not given to be sold for* the payment of debts, but *are only charged with such payment. However, the question is, whether that circumstance makes any difference. And his Honour was of opinion that it did not.* And if such a distinction was to be made, the consequence would be, that whenever lands are charged with the payment of debts generally, they could never be discharged of that trust without a suit in this Court, which would be extremely inconvenient. *No instances have been produced to show that in any other respect the charging lands with the payment of debts differs from the directing them to be sold for such a purpose; and therefore there is no reason that there should be a difference established in this respect.* The only objection that seemed to be of weight with regard to this matter is, that where lands are appointed to be sold for the payment of debts generally, the trusts may be said to be performed as soon as those lands are sold; but where they are only charged with the payment of debts, it may be said that the trust is not performed till those debts are discharged. And so far, indeed, it is true, that where lands are charged with the payment of annuities those lands will be charged in the hands of the purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund; but where lands are not burdened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money; and that seems to be the true distinction.

Having thus considered the case under the general rule, his Honour said he would now consider it under the particular circumstances that attend it; and the particular circumstances are such as are far from strengthening the plaintiff's case, but rather the contrary.

One of those circumstances is the length of time the plaintiffs have lain by, without at all insisting on any charge upon these

estates. Goodwin was a solvent man till his bankruptcy, in 1732. Here have been three purchases of these estates, made at different times—the one in 1727, the other two in 1725 and 1724. The first of them was made by Hunt, the second by Wright, and the third by Merryman. During all these transactions the plaintiffs do not mention one word of their charge upon this estate; but, on the contrary, regularly received their interest of Goodwin till the year 1730. It is indeed true, that there is no express proof that the plaintiffs knew of these purchases, but there is reason to imagine that they did. The purchases were made in the neighbourhood by outcry; some of the creditors lived in the same town that Goodwin did; and all of them lived within three or four miles of him; and Elliot, one of the creditors, was a subscribing witness to one of the purchase deeds. The want of notice, too, on the part of the purchasers, is a considerable circumstance in their favour. It is indeed true, that they had notice that there were debts chargeable upon this estate; but it does not appear they knew to whom those debts were owing. Another circumstance is, that Goodwin was a co-obliger in three of these bonds, and to another of the obligees he afterwards gave his bond alone, which may well be considered as a satisfaction for that bond. By this it appears that the creditors greatly relied upon Goodwin for their pay-master; and there is not much reason therefore that they should now be allowed to resort to the testator's estate.

Upon the whole, his Honour's opinion was that the plaintiffs' bills must be dismissed; and even with costs, as against Wright, there being no manner of pretence for the plaintiffs to come upon that estate, it being all leasehold and sold to Wright by the executor, who by law is the proper person entrusted to dispose of the testator's personal estate. However, with regard to the rest of the defendants his Honour said he would only dismiss the bill generally without costs and so he was pleased to decree accordingly.

Elliot v. Merryman.

NOTES.

1. Legislation as to trustees' receipts.
2. The law independently of statutory enactment, p. 837.
3. As to the continuance of a power or trust for sale, p. 839.
4. As to the persons who could (independently of statute) sell and convey under a charge of debts, p. 842.
5. Liability of purchasers of personal estate from executors or administrators to see to application of the purchase-money, p. 844.

1. Legislation as to Trustees' Receipts.

Elliot v. *Merryman* is a leading case as to the liability, apart from statute, of a purchaser to see to the application of his purchase-money, and on the question whether a charge of debts gives a power of sale.

A succession of statutes, however, ending in the legislation of 1925, have so completely altered the law on these matters that the notes appearing in the last edition have been much reduced.

By the Trustee Act, 1925, s. 14, sub-s. 1, it is provided that the receipt in writing of a trustee for any money, securities, or other personal property or effects, payable, transferable or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring, or delivering the same and shall effectually exonerate him from seeing to the application or being answerable for any loss or misapplication thereof.

By sub-section 2, the section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt (a) for the proceeds of sale or other capital money arising under a trust for sale of land, or (b) for capital money arising under the Settled Land Act, 1925.

The above enactment applies to trusts created either before or after the commencement of the Act (*c*); but it only applies to receipts given after 1925 (*d*). Receipts given between 1881 and 1894 are protected by the Conveyancing Act, 1881, s. 36, and those given between 1893 and 1926, by the Trustee Act, 1893, s. 20.

By the Law of Property Act, 1925, s. 27, sub-s. 1, it is provided that a purchaser of a legal estate from trustees for sale shall not be concerned with the trusts affecting the proceeds of sale of land subject to a trust for sale. By section 2, sub-section 1, a

(*c*) Section 69, sub-section 1.
(*d*) Section 69, sub-section 3.

conveyance to a purchaser of a legal estate in land is to overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if (1) the conveyance is made under the powers conferred by the Settled Land Act, 1925, or any additional powers conferred by a settlement and the equitable interest or power is capable of being overreached thereby, and the statutory requirements respecting the payment of capital money are complied with; or (2) if the conveyance is made by trustees for sale and the equitable interest is capable of being overreached by such trustees, and the statutory requirements respecting the payment of capital money are complied with; or (3) if the conveyance is made by a mortgagee or personal representative in the exercise of his paramount powers; or (4) if the conveyance is made under an order of the Court and the equitable interest or power is bound by such order, and any capital money arising from the transaction is paid into, or in accordance with the order of, the Court.

By the Settled Land Act, 1925, s. 95, the receipt of the trustees of a settlement for any money or securities effectually discharges the payer or transferor therefrom and from being bound to see to the application, and in the case of a mortgagee or other person advancing money from being concerned to see that any money advanced by him is wanted for any purpose of the Act, or that no more than is wanted is raised.

2. The Law independently of Statutory Enactment.

The power of the vendor to give a good discharge is a question of *title*, not of conveyance (*e*).

Where a power of giving receipts was in *express* terms conferred upon trustees, the purchaser, provided the terms of the power were followed, was not, in cases free from fraud and collusion, bound to see to the application of the purchase-money (*f*).

Where, however, no such power was in *express* terms given, it was held, under the old law, that it could not be *implied* in the following cases :—

If a trust directed lands to be sold for payment of certain debts, mentioning in particular to whom those debts were owing (*g*);

(*e*) *Forbes* v. *Peacock*, 12 Si. 528.

(*f*) *Pell* v. *De Winton*, 2 De G. & J. 13.

(*g*) See the principal case, and *Doran* v. *Wiltshire*, 3 Swans. 701; *Smith* v. *Guyon*, 1 Bro. Ch. 186; *Rogers* v. *Skillicorne*, Amb. 189; *Binks* v. *Rokeby*, 2 Madd. 238; Lewin (13th ed.), p. 1084.

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Where there was a trust for payment of *legacies or annuities* (*h*), If property were vested in trustees upon trust to sell and *divide* the proceeds amongst certain adult *cestuis que trust* (*i*). So if an estate were charged with a sum of money payable to an infant on his attaining his majority, the purchaser would be bound to see the money duly paid (*k*).

Where, however, trustees were directed to sell at a time when the persons amongst whom they were to distribute the proceeds of the sale were either not ascertainable or not of age, it was implied that the settlor or testator *intended* to confer upon the trustees a power of giving receipts, inasmuch as the money could not be paid at the time of the sale to any persons but the trustees (*l*).

So, where money to arise from a sale was not merely to be paid to certain persons, but was to be applied by the trustees upon trusts requiring care and discretion, the presumption arose that the settlor intended to confide the execution of the trust to the trustees solely, and the purchaser was not bound to see to the application of the purchase-money, *Doran* v. *Wiltshire* (*m*).

If there were no collusion, or fraud, or no decree for administration (*n*), a purchaser was not bound to see that the purchase-money was rightly applied, " if a trust directed the land to be sold for the payment of debts generally," as laid down in the principal case; and it was, for the first time, there decided, that it made no difference whether lands were given to be sold for the payment of debts or were only charged with such payment (*o*). So, also, if the trust were for the payment of a particular debt, and of the testator's other debts (*p*); or where there was a trust or charge for the general payment of debts, as well as for the payment of legacies, for the purchaser could not be expected to see to the discharge of legacies,

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(*h*) *Johnson* v. *Kennett*, 3 My. & K. 630; *Horn* v. *H.*, 2 S. & S. 448; *Re Rebbeck*, 63 L. J. Ch. 596; cf. *Re Henson*, [1908] 2 Ch. 356.

(*i*) *Weatherby* v. *St. Giorgio*, 2 Ha. 624.

(*k*) *Dickinson* v. *D.*, 3 Bro. Ch. 19; see Dart (7th ed.), p. 632.

(*l*) *Balfour* v. *Welland*, 16 V. 151, 156; *Groom* v. *Booth*, 1 Drew. 548; *Sowarsby* v. *Lacy*, 4 Madd. 142; *Lavender* v. *Stanton*, 6 Madd. 46; *Breedon* v. *B.*, 1 Russ. & My. 413.

(*m*) *Doran* v. *Wiltshire*, 3 Swans. 699; Lewin (13th ed.), p. 1082; *Balfour* v. *Welland*, 16 V. 151; *Tait* v. *Lathbury*, 35 B. 112; *Wood* v. *Harman*, 5 Madd. 368.

(*n*) See *Lloyd* v. *Baldwin*, 1 Ves. Sen. 173.

(*o*) *Williamson* v. *Curtis*, 3 Bro. Ch. 96; *Smith* v. *Guyon*, 1 Bro. Ch. 186; *Balfour* v. *Welland*, *supra*; *Shaw* v. *Borrer*, 1 Keen, 559; *Barker* v. *Devon*, 3 Mer. 310; *Robinson* v. *Lowater*, 5 De G. M. & G. 272; *Dowling* v. *Hudson*, 17 B. 248; *Storry* v. *Walsh*, 18 B. 559.

(*p*) *Robinson* v. *Lowater*, 5 De G. M. & G. 272.

which could not be paid till after the debts (*q*); or where there was a devise or charge for the general payment of debts and annuities (*r*).

3. As to the continuance of a Power or Trust for Sale.

Until the statutory alteration mentioned below, the receipt of a trustee for sale moneys was only a good discharge to a purchaser if given in respect of a power or trust for sale still existing.

An express power or even a trust for sale might be determined by the trusts being satisfied not only in cases where it was expressed that it was to be exercised only during the continuance of such trusts (*s*), but also if there was no such restriction (*t*).

In some cases, notwithstanding that the interests have become absolute, the power has been held to continue for the purpose of division or from the manifest intention of the testator (*u*), or where there are several beneficiaries, and the trusts are subsisting as to some, though others have attained vested absolute interests (*x*).

Under the legislation of 1925, a *power* of sale expressed to be given to trustees only operates to make them trustees for the purposes of the Settled Land Act; and a *trust* for sale is subject to the following enactment in section 23 of the Law of Property Act, 1925, which replaces section 10 of the Conveyancing Act, 1911 :—

> " 23. Where land has, either before or after the commencement of this Act, become subject to an express or implied trust for sale, such trust shall, so far as regards the safety and protection of any purchaser thereunder, be deemed to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale.

(*q*) See *Re Henson*, [1908] 2 Ch. 356, distinguishing *Re Rebbeck*, 63 L. J. Ch. 596; 42 W. R. 473; *Jebb* v. *Abbott* and *Benyon* v. *Collins*, cited by Mr. Butler in his note on Co. Litt., 290 b; *Rogers* v. *Skillicorne*, Amb. 188; *Walker* v. *Flamstead*, 2 Ld. Ken. 2nd part, 57; *Dowling* v. *Hudson*, 17 B. 248.

(*r*) *Page* v. *Adam*, 4 B. 269.

(*s*) *Wood* v. *White*, 2 Keen, 664; 4 My. & C. 460.

(*t*) *Lantsbery* v. *Collier*, 2 K. & J. 709; *Re Cotton's Trustees*, 19 Ch. D. 624; *Doncaster* v. *D.*, 3 K. & J. 26; *Walrond* v. *Rosslyn*, 11 Ch. D. 640, and *Vine* v. *Raleigh*, 24 Ch. D. 238; and see *Waring* v. *Coventry*, 1 My. & K. 249, 252; *Re Brown*, 10 Eq. 349.

(*u*) *Re Cooke's Contract*, 4 Ch. D. 454; *Peters* v. *Lewes, etc. Ry. Co.*, 16 Ch. D. 703; *S. C.*, 18 Ch. D. 429; *Re Sudeley*, [1894] 1 Ch. 334; *Re Cotton's Trustees*, 19 Ch. D. 624; *Re Dyson and Fowke*, [1896] 2 Ch. 720; *Re Jump*, [1903] 1 Ch. 129.

(*x*) *Trower* v. *Knightley*, 6 Madd. 134; *Taite* v. *Swinstead*, 26 B. 528; *Re Horsnaill*, [1909] 1 Ch. 631.

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"This section applies to sales whether made before or after the commencement of this Act, but operates without prejudice to an order of any court restraining a sale."

In *Forbes* v. *Peacock* (*y*), the testator charged his real estate with the payment of his debts, and directed it to be sold (but without saying by whom) upon the death of his wife, who was tenant for life, if not sooner disposed of, and the proceeds, with the residue of his personal estate, to be divided among certain of his relations. Soon after the death of the widow (twenty-five years having elapsed since the testator's death), the executor contracted to sell to the defendant, and refused to answer an inquiry whether there were any debts unsatisfied. Lord Lyndhurst held that the executor could make a title, saying: "Assuming that the facts *relied upon in this case amount to notice that the debts had been paid*, yet, as the executor had authority to sell, not only for the payment of debts, *but also for the purpose of distribution* among the residuary legatees, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required." The observations of Lord Lyndhurst implied that if at the death of the testator there had been no debts, the power would not have arisen. In *Stroughill* v. *Anstey* (*z*), Lord St. Leonards disapproved of this, observing: "When a testator by his will charges his estate with debts and legacies, he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is by implication a declaration by the testator that he intends to entrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee. *That intention does not cease because there are no debts.*"

Where no statute applied, if a testator charged his land with the payment of his debts and devised it to trustees, not being executors, upon trust for others, it was a question whether the executor *alone* could sell, and convey the legal estate.

And where a direction to executors to pay debts was followed by a devise of real estate to the executors, either as such or in their own names, and they took the legal estate, then whether they took the beneficial interest for themselves or in trust for others, the

(*y*) 1 Ph. 717.

(*z*) 1 De G. M. & G. 648; *Anson* v. *Potter*, 13 Ch. D. 141, and see *Re Henson*, [1908] 2 Ch. 356.

estate was charged with the debts, and they had a power to sell for payment thereof, and to convey the legal estate, and ordinarily a purchaser was not bound to inquire as to whether the debts or legacies had been paid (*a*).

Where a testator devised an estate to trustees, and directed a sale *in case the personal assets were insufficient*, the question which arose was, whether the sale was a proper sale, rather than, whether, the sale being admittedly proper, there was a power to give a good discharge for the purchase-money (*b*).

The rule, that a purchaser is not bound, where the debts are charged generally, to see to the application of the purchase-money, was subject to this obvious exception, that, if a purchaser or mortgagee is a party to a breach of trust, it can afford him no protection. Where, for instance, a deviseee had a right to sell, but sold to pay his own debt, and the party who concurred in the sale was aware or had notice of the fact that such was its object (*c*) : or where the power to sell the real estate was only in case of a deficiency of the personal estate, and the purchaser had notice that the personal estate was ample and that the debts had been paid; for as he had then notice that what was intended was a breach of trust, he would, by becoming a purchaser, be a party to such breach of trust : *Carlyon* v. *Truscott* (*d*).

The question as to what period of time was sufficient to raise a presumption that debts had been paid, so as to make it the duty of a purchaser (from a trustee selling under a power of sale) to make inquiries, was settled at the period of twenty years from the death of the testator (*e*).

This rule did not, however, in general apply to an executor selling leaseholds, for the exercise by a trustee of a power of sale, and the exercise by an executor, known to be an executor (*f*), of the power which the law gives him to deal with assets vested in him in that character, are two very different things (*g*). If, however,

(*a*) *Re Tanqueray-Willaume, etc.*, 20 Ch. D. 465, 479; *Marshall* v. *Gingell*, 21 Ch. D. 790.

(*b*) See *Culpepper* v. *Aston*, 2 Ch. Ca. 115; *Keane* v. *Robarts*, 4 Madd. 356; *Greetham* v. *Colton*, 34 B. 615; *Carlyon* v. *Truscott*, 20 Eq. 348.

(*c*) *Eland* v. *E.*, 4 My. & C. 427. See also *Watkins* v. *Cheek*, 2 S. & S. 199; *Howard* v. *Chaffer*, 2 Dr. & Sm. 236; *Stroughill* v. *Anstey*, 1 De G. M. & G. 648; *Colyer* v. *Finch*, 5 H. L. Cas. 923.

(*d*) 20 Eq. 351; cf. *Re Verrell's Contract*, [1903] 1 Ch. 65.

(*e*) *Re Tanqueray-Willaume*, 20 Ch. D. 480.

(*f*) *Solomon* v. *Attenborough*, [1912] 1 Ch. 451.

(*g*) *Re Whistler*, 35 Ch. D. 561; *Re Venn, etc.*, [1894] 2 Ch. 101; *Re Henson*, [1908] 2 Ch. 356; *Re Scott, etc.*, [1895] 1 Ch., p. 625.

the executor had assented to a bequest of the leaseholds it might be otherwise, for the leaseholds would then be vested in the legatee (*h*).

4. As to the Persons who could (independently of statute) Sell and Convey under a Charge of Debts.

A charge was created not only by a direct expression of intention to that effect, but even by a mere direction that the debts should be paid. Such a direction gave the executors an equitable power of sale over the real estate (*i*), but a mere direction that the testator's *debts were to be paid by his executors* was insufficient to give the executors a power of sale, for it was held to amount merely to a direction to the executors to pay out of the personal estate (*k*).

The conclusion seems to be this, that where there was a *general* charge of debts upon real estate, the executors had in *equity* an *implied* power to sell, and they alone could give a valid receipt for the purchase-money, but as they did not take by implication a legal power to sell, and could not therefore convey the legal estate, the persons in whom it was vested (if it were not already in the executors by devise or otherwise) (*l*) had to concur in the conveyance.

Where there was an express trust for sale, at a particular period which had arrived, the trustees could sell, without the concurrence of the executors: *Hodkinson* v. *Quinn* (*m*). "It would," said Page-Wood, V.-C., in this case, "be a very serious conclusion to hold that this decision of *Robinson* v. *Lowater* (*n*) has rendered it possible for executors to sell after an actual alienation by devisees. None of the authorities have gone that length. * * * Irrespectively of the reasons afforded by this particular will, I should be inclined to hold generally, that any sale by trustees under a power (*o*) prior to an actual sale by executors, would be effectual."

(*h*) *Re Culverhouse*, [1896] 2 Ch., p. 253.

(*i*) *Legh* v. *Earl of Warrington*, 1 Bro. P. C. 511; Dart (1905), p. 633 *et seq*; and see *Re Head's Trustees and Macdonald*, 45 Ch. D. 310; *Re Butler*, [1894] 3 Ch. 250.

(*k*) *Brydges* v. *Landon*, cited 3 V. 550; *Keeling* v. *Brown*, 5 V. 359; *Gosling* v. *Carter*, 1 Coll. Ch. R. 644; *Cook* v. *Dawson*, 29 B. 123; but where the executors were also devisees, see *Alcock* v. *Sparhawk*, 2 Vern. 228; *Re Tanqueray-Willaume, etc.*, 20 Ch. D. 465, 479.

(*l*) *Re Tanqueray-Willaume*, 20 Ch. D. 480.

(*m*) 1 John. & H. 303.

(*n*) 17 B. 592; 5 De G. M. & G. 272.

(*o*) The trustees in *Hodkinson* v. *Quinn* had a trust for sale and not a mere power.

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By 22 & 23 Vict. c. 35 (Lord St. Leonards' Act), ss. 14—18, the difficulty created by the earlier decisions was removed, in cases where the will contained a charge of debts or legacies, the devisees in trust of the testator's entire interest in the land so charged being enabled to sell, and if there were no such devisees, the executors could sell. These provisions have been repealed by the Administration of Estates Act, 1925. By section 1 of such last-mentioned Act (reproducing with amendments section 1 of the Land Transfer Act, 1897), *it is provided* that real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death devolve from time to time on the personal representative of the deceased, in like manner as before the Act chattels real devolved. And by section 2, subject to the provisions of the Act, all enactments and rules of law with respect to probate or letters of administration, or to dealings before probate in the case of chattels real, and with respect to costs and other matters in the administration of personal estate, in force before the commencement of the Act, and all *powers*, rights, obligations and liabilities of a personal representative, in force at the commencement of the Act, with respect to chattels real, shall apply to the personal representative and have effect with respect to the real estate vested in him, and in particular all such powers of disposition as were before the Act exercisable as respects chattels real by the survivor or survivors of two or more personal representatives, as well as by a single personal representative, or by all the personal representatives together, shall be exercisable by the personal representatives or representative of the deceased with respect to his real estate. By section 2, sub-section 2, where there are two or more personal representatives, a conveyance of real estate shall not (save as otherwise provided as respects trust estates including settled land) be made without the concurrence of all such representatives or an order of the Court, but where probate is granted to one or some of two or more persons named as executors (whether or not power is reserved to the other or others to prove) any conveyance of the real estate may be made by the proving executor or executors for the time being, without an order of the Court, and shall be as effectual as if all the persons named as executors had concurred therein. By section 54 of the Administration of Estates Act, 1925, it is declared that, save as otherwise provided, the Act does not apply in any case where the death occurred before the commencement of the Act.

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By section 3, sub-section 1 of the Administration of Estates Act, 1925, the expression " real estate " includes, for the purposes of Part I of the Act, chattels real. Accordingly, the power of one of several executors or administrators, in respect of the disposition of leasehold property, would seem to be more restricted than it was before 1926.

5. Liability of Purchasers of Personal Estate from Executors or Administrators to see to application of the Purchase-money.

However personal estate may be bequeathed, it must be applied, in the first place, by the executors for payment of the debts of the testator, and the costs of administration (*p*), in a due course of administration (*q*). Upon the same principles, therefore, by which a purchaser of real estate, devised for the *general* payment of debts was (independently of statute) exempted from seeing to the application of the purchase-money, it is a general rule that a person who in good faith purchases or takes a mortgage of leaseholds or other personalty from an executor or administrator professing to act as executor or administrator (*r*) is not bound to see to the application of the purchase-money. " After the sale is made, the creditors cannot," as observed by the M.R. in the principal case, " break in upon it " (*s*).

An executor has complete and absolute control over the property, and it is for the safety of mankind that it should be so. He may sell or pledge the assets of his testator, and give valid receipts (*t*), and nothing which he does can be disputed, except on the ground of fraud and collusion (*u*); and a like control is possessed by an administrator (*x*).

The sale or mortgage of a chattel by an executor will be good against both the residuary pecuniary and specific legatees, as well as the creditors of the testator, whose remedy, in case of the mis-

(*p*) *Re Whistler*, 35 Ch. D. 561, 566; *Re Verrell's Contract*, [1903] 1 Ch. 65, 69.

(*q*) *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236.

(*r*) *Solomon* v. *Attenborough*, [1912] 1 Ch. 451; [1913] A. C. 76.

(*s*) See *Bonney* v. *Ridgard*, 1 Cox, 145; *Scott* v. *Tyler*, Dick. 725; *Andrew* v. *Wrigley*, 4 Bro. Ch. 125; *M'Leod* v. *Drummond*, 17 V. 154; *Keane* v. *Robarts*, 4 Madd. 357; *Ward* v. *W.*, 4 Ir. Ch. R. 215; *Savage* v. *Humble*, 3 Bro. P. C. 5; *Miles* v. *Durnford*, 2 De G. M. & G. 641; *Berry* v. *Gibbons*, L. R. 8 Ch. 747.

(*t*) *Charlton* v. *Durham*, L. R. 4 Ch. 433.

(*u*) *Per* Hatherley, C., in *Vane* v. *Rigden*, L. R. 5 Ch. p. 668; *Re Venn & Furze's Contract*, [1894] 2 Ch. 101; see *Solomon* v. *Attenborough*, *supra*; *Wise* v. *Whitburn*, [1924] 1 Ch. 460.

(*x*) *Smith* v. *Everett*, 27 B. 454.

application of the money by the executor, will not be against the purchaser or mortgagee, but against *the executor* (*y*).

In *Solomon* v. *Attenborough* (*z*), a testator died in 1878, having appointed A and B his executors and trustees and having given to them his residuary estate upon trust for sale and to divide the proceeds as therein mentioned. The residuary estate included certain articles of plate, and in 1892 A (without disclosing that he was an executor) raised money for his own purposes by pledging the articles to the defendants, and he paid interest on the loan until his death in 1907. After A's death, C was appointed a trustee with B, and the trustees having discovered that the articles had been pawned with the defendants, brought this action to recover the same. It was shown by the evidence that all the testator's debts and funeral and testamentary expenses had been paid before 1892, and that the residuary estate (including the articles in question) was then held by the executors as trustees and not as executors. It was held by the Court of Appeal, overruling Joyce, J., that the defendants obtained no title by the pledge and that the articles must be delivered up to the trustees. Cozens-Hardy, M.R., and Buckley, L.J., rested their decision upon the ground that in making the pledge, A had not purported to act as executor, nor was he known by the defendants to be an executor. Fletcher Moulton, L.J., on the other hand, rested his judgment upon the ground that the executors having ceased to hold the estate as executors, one of the trustees could not alone pass a good title even to a purchaser for value without notice. "These goods were pawned by a person who was not the owner," said the Lord Justice (*a*), "because the sale or pawning of these articles could only have been done by the two trustees jointly who had the legal estate in them." The House of Lords (Lord Haldane, L.C., and Lords Atkinson and Shaw) affirmed the judgment of the Court of Appeal, but did so expressly upon the grounds relied upon by Fletcher Moulton, L.J. "I agree," said Lord Haldane, "with the judgment of Fletcher Moulton, L.J. The real point is, I think,

(*y*) *Ewer* v. *Corbet*, 2 P. W. 148; *Burting* v. *Stonard*, 2 P. W. 150; *M'Leod* v. *Drummond*, 17 V. 163, 169; 11 R. R. 41; *Andrew* v. *Wrigley*, 4 Bro. Ch. 125; *Keane* v. *Robarts*, 4 Madd. 332, 357; *Gray* v. *Johnston*, L. R. 3 H. L. 11; *Berry* v. *Gibbons*, L. R. 8 Ch. 747.

(*z*) [1912] 1 Ch. 451; [1913] A. C. 76; see also *Wise* v. *Whitburn*, [1924] 1 Ch. 460, in which case, however, the Court held that the purchaser had express notice that the executors had ceased to hold the property in question (a leasehold house) as executors, and that they held the same as trustees.

(*a*) [1912] 1 Ch. p. 457.

more simple than it was regarded as being by his colleagues in the Court of Appeal. . . . The property, if I am right in the inference which I draw from the circumstances, was vested not in A, but in A and his co-trustee jointly in 1892, when the attempted pledge was made, and I see no answer to the case made by the respondents."

Verney, M.R., in the principal case, mentions two exceptions from the rule that an executor can give a good title to the personal estate (1) where the property assigned was clothed with a particular trust (*b*), and (2) where there is fraud on the part of a purchaser or mortgagee. Thus, where an executor disposes of his testator's assets in payment of or as a security *for a debt of his own*, the person to whom they are disposed of or pledged will take them subject to the claims of the creditors and of specific and general legatees of the testator, if the defendants shut their eyes against information which, without gross neglect, they could not help receiving (*c*).

The exceptions from the general rule, that purchaser from an executor is not bound to see to the application of the purchase-money, were summed up by Lord Thurlow, in *Scott* v. *Tyler* (*d*), thus: "If one concerts with an executor, by obtaining the testator's effects at a nominal price or at a fraudulent under-value (*e*), or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, *or in any other manner* (*f*), contrary to the duty of the office of executor, such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value" (*g*).

A person indebted to a testator's estate, who pays a third party by order of the testator's executor, and obtains the executor's receipt without notice that the payment is wrongfully made, will obtain thereby a complete discharge (*h*). And upon the same

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(*b*) *Hill* v. *Simpson*, 7 V. 152; *Wise* v. *Whitburn*, [1924] 1 Ch. 460.

(*c*) *Taylor* v. *Hawkins*, 8 V. 209; *Gray* v. *Johnston*, L. R. 3 H. L. 1; *Farhall* v. *F.*, 7 Eq. 286; *Jones* v. *Stöhwasser*, 16 Ch. D. 577; *Hill* v. *Simpson*, 7 V. 152; *Wise* v. *Whitburn*, [1924] 1 Ch. 460.

(*d*) Dick. 725.

(*e*) *Rice* v. *Gordon*, 11 B. 269.

(*f*) "Very material words," *per* Eldon, C., *M'Leod* v. *Drummond*, 17 V., p. 167.

(*g*) Cf. *M'Leod* v. *Drummond*, 17 V. 170; and see *Solomon* v. *Attenborough*, *supra*; *Wise* v. *Whitburn*, *supra*.

(*h*) *Ferrier* v. *F.*, 11 L. R. Ir. 56.

principle a banker will not be liable for paying the cheque of his customer, being an executor, who misapplies the money, unless a misapplication thereof was intended by the executor amounting to a breach of trust of which the banker was cognisant, and by which he derived personally a profit (*i*). And even if the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque; for if he did so he would be making himself a party to an inquiry as between his customer and third person (*k*).

If, however, an executor or a trustee who is indebted to a banker, or to another person having the legal custody of the assets of a trust estate, applied a portion of them in the payment of his own debt to the individual having that custody, as the person receiving the debt, has at once not only abundant proof of this breach of trust, but participates in it for his own personal benefit, he would be compelled to make restitution (*l*).

(*i*) *Gray* v. *Johnston*, L. R. 3 H. L. 1; cf. *Re Blundell*, 40 Ch. D. p. 382.

(*k*) L. R. 3 H. L. p. 14.

(*l*) *Ib.* p. 14; and see *Pannell* v. *Hurley*, 2 Coll. Ch. R. 241; *Bodenham* v. *Hoskyns*, 2 De G. M. & G. 903; *Connolly* v. *Munster Bank*, 19 L. R. Ir. 119; *Thomson* v. *Clydesdale Bank, Ltd.*, [1893] A. C. 282; *Coleman* v. *Bucks and Oxon Union Bank*, [1897] 2 Ch. 243.

MACKRETH *v.* SYMMONS.

1808. 15 V. 329; 10 R. R. 85.

Vendor's Lien for Unpaid Purchase-money.

A vendor has a lien for purchase-money against the vendee, volunteers, and purchasers with notice, or having equitable interests, only claiming under him: unless clearly relinquished.

The bill stated, that, in the years 1783 and 1784, the plaintiff was indebted to John Manners in several sums, amounting in the whole to £13,500; for which sums John Martindale, as surety, joined the plaintiff in bonds. In 1790, Martindale, having, upon a settlement of accounts with the plaintiff in 1785, taken credit for payment to Manners of £3,000, undertook to discharge the remaining £10,500; and they settled an account accordingly. Other accounts were afterwards settled between them—the last in February, 1792; upon which a balance of £54,000 was due to Martindale, including £10,393 17s., *the value of annuities* granted by the plaintiff; against which Martindale agreed to idemnify the plaintiff, in consideration of the plaintiff's agreeing to pay him the amount. *A bond for* £20,000 *was given accordingly*; and a mortgage in fee was executed by the plaintiff to Martindale for the balance of £54,000.

By indentures of lease and release, dated the 30th and 31st of October, 1793, reciting an agreement by the plaintiff to sell the reversion of the mortgaged estates to Martindale, which was valued at £60,000, composed of the principal and interest due upon the mortgage, those estates were conveyed to Henry Martindale and his heirs to the use of the plaintiff for life, with remainder to John Martindale in fee.

The bill further stated, that John Martindale *did not, according to his undertaking, pay the sum of* £13,500 *to Manners,* nor *the value of the annuities*; which sums constituted

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part of the consideration for his purchase of the reversion of the estate. In September, 1797, a commission of bankruptcy issued against him, under which Manners' representatives proved the debt upon the bonds, and received dividends; the plaintiff being obliged to pay the remainder of the debt on account of those bonds, being £14,128 3s. 9d., besides costs, and several sums on account of the annuities.

John Martindale, before his bankruptcy, had contracted to execute a mortgage to the defendant of the reversion comprised in the indentures of 1793; and the plaintiff, claiming a lien upon the estate for the payments he had made in consequence of Martindale's failure to fulfil his engagements, gave notice to the assignees under the commission. In 1798, Symmons obtained a decree, that the assignees should execute a mortgage of the reversion to him, expressly without prejudice to the plaintiff's claim; and afterwards filed a bill of foreclosure against the assignees, and obtained a decree; Mackreth not being a party to that suit. *The legal estate was vested in Coutts*, as a trustee, under a conveyance by Mackreth and Martindale in 1793, to secure annuities of £2,000.

The bill, filed by Mackreth, prayed a declaration, that the plaintiff has a lien upon the reversion of the estates, sold to Martindale and mortgaged to Symmons, for the payments he had been obliged to make, and those sums which he may hereafter pay in respect of annuities, etc.

The defendant Symmons, by his answer, denied that he had any notice, prior to his entering into the agreement with Martindale, that the plaintiff had not received full consideration; and submitted that he had no lien.

Sir Samuel Romilly and Mr. Wriottesley, for the plaintiff.—The equitable lien of a vendor upon the estate sold for the purchase-money, as against the vendee, and even though a bond was taken, is established by a great number of cases, from *Chapman* v. *Tanner* (*a*), to *Nairn* v. *Prowse* (*b*), *Austin* v. *Halsey* (*c*). * * * * There are but two periods to which the

(*a*) 1 Vern. 267.
(*b*) 6 V. 752; 6 R. R. 37.
(*c*) 6 V. 475; see 483.

point of notice can apply: first, the time when the consideration was advanced; secondly, when the conveyance was executed; and even where a consideration has actually passed (*d*). * * * In this case it is essential that there should not have been notice at the latter period, before which notice is clearly established. The estate was never properly out of the hands of the plaintiff. He had not taken a security carved out by himself, which might preclude the equitable lien he once had, which therefore still remains. From the nature of this transaction, the consideration being a former debt, no money actually passing, no such hardship can arise from enforcing the lien, as in the case of a purchaser for valuable consideration actually paid in that transaction, who is affected by notice.

* * * * *

Mr. Richards, Mr. Alexander, and Mr. William Agar, for the defendant.— * * * In the case of *Chapman* v. *Tanner* (*e*) there was a special agreement: the title-deeds were kept by the vendor, a deposit of the title-deeds of itself amounting to an equitable charge. Other cases, besides those which have been mentioned, in which this point arose, either directly or incidentally, are *Bond* v. *Kent* (*f*)—the case of a mortgage of a purchased estate for part of the money, and a note for a remainder; *Pollexfen* v. *Moore* (*g*)—a very perplexed case, often cited; *Fawell* v. *Heelis* (*h*); *Blackburn* v. *Gregson* (*i*)—which is merely the opinion of Lord Loughborough, who desired to have the point further considered; *Trimmer* v. *Bayne* (*k*). The result of all of them is, that, where a security is given, there is no place for this equity, the purchaser certainly having to show that it does not exist. Here, a bond was given by Martindale: the security stipulated between the parties; and, therefore, the lien, substituted by equity, where there is no stipulation for a particular security, cannot be raised.

(*d*) *Wigg* v. *W.*, 1 Atk. 382.
(*e*) 1 Vern. 267.
(*f*) 2 Vern. 281.
(*g*) 3 Atk. 272.
(*h*) Amb. 724; 1 Bro. Ch. 422 n.; Dick. 485.
(*i*) 1 Bro. Ch. 420.
(*k*) 9 V. 209.

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Sir Samuel Romilly, in reply.—The plaintiff being called upon, and obliged to pay the debt, against which Martindale undertook to indemnify him, that undertaking forming the consideration of Martindale's purchase, he cannot, upon the ground of fraud, be permitted to retain the estate. The lien, therefore, is clear in respect of the £10,500. The distinction as to the annuities rests upon the single circumstance, that a security by a bond of indemnity was taken, which is confined to the annuities.

* * * * *

Nov. 26th, 1808.

Lord Chancellor Eldon, having stated the case very particularly, and observing that the legal estate in the premises was, before the assignees of Martindale executed the agreement for a mortgage to Symmons, vested, under a former conveyance by Mackreth, in a trustee to secure annuities granted by him, pronounced the following judgment:—

This case, when it was argued, and since, has appeared to me to involve a question of very great importance, with regard to which I am not able to find any rule which is satisfactory to my mind. If I had found, laid down in distinct and inflexible terms, that, where the vendor of an estate takes a security for the consideration, he has no lien, that would be satisfactory; as, when a rule, so plain, is once communicated, the vendor, not taking an adequate security, loses the lien by his own fault. If, on the other hand, a rule has prevailed, as it seems to be that it is to depend, not upon the circumstances of taking a security, but upon the nature of the security, as amounting to evidence, as it is sometimes called, or to declaration plain, or manifest intention, the expressions used upon other occasions, of a purpose to rely, not any longer upon the estate, but upon the personal credit of the individual, it is obvious that a vendor, taking a security, unless by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation in which he stands, without the judgment of a Court, how far that security does contain the evidence, manifest intention, or declaration plain, upon that

point. That observation is justified by a review of the authorities: from which it is clear that different Judges would have determined the same case differently; and, if some of the cases that have been determined had come before me, I should not have been satisfied that the conclusion was right.

This bill insists upon a lien in respect of these annuities; to be paid all that the plaintiff himself has paid: and either as to the original value, or the present value, or the future payments. I state that claim in these different terms, as, to determine what is the lien, it is necessary to point out the amount of it, and how it is to be calculated. Some doubt was thrown in the argument upon the question of lien between the vendor and vendee; but it was not carried far; and it is too late to raise a doubt upon it: but it is insisted, that the lien does not prevail against third persons, even with notice of the situation of the vendor and vendee. It may be of use to state the cases upon this subject in the order of time.

[His Lordship then carefully considered many cases to which it is no longer necessary to refer, and continued:] From all these authorities the inference is, *first, that, generally speaking, there is such a lien; secondly, that in those general cases in which there would be the lien as between vendor and vendee, the vendor will have the lien against a third person, who had notice that the money was not paid.* Those two points seem to be clearly settled. I do not hesitate to say, that, if I had found no authority that the lien would attach upon a third person, having notice, I should have had no difficulty in deciding that upon principle, as I cannot perceive the difference between this species of lien and other equities, by which third persons, having notice, are bound. In the case of a conveyance to B, the money being paid by A, B is a trustee; and C taking from him, and having notice of the payment by A, would also be a trustee, and many other instances may be put (*l*).

The more modern authorities upon this subject have brought it to this inconvenient state—that the question is not a dry question upon the fact, whether a security was taken, but it

(*l*) See *Dyer* v. *D.*, and notes, *ante.*

depends upon the circumstances of each case whether the Court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken.

In this case, having, as other Judges have had, to determine this question of intention upon circumstances, I may mistake the fair result of the circumstances which I have endeavoured to collect. I must say I have felt from the first, that there is, upon the part of the plaintiff, that natural justice and equity, which excite a wish, that I could enforce the lien throughout; but, first, as to the annuities, I am persuaded that, with reference to that part of the case involving the question of lien as to the consideration, or any part of it, or any sum of money, the quantum of which is to be estimated with reference to the present value, or the past or future payments, this as a case in which the plaintiff intended to rely entirely upon the personal security, the bond for £20,000; and that was the conception of Martindale also; by whose default of payment, therefore, the estate is not now subject to the lien in respect of the consideration of the annuities, or any allowance in respect of it. See how it stands. In 1790, the plaintiff, as principal, and Martindale, as surety, being engaged in an obligation, which I understand to be a personal one, for these annuities, agree to change situations; Martindale to be the principal, and the plaintiff to be surety; in consideration of which the plaintiff agrees to give £9,000, secured by a mortgage. It rests upon that until 1793, when the transaction takes this course: that Martindale shall be no longer a mortgagee, but owner of the reversion in fee, and, which is material, of the reversion expectant upon the plaintiff's life estate. The annuities remain upon the old footing; that is, some payments were made, or arrears accrued, between 1792 and 1793, and payments were to arise from time to time. The value given to Martindale, in 1792, by the mortgage of £9,000, for taking the liability upon himself, was a value which merely, by the lapse of time, between 1792 and 1793, must have varied. If the annuities had been paid there must have been a difference in the estimation; also *de anno in annum*, the value was

decreasing, not only as the annuities were wearing out, but also as the number of the annuitants was decreasing by death. It is impossible, it is not natural, to suppose, that parties dealing for the consideration of annuities and the purchase of a reversion, which might not take effect in possession until all the annuitants were dead, relied on that reversion as security, in addition to the indemnity by the bond for £20,000; in the original transaction the estate being pledged for the sum of £9,000, as if actually paid.

Then, as to the lien for what is it? Is it for the original sum? That it cannot in justice be. Is it for future payments—that, one sum being paid, it does not attach? another sum not being paid, it does attach? a charge upon the reversion arising from time to time, accordingly as these payments are, or are not, made? And is that interference to be drawn where a conveyance was executed without the least notice of such an intention—a security taken, not of itself sufficient to exclude the purpose of such a lien? but the nature of the subject, connected with the fact of that security taken, is decisive proof against such an intention; and it appears accordingly in the other cause, *Symmons* v. *Rankin*, that Mackreth and Martindale joined in the conveyance to Coutts, to secure an annuity of £2,000, without the least reference to such an intention.

I admit, that the opinion of Lord Loughborough (*m*) that the case, before Lord Camden (*n*), went upon the ground of lien, is an authority very considerably against my opinion; and I cannot say upon what the case did proceed, if not upon that ground; as the estate, given by the wife to her husband for his life, after her own death, if not affected by the lien, could not be bound to pay the annuity. If that case is actually represented, Lord Camden's opinion seems to have been that the mere circumstance of an estate given in consideration of an annuity, with a bond, would not prevent the lien attaching from time to time; and, so understanding it, I cannot bring my mind to the conclusion that it is an authority which ought to lead me to determine, that, with reference to these annuities, there is a lien,

(*m*) See *Blackburn* v. *Gregson*, 1 Bro. Ch. 420.
(*n*) *Tardiffe* v. *Scrughan*, cited 1 Bro. Ch. 423.

either for the original value, the present value, or the future payments, which may or may not become due.

As to the other part of the case, I have considered long, whether the conclusion is just, that, not meaning to have a lien, as I think this party did not, with regard to the annuities, he should mean to have a lien as to the sum of money due to Manners. My individual opinion is that the intention was the same as to both; but, with regard to the latter, the cases authorise the lien; unless it is destroyed by particular circumstances, which do not exist here. That sum is precisely in the condition of a part of the consideration, not paid; and then the inference in equity, unless there are strong circumstances, getting over it, is, that a lien was intended. This comes very near the doctrine of Sir Thomas Clarke (*o*), which is very sensible; that, where the conveyance, or the payment, has been made by surprise, there shall be a lien. This plaintiff understood at the time of the conveyance, that this money was to be paid on his account to Manners; which is the same as if it was to have been paid to himself, and was not paid; and then the only question is, whether, as, from the special circumstances as to the value and nature of the annuities, I am to infer that a lien was not intended as to them, I must make the same inference with respect to this gross sum; as to which, if the annuities were not mixed with the transaction, the doctrine of equity is, that the lien would attach. As to that sum, my judgment is, that the plaintiff has a lien.

It is contended that there are other circumstances in this case: that the defendant, Symmons, has a conveyance of the estate without notice, or, rather, a contract; as he had notice at the time of the conveyance. It is not necessary to go into the doctrine as to the effect of notice at the time of the contract, or at the time of payment of the money; though there is no doubt the defendant, when he took his conveyance, had notice from the recitals in his title-deed of Mackreth's rights and Martindale's obligations, as vendor and vendee. Neither is it necessary to go into the consideration of another argument; that

(*o*) *Burgess* v. *Wheate*, 1 Black. 150.

the defendant's money was not originally lent upon the faith of the land. There is a great difference between the effect of a judgment as attaching upon the land, and a special agrement by a creditor for a security upon the land. It is not, however, necessary to determine such questions; as neither the plaintiff nor the defendant Symmons has the legal estate, which appears in the other cause, *Symmons* v. *Rankin*, to be in Coutts, under the *conveyance* of 1793, in which Martindale and Mackreth joined; and then, between equities the rule "*Qui prior est tempore potior est jure*," applies (*p*).

The result of this case is, that the bill must be dismissed as it regards the annuities, and is right as to the other part of the claim; and, being right in one point, and wrong in the other, the decree must be without costs.

This case was mentioned by way of motion to vary the minutes, upon a misunderstanding as to the costs.

Lord Chancellor Eldon, having repeated the ground upon which no costs were given, made the following additional observations:—

Since the judgment was pronounced, I have met with a case which was not cited in the argument, but is referred to in Mr. Sugden's work (*q*), which seems to me to be a book of considerable merit, in which this subject is considered with much attention, and he comes to a conclusion different from mine. I looked into the Registrar's Book for that case, the name of which I do not recollect; and it does seem to me that his inference is not the necessary inference, arising from the circumstances of that case, as I find it in the Registrar's Book. I mention this, to show that I have not withdrawn from the opinion I have expressed upon this subject; as to which, conceiving it to be of great importance, I should, if convinced, be very ready to retract; but, having endeavoured to collect all the doctrine of the Court upon it, I am sure I am right in that. I wish I was as sure in the application of the evidence.

(*p*) This rule only applies when the equities are equal. See *Russell* v. *R.*, *ante*; *Rice* v. *R.*, 2 Drew. 73.

(*q*) The case alluded to by the Lord Chancellor appears to be *Comer* v. *Walkley*, stated 356, 2nd edit.; 465, 866, 11th edit., Sugd. V. & P.

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NOTES.

1. Generally.
2. Lien against a railway or other company, p. 860.
3. Purchaser for value without notice, p. 862.
4. Cases in which the lien is determined or does not attach, p. 865.
   By taking security, p. 865.
   Loss of lien as against third persons by conduct, etc., p. 870.
5. Enforcement of lien, p. 872.
6. Vendee's lien for purchase-money, p. 873.

1. Generally.

A vendor's lien for unpaid purchase-money is a charge upon the property sold, created by construction of equity independently of any supposed agreement (*r*). It applies in a sale of personal (*s*) as well as in a sale of real property, and apparently extends " to all cases in which the property sold is of such a nature as that the Court will decree specific performance of the contract for the purchase of it " (*t*).

The lien attaches upon land of any tenure (*u*), and extends to machinery affixed to the land (*x*).

The doctrine is thus stated by Eldon, C., in the principal case (*y*) :—" Where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt indorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of a contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case, for the whole consideration; in the other, for that part of the money which was not paid " (*z*). And it applies on possession being given, whether the conveyance has been executed or not (*a*).

(*r*) Cf. Story (1892), 1217, 1220; *Toft* v. *Stephenson*, 5 De G. M. & G. 735; *Dixon* v. *Gayfere*, 1 De G. & J. 655.

(*s*) *Davies* v. *Thomas*, [1900] 2 Ch. 468 (C. A.); *Re Stucley*, [1906] 1 Ch. 67; *Re Patent Carriage Co.*, 2 Eq. 349; *Dansk Rekylriffel, etc.* v. *Snell*, [1908] 2 Ch. 127; and see section 41 of Sale of Goods Act, 1893.

(*t*) *Re Stucley*, *ubi cit.*, *supra*; *per* Stirling, L.J., at p. 79; Fry, Specific Performance (6th ed.), p. 550.

(*u*) *Winter* v. *Anson*, 3 Russ. 492; *Matthew* v. *Bowler*, 6 Ha. 110; *Wrout* v. *Dawes*, 25 B. 369.

(*x*) *Re Vulcan Ironworks*, [1888] W. N., p. 37.

(*y*) This extract is taken from the observations of Eldon, C., before delivering his final judgment; see 15 V., p. 337.

(*z*) See also *Chapman* v. *Tanner*, 1 Vern. 267; *Austen* v. *Halsey*, 6 V. 475.

(*a*) *Smith* v. *Hibbard*, Dick. 730; *Smith* v. *Evans*, 28 B. 59.

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The trustee in bankruptcy of a bankrupt vendor, or his assignees by parol assignment, are also entitled (*b*).

The principle would also apply to the case of a mortgagor who has not received the mortgage money, although the deed contains an acknowledgment, and a receipt has been indorsed. As against the mortgagee, the mortgagor would be entitled to redeem, on payment of what should be found to have been actually advanced, with interest (*c*); as against transferees of the mortgage taking in good faith for value the mortgagor would be bound by the acknowledgment (*d*).

It has been said that a vendor's lien will also extend to money advanced by the unpaid vendor to the purchaser for improvements (*e*), but the decision does not seem to go as far as this.

The lien prevails against the purchaser and all volunteers claiming under him (*f*); against subsequent purchasers for value with notice (*g*); and also (subject, nevertheless, to the statutory provisions concerning registration, mentioned later) against purchasers for value *without* notice, unless such purchasers have the legal estate (*h*), or a better equity than the vendor (*i*).

The trustee in bankruptcy of a purchaser will be affected by the equitable lien, although he may have had no notice of it; for it is a clear principle that trustees in bankruptcy take subject to all the equities attaching to the bankrupt (*k*). So, also, will the assignees under a general assignment for the benefit of creditors of the purchaser (*l*).

In *Barker* v. *B.* (*m*), a testator gave a legacy to his daughters

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(*b*) *Grant* v. *Mills*, 2 V. & B. 309, 13 R. R. 101; *Dryden* v. *Frost*, 3 My. & C. 670; *Lacey* v. *Ingle*, 2 Ph. 413.

(*c*) *Bickerton* v. *Walker*, 31 Ch. D. 151, at p. 157; *De Lisle* v. *Union Bank of Scotland*, [1914] 1 Ch. 22.

(*d*) *Bickerton* v. *Walker*, *supra*; *Powell* v. *Browne*, 97 L. T. 167; *Bateman* v. *Hunt*, [1904] 2 K. B. 530; *De Lisle* v. *Union Bank of Scotland*, *supra*; and see section 68 of the Law of Property Act, 1925, replacing section 55 of the Conveyancing Act, 1881.

(*e*) *Ex p. Linden*, 1 Mont. D. & De G. 428.

(*f*) *Mackreth* v. *Symmons*; *Leman* v. *Whitley*, 4 Russ. 423; *Harris* v. *Tubb*, 42 Ch. D. 79, at p. 80.

(*g*) *Ibid.*; and *Frail* v. *Ellis*, 16 B. 350.

(*h*) *Ibid.*; and *Frere* v. *Moore*, 8 Price, 475; *Harris* v. *Tubb*, 42 Ch. D. 79; *Wilson* v. *Kelland*, [1910] 2 Ch. 306.

(*i*) *Rice* v. *R.*, 2 Drew. 73; *Kettlewell* v. *Watson*, 26 Ch. D. 501.

(*k*) *Ex p. Hanson*, 12 V. 349; 8 R. R. 335; *Grant* v. *Mills*, 2 V. & B. 306; 13 R. R. 101; *Ex p. Peake*, 1 Madd. 346; 16 R. R. 233.

(*l*) *Fawell* v. *Heelis*, Amb. 724; *Blackburn* v. *Gregson*, 1 Bro. Ch. 420; *Bowles* v. *Rogers*, 6 V. 95 (n.).

(*m*) 10 Eq. 438.

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on condition that they should convey to his sons certain shares in real estate. The daughters conveyed, but they were not paid the legacies. Romilly, M.R., held that the transaction was not a sale, and that accordingly the daughters were not entitled to the benefit of a vendor's lien on the land conveyed.

The vendor's lien, like any other equitable chose in action, is assignable, and such assignment may, it seems, be effected by parol (*n*), but the assignee will take it subject to any prior incumbrances created by the vendor (*o*).

A bequest to a charity, of money due upon a vendor's lien, was within the Mortmain Act (*p*), and therefore void as savouring of realty.

The mere fact that the vendor's lien still subsists will not prevent the vendor from being deemed in equity a trustee for the purchaser (*q*).

The right which the owner of an express charge possesses to have the charge raised by a sale or mortgage of the property charged extends to a lien arising under general principles of equity, such as a vendor's lien (*r*).

A judgment entered up against the vendor after a contract for sale may be enforced against the unpaid purchase-money by equitable execution (*s*).

Where an agent is authorised to receive the purchase-money, the lien is not lost where in fact no actual payment of the purchase-money is made, but only a payment by account (*t*).

By section 67 of the Law of Property Act, 1925, (re-enacting section 54 of the Conveyancing Act, 1881), a receipt (in the case of deeds executed after 1881) for consideration money in the body

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(*n*) *Dryden* v. *Frost*, 3 My. & C. 670; Coote on Mortgages (9th ed.), p. 1377; and see *Ryall* v. *Rowles* and notes, vol. 1.

(*o*) *Lacey* v. *Ingle*, 2 Ph. 413; *Mangles* v. *Dixon*, 1 Mac. & G. 437; 3 H. L. Cas. 702; *Rayne* v. *Baker*, 1 Gif. 241; *Peto* v. *Hammond*, 29 B. 91.

(*p*) 9 Geo. 2, c. 36; *Harrison* v. *H.*, 1 Russ. & M. 71. See now 51 & 52 Vict. c. 42; 54 & 55 Vict. c. 73; 55 Vict. c. 11.

(*q*) See *Lysaght* v. *Edwards*, 2 Ch. D., p. 506. As to the sense in which the vendor is a trustee for the purchaser, see also *Shaw* v. *Foster*, L. R. 5 H. L. 321, 338, 356; *Rose* v. *Watson*, 10 H. L. C. 672; *Rayner* v. *Preston*, 18 Ch. D. 1, 13; *Ridout* v. *Fowler*, [1904] 1 Ch. 658, at p. 661; *Re Stucley*, [1906] 1 Ch. 67, at pp. 78 and 79; *Lockharts* v. *Bernard Rosen & Co.*, [1922] 1 Ch. 433.

(*r*) *Per* Vaughan-Williams, L.J., in *Re Stucley*, [1906] 1 Ch., p. 76; and see *Levy* v. *Stogdon*, [1898] 1 Ch. 478. See also section 90 of the Law of Property Act, 1925, and the definition clause (section 205) by which "mortgage," as used in the Act, inclues a lien.

(*s*) *Brown* v. *Perrott*, 4 B. 585; cf. *Robinson* v. *Hedger*, 14 Jur. 784.

(*t*) *Wrout* v. *Dawes*, 25 B. 369; *Wilson* v. *Keating*, 4 De G. & J. 588.

of the deed is sufficient discharge to the person paying the same, without any indorsed receipt; and by section 68 (re-enacting section 55 of the Conveyancing Act, 1881), a receipt for consideration money in the body of a deed or indorsed thereon is, in favour of a subsequent purchaser not having notice that the money thereby acknowledged to be received was not in fact paid, to be sufficient evidence of the payment (*u*).

Statutes of Limitation.—A vendor's lien for unpaid purchase-money on a sale of real estate will (unless kept alive) become barred at the end of twelve years from the time when the money becomes payable (*x*). A vendor's lien on personal estate like any other charge on personal estate is not subject to any Statute of Limitations, and therefore a claim for the sum unpaid, with interest thereon, is not barred by lapse of time (*y*).

2. Lien against a Railway or other Company.

A vendor of land to a railway company is, with respect to his lien, in no different position from a vendor of land to any other person (*z*), and will have a lien thereon in respect of unpaid compensation as well as purchase-money (*a*), unless that compensation is the subject of a separate agreement between him and the company (*b*), and he is not deprived of his lien by a deposit and bond under the 85th section of the Lands Clauses Consolidation Act, 1845 (*c*), nor by accepting a deposit in the names of trustees in lieu of the statutory deposit, if the purchase and compensation moneys exceed the deposited sum (*d*). The lien also extends as against another company, lessee of the company which made the purchase (*e*).

(*u*) See *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192; *Rimmer* v. *Webster*, [1902] 2 Ch. 163; *Bateman* v. *Hunt*, [1904] 2 K. B. 530; *Re Capell* v. *Winter*, [1907] 2 Ch. 376. Where there is no receipt in, or endorsed on, the deed, the vendor, it seems, must, at his own expense, prove there is no vendor's lien : *Re Scott and Alverez's Contract*, [1895] 1 Ch. 596.

(*x*) Real Property Limitation Act, 1874, s. 8; *Toft* v. *Stephenson*, 5 De G. M. & G. 735.

(*y*) *Re Stucley*, [1906] 1 Ch. 67; *Levy* v. *Stogdon*, [1898] 1 Ch. 478, and cf. *Mellersh* v. *Brown*, 45 Ch. D. 225; *Re Hancock*, 59 L. T. 197. But as to state demands, see *Brooks* v. *Muckleston*, [1909] 2 Ch. 519.

(*z*) *Per* Selwyn, L.J., *Wing* v. *Tottenham, etc., Ry. Co.*, L. R. 3 Ch. 740; *Allgood* v. *Merrybent, etc., Ry. Co.*, 33 Ch. D. 574.

(*a*) *Walker* v. *The Ware Ry. Co.*, 1 Eq. 195.

(*b*) *Ibid.* (*c*) 8 & 9 Vict. c. 18; *ibid.*

(*d*) *Ibid.*

(*e*) *Bishop of Winchester* v. *Mid-Hants Ry. Co.*, 5 Eq. 17; *Cosens* v. *Bognor Ry. Co.*, L. R. 1 Ch. 594.

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And a mortgage of part of the land under a Railway Act will not oust the vendor's lien (*f*).

The vendor of land to a railway company has the ordinary remedies for enforcing his lien (*g*), and the Court will, although the railway may have been made over the land, and opened for public use, enforce the lien by sale (*h*), or decree rescission of the contract and possession (*i*). But it is now settled that the Court will not grant an interlocutory *injunction* to restrain the company from running trains or engines over the land until the payment of the purchase-money of the land agreed to be taken (*k*), unless, perhaps, the company were destroying the property (*l*); but it would seem in such a case that it would be more proper to apply to have the purchase-money paid into Court (*m*).

In *Allgood* v. *Merrybent, etc., Ry. Co.* (*n*), after judgment that the unpaid vendor was entitled to his lien, it being clear that a sale would be useless, an injunction was granted restraining the defendant company from running trains over the land and from continuing in possession of it (*o*).

The Court will not generally appoint a receiver before judgment (*p*), but it will do so at the hearing (*q*).

Where land is taken by a railway company, and the purchase-money, ascertained by *arbitration* under the Lands Clauses Consolidation Act, 1845 (*r*), has been paid, the vendor is not entitled to a lien on the land sold for the *costs of the arbitration* payable to him by the company (*s*). Nor is a vendor entitled to a lien for costs on the sum deposited by a railway company under

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(*f*) *Nash* v. *Worcester Improvement Commissioners*, 1 Jur. (N.S.) 973.

(*g*) *Wing* v. *Tottenham, etc., Ry. Co.*, L. R. 3 Ch. 740; Kerr on Injunctions (6th ed.), p. 122.

(*h*) *Ibid.*; *Walker* v. *The Ware, etc., Ry. Co.*, 1 Eq. 195.

(*i*) *Allgood* v. *Merrybent, etc. Ry. Co.*, 33 Ch. D., p. 574.

(*k*) *Pell* v. *Northampton, etc., Ry. Co.*, L. R. 2 Ch. 100; *Munns* v. *Isle of Wight Ry. Co.*, L. R. 5 Ch. 414; *Lycett* v. *Stafford, etc., Ry. Co.*, 13 Eq. 261; and see *Bishop of Winchester* v. *Mid-Hants Ry. Co.*, 5 Eq. 17; *Latimer* v. *Aylesbury, etc., Ry. Co.*, 9 Ch. D. 385; Kerr on Injunctions (6th ed.), p. 122.

(*l*) *Pell* v. *Northampton, etc., Ry. Co.*, L. R. 2 Ch. 101, *per* Turner, L.J.

(*m*) *Ibid.*, 102, Cairns, L.J.

(*n*) 33 Ch. D. 571.

(*o*) *Seton* (7th ed.), pp. 2221-2. And see the judgment in *Marshall* v. *Scarborough, etc., Ry. Co.*, [1889] W. N. 73; Kerr on Injunctions (6th ed.), pp. 122-3.

(*p*) *Latimer* v. *Aylesbury, etc., Ry. Co.*, 9 Ch. D. 385.

(*q*) *Munns* v. *Isle of Wight Ry. Co.*, L. R. 5 Ch. 414; *Williams* v. *Aylesbury, Ry. Co.*, 28 L. T. 547.

(*r*) 8 & 9 Vict. c. 18.

(*s*) *Ferrers* v. *Stafford and Uttoxeter Ry. Co.*, 13 Eq. 524.

the 85th section of the Lands Clauses Consolidation Act (*t*), and upon due performance of the condition of the bond, mentioned in the same section, the company are entitled to have the money paid out to them, notwithstanding the pendency of a question between them and the vendor with respect to such costs (*u*). And where the sale to the railway company is in consideration of a *rent charge* of the company, under the 10th and 11th sections of the Lands Clauses Consolidation Act, it has been held, on the principle of *Winter* v. *Anson* (*x*), that there will be no lien for unpaid purchase-money (*y*).

3. Purchaser for Value without Notice.

Although the equitable lien for unpaid purchase-money will, as is laid down in *Mackreth* v. *Symmons*, bind the estate not only in the hands of the purchaser and his heirs, and persons taking from them as volunteers, but also in the hands of purchasers for valuable consideration, who bought *with notice* (*z*) that the purchase-money remained unpaid (*a*), yet the lien will not prevail against a *bona fide* purchaser acquiring the legal estate who bought *without notice* that the purchase-money remained unpaid (*b*); and although the title is deduced from the first vendor, in recital, still that will not be sufficient to affect the purchaser with notice, if the recital does not show that the estate was not paid for (*c*).

The fact of the vendor remaining in possession of the estate as lessee, where he has acknowledged the receipt of the purchase-money in the body of the deed and by indorsement will not be *notice* of the purchase-money remaining unpaid, so as to cause the lien to attach (*d*). But if the vendor claiming a lien retains

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(*t*) 8 & 9 Vict. c. 18.

(*u*) *Re L. & S. W. Ry. Co.*, 2 Ph. 772; *Re Neath, etc., Ry. Co.*, L. R. 9 Ch. 263.

(*x*) 1 S. & S. 434.

(*y*) *Jersey* v. *Briton, etc., Dock Co.*, 7 Eq. 409. But see *Eyton* v. *Denbigh, etc., Ry. Co.*, 6 Eq. 14; *ibid.*, 7 Eq. 439.

(*z*) Such notice may be the statutory notice created by registration; see *infra*, p. 871.

(*a*) *Hearle* v. *Botelers*, Cary 35; *Gibbons* v. *Baddall*, 2 Eq. Ca. Abr. 682 (n.); *Elliott* v. *Edwards*, 2 B. & P. 183; *Walker* v. *Preswick*, 2 Ves. Sen. 622; *Hughes* v. *Kearney*, 1 Sch. & L. 135; 9 R. R. 30; Coote (9th ed.), p. 1376.

(*b*) *Cator* v. *Pembroke*, 1 Bro. Ch. 302; *Harris* v. *Tubb*, 42 Ch. D. 79.

(*c*) *Cator* v. *Pembroke, supra; Eyre* v. *Sadleir*, 14 Ir. Ch. R. 119. Cf. *Davies* v. *Thomas*, 2 Y. & C. Ex. 234; Coote (9th ed.), p. 1321.

(*d*) *White* v. *Wakefield*, 7 Si. 401; *Price* v. *Blakemore*, 6 B. 507, and see sections 67 & 68 of the Law of Property Act, 1925.

the conveyance and the title-deeds, a subsequent purchaser or mortgagee (although he may have acquired the legal estate) may be affected with notice of the lien, and therefore bound by it where the Court imputes to him fraud or gross and wilful negligence, for omitting all inquiries as to the deeds (*e*).

If the legal estate is outstanding, then, as the second purchaser has only an equitable interest, subsequent to that of the equitable lien, the maxim, "*Qui prior est tempore potior est jure*," may, as in the principal case, apply; and the equitable lien (subject to the question of registration mentioned later) will have precedence (*f*). In *Rice* v. *R.* (*g*), certain leasehold property was assigned to a purchaser, *by a deed which recited the payment of the whole purchase-money, and had the usual receipt indorsed on it*, and the *title-deeds were delivered up to the purchaser.* Some of the vendors received no part of their share of the purchase-money, having allowed the payment to stand over for a few days, on the promise of the purchaser then to pay. The day after the execution of the deed, the purchaser deposited the assignment and title-deeds with the defendants, with a memorandum of deposit to secure an advance, and then absconded, without paying either the vendors or the equitable mortgagees:—Kindersley, V.-C., held that the defendants, the equitable mortgagees, having the better equity, were entitled to payment out of the estate in priority to the claim of the vendors for their lien. "In a contest," said his Honour, "between persons having only equitable interests, *priority of time is the ground of preference last resorted to* (*h*); *i.e.*, a Court of equity will not prefer the one to the other, on the mere ground of priority of time, until it finds, upon an examination of the relative merits, that there is no other sufficient ground of preference between them; or, in other words, that their equities are *in all other respects equal*; and that if one has, on other grounds, a better equity than the other, priority of time is immaterial. . . . So far as relates to the nature and quality of the two equitable interests, abstractedly considered, they seem to me to stand on an

(*e*) See *Le Neve* v. *Le N.*, *ante*, notes; *Worthington* v. *Morgan*, 16 Si. 547; *Peto* v. *Hammond*, 30 B. 495; *Hewitt* v. *Loosemore*, 9 Ha. 449; *Finch* v. *Shaw*, *Colyer* v. *Finch*, 19 B. 500; 5 H. L. Cas. 905; and see section 13 of the Law of Property Act, 1925.

(*f*) *Frere* v. *Moore*, 8 Price 475.

(*g*) 2 Drew. 73.

(*h*) See as to this *Taylor* v. *Russell*, [1891] 1 Ch. p. 17; *Kettlewell* v. *Watson*, 26 Ch. D. 501, and see notes to *Russel* v. *R.*, *ante*.

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equal footing; and this I conceive to have been the ground of Lord Eldon's decision in *Mackreth* v. *Symmons*, where, in a contest between the vendor's lien for unpaid purchase-money and the right of a person who had subsequently obtained from the purchasers a mere contract for a mortgage, and nothing more, he decided in favour of the former, as being prior in point of time. . . . If, then, the vendor's lien for unpaid purchase-money, and the right of an equitable mortgagee by mere contract for a mortgage, are equitable interests of equal worth in respect of their abstract nature and quality, is there anything in the special circumstances of the present case to give to the one a better equity than the other? One special circumstance that occurs is this, that the equitable mortgagee has the possession of the title-deeds. . . . We have here ample authority for the proposition, or rule of equity, that as between two persons whose equitable interests are precisely of the same nature and quality, and in that respect precisely equal, the possession of the deeds gives the better equity. And applying this rule to the present case, it appears to me that the equitable interests of the two parties being, in their nature and quality, of equal worth, the defendant, having possession of the deeds, has the better equity. . . . I have no doubt, that in *Mackreth* v. *Symmons*, if the equitable mortgagee had, in addition to his contract for a mortgage, obtained the title-deeds from his mortgagor, Lord Eldon would have decided in his favour. . . . It appears to me that in all cases of contest between persons having equitable interests, *the conduct of the parties and all the circumstances* must be taken into consideration, in order to determine which has the better equity. And if we take that course in the present case, everything seems in favour of the defendant, the equitable mortgagee. The vendors, when they sold the estate, chose to leave part of the purchase-money unpaid, and yet executed and delivered to the purchaser a conveyance by which they declared, in the most solemn and deliberate manner, both in the body and by a receipt indorsed, that the whole purchase-money had been duly paid. They might still have required that the title-deeds should remain in their custody with a memorandum, by way of equitable mortgage, as a security for the unpaid purchase-money; and if they had done so, they would have been secure against any subsequent equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of

dealing with the estate as the absolute, legal and equitable owner, free from every shadow of incumbrance, or adverse equity. In truth, it cannot be said that the purchaser, in mortgaging the estate by the deposit of the deeds, has done the vendors any wrong, for he has only done that which the vendors authorised and enabled him to do. The defendant who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had in effect, by their acts, assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute indefeasible title both at law and in equity" (*i*).

4. Cases in which the Lien is determined or does not attach.

By Express Agreement.—Express stipulations inconsistent with the retention of a lien will of course exclude it (*k*).

By Taking Security.—The mere taking of personal security, *e.g.*, bills of exchange (*l*), is not sufficient to take away the lien. The question in each case is, does the evidence show an intention on the part of the vendor to rely not upon the security of the estate, but solely upon the personal credit of the vendee? "The more modern authorities upon this subject have brought it to this inconvenient state, that the question is not a dry question upon the fact whether a security was taken, but it depends upon *the circumstances of each case*, whether the Court is to infer, that the lien *was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken*" (*m*).

Sometimes the decision will turn upon the particular circumstances of the bargain between the parties (*n*), sometimes upon the nature of the property sold or the purpose for which it was sold (*o*), sometimes, as in *Nairn* v. *Prowse* (*p*) and *Mackreth* v. *Symmons*, upon the nature of the security taken.

(*i*) See sections 67 and 68 of the Law of Property Act, 1925; and see *Capell* v. *Winter*, [1907] 1 Ch., p. 381.

(*k*) *Re London and Lancashire Paper Mills Co.*, 58 L. T. 798.

(*l*) *Grant* v. *Mills*, 2 V. & B. 306; 13 R. R. 101.

(*m*) *Per* Eldon, C., *supra*, pp. 952, 953; *Nairn* v. *Prowse*, 6 V. 752; 6 R. R. 37; *Winter* v. *Anson*, 3 Russ. 488; *Ex p. Loaring* v. *Pocknell*, 13 Si. 406.

(*n*) *Clark* v. *Royle*, 3 Si. 502; *Buckland* v. *Pocknell*, 13 Si. 406.

(*o*) *Jersey* v. *Briton, etc., Dock Co.*, 7 Eq. 409; *Re Brentwood Brick, etc., Co.*, 4 Ch. D. 562. Cf. *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell*, [1908] 2 Ch. 127.

(*p*) *Supra.*

It lies on the vendee to show that the vendor agreed to rest on the security and to discharge the land (*q*), and evidence may be given to show the real nature of the transaction (*r*).

It is now settled, that a mere personal security for the purchase-money, as a bond (*s*), a bill of exchange (*t*), although with a surety (*u*), or a promissory note (*x*), whether negotiated or not (*y*), will not, without more, be sufficient evidence of the intention of the vendor to give credit exclusively to the purchaser, or to his security, so as to take away the lien.

In *Winter* v. *Anson* (*z*) there was an agreement for the sale of an estate, by which it was, amongst other things, agreed that the amount of the consideration-money should be secured by the bond of the purchaser to the vendor, with interest at £4 per cent., and *should remain so secured, during the life of the vendor*, on the regular payment of interest. A conveyance was executed, *in pursuance of the agreement, and in consideration of the purchase-money therein expressed to have been paid*, and the vendor's receipt was indorsed upon it. Part only of the purchase-money had, in fact, been paid, and the residue was secured by bond conditioned to be void on payment by the vendee, to the executors, administrators, or assigns of the vendor of the residue of the purchase-money within twelve months next after the decease of the vendor, with interest at £4 per cent. Leach, M.R., although he at first decided in favour of the lien, afterwards decided against it, upon the ground that the case was, in principle, the same as if the conveyance had stated the real contract of the parties; and that by the effect of that contract, the vendor agreed to part with his estate *in consideration of the bond for the future* payment of the price; and that, when such bond was executed the estate passed to the vendee in equity, as well as at law. This decision was reversed by Lyndhurst, C. "I do not think," said his Lordship, "that the lien is affected by the fact of the period of payment being dependent on the life of the vendor. That circumstance

(*q*) *Hughes* v. *Kearney*, 1 Sch. & L. 132; 9 R. R. 30.

(*r*) *Frail* v. *Ellis*, 16 B. 350.

(*s*) *Hearle* v. *Botelers*, Cary, 35; *Winter* v. *Anson*, 3 Russ. 488; *Collins* v. *C.*, 31 B. 346.

(*t*) *Teed* v. *Carruthers*, 2 Y. & C. Ch. 31; *Grant* v. *Mills*, *supra*.

(*u*) *Hughes* v. *Kearney*, 1 Sch. & L. 136; *Grant* v. *Mills*, *supra*.

(*x*) *Gibbons* v. *Baddall*, 2 Eq. Ca. Abr. 682 (n.); *Hughes* v. *Kearney*, *supra*; *Ex p. Peake*, 1 Madd. 346.

(*y*) *Ex p. Loaring*, 2 Rose, 79.

(*z*) 1 S. & S. 434.

does not appear to me to afford *such clear and convincing evidence of the intention of the vendor to rely, not upon the security of the estate, but solely upon the personal credit of the vendee*, as would be necessary in order to get rid of the lien" (*a*). An appeal was lodged against this decision, but it was afterwards withdrawn (*b*). In *Jersey* v. *Briton Ferry Co.* (*c*) a man conveyed a piece of land for the construction of a public work in consideration of an annual payment. James, V.-C., followed the principle stated by Leach, M.R., in the above case, which he considered was not affected by the judgment on appeal, a judgment resting on the view taken by Lord Lyndhurst on the facts. Applying in *Jersey* v. *Briton Ferry Co.* the principles laid down in *Winter* v. *Anson* by Leach, M.R., James, V.-C., said: "A man conveys a piece of land for the construction of a public work, in consideration of an annual payment. It appears to me it would be contrary to the intention of the parties to suppose the vendor was reserving to himself a right at some future time to enter and destroy the public work if the annual rent should fall into arrear. Hence, in my opinion, there is no lien."

Where an estate is conveyed, in *consideration of an annuity*, the vendor may have a lien upon the land for the annuity, *although a bond or covenant* is given to secure the payment of the annuity (*d*). In *Matthew* v. *Bowler* (*e*), where there was a sale and assignment of a life interest in leaseholds in *consideration of a weekly sum*, to be paid to the vendor during her life, with *a covenant by* the purchaser, for himself, his heirs, executors, and administrators, to make the weekly payment to the vendor, and to repair and insure the premises, and otherwise perform the covenants in the lease, Wigram, V.-C., held that the vendor was entitled to a lien on the life interest in the leaseholds, which was the subject of the assignment for the weekly payment.

But where the Court is satisfied, from the particular circumstances of the case, that the vendor *intended* to substitute the vendee's personal security for his lien, the lien is gone (*f*).

(*a*) 3 Russ. 488.

(*b*) Sugd. V. & P. 258 (11th ed.).

(*c*) 7 Eq. 409. Cf. *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell*, [1908] 2 Ch. 127.

(*d*) *Tardiffe* v. *Scrughan*, 1 Bro. Ch. 423; *Blackburn* v. *Gregson*, 1 Bro. Ch. 420.

(*e*) 6 Ha. 110.

(*f*) *Mackreth* v. *Symmons; Nairn* v. *Prowse*, 6 V. 752; 6 R. R. 37, *supra; Re Albert L. A. Co.*, 11 Eq., p. 178.

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In *Clark* v. *Royle* (*g*), where the conveyance was made in consideration of the vendee entering into covenants therein contained for payment of an annuity to the vendor, and £3,000 to certain persons in the event of the vendee's marrying, Shadwell, V.C., distinguishing the case from *Tardiffe* v. *Scrughan* (*h*), held that there was no lien, on the ground that the deed plainly marked out, that the *consideration on the one side was the conveyance of the estate, and on the other, the entering into the covenants.*

So in *Parrott* v. *Sweetland* (*i*), where a receipt was given by the vendor *for a bond*, as the consideration for an estate, the lien was gone, as the parties in effect bargained for a security, and not for a stipulated sum.

Again, in *Buckland* v. *Pocknell* (*k*), A agreed to sell an estate to B for an annuity of £200, to be paid to him for his life, and an annuity of £92, to be paid after his decease to his son, and B was to pay off a mortgage to which the estate was subject. Accordingly B executed a deed, by which he granted the annuities to A and his son, and covenanted to pay them; and by a conveyance of even date, but executed after the annuity deed, after reciting the annuity deed, A and the mortgagee, in pursuance of the agreement, and in *consideration of the premises and of the annuities having been so granted as thereinbefore recited*, and of the payment of the mortgage-money, conveyed the estate to B. Upon the death of A, his son's annuity, which had been assigned to the plaintiff, became in arrear. Shadwell, V.-C., held that there was no lien for the annuity.

So, likewise, in *Dixon* v. *Gayfere* (*l*), where the purchaser contracted to buy an estate from the vendor, and upon an assignment being made to grant to the vendor an annuity of £50 per annum, during three lives, "*to be secured by bond*," Romilly, M.R., held, that the vendor had no lien on the estate for payment of the annuity. The decree, however, was varied by Cranworth, C., who, agreeing with his Honour that the vendor had no lien on the estate for payment of the annuity, held that he was entitled (the purchaser being dead and there having been no conveyance) to have

(*g*) 3 Si. 499.
(*h*) *Supra.*
(*i*) 3 My. & K. 655.
(*k*) 13 Si. 406; see *Frail* v. *Ellis*, 16 B. 350.
(*l*) 17 B. 421; 21 B. 118.

the annuity secured by a valid and effectual bond before he could be called upon to convey the estate (*m*).

So in *Re Brentwood Brick, etc. Co.* (*n*), where a leasehold brick-field was assigned to a company in consideration of £6,000 to be paid to the vendor as thereinafter mentioned, *viz.*, 50 per cent. on all moneys to be received from sale of shares, and 50 per cent. on all moneys borrowed by the company by way of capital, until the £6,000 was paid. The company became abortive. No money was received by sale of shares, or borrowed, and ultimately the company was ordered to be wound up. It was held by the Court of Appeal that the nature of the contract was such as to exclude the vendor's lien, and that the vendor had no lien on the leasehold premises. "The vendor," said James, L.J., "got for his property a charge upon, and a right to the capital of the company to the extent of £6,000, when it came in. To my mind it is clear that he intended to rely on that fund for payment, *and intended that the company should have the means of borrowing.* This is quite inconsistent with a lien, which would probably make the company unable to pledge their property" (*o*).

An actual agreement, though by parol, to accept a security, and rely upon it alone, will discharge the vendor's lien for unpaid purchase-money. In *Winter* v. *Anson* (*p*), Leach, M.R., observes, "It is the vendor who in the first place attempts to raise an equity against the allegation of the deed : and if the vendor be permitted to repel the effect of the deed, by showing that the price was not paid, it must necessarily follow that the vendee must be at liberty to disclose the whole truth, and to explain the reason why that payment was not made." Where there was a stipulation that the purchase-money should be paid within two years after a resale, the lien was held gone (*q*); and see *Re London, etc. Paper Mills Co.* (*r*), where an express stipulation had been substituted for the lien.

If a vendor take a totally distinct and independent security, as

(*m*) *Dixon* v. *Gayfere*, 1 De G. & J. 655. See also *Dyke* v. *Rendall*, 2 De G. M. & G. 209; *Frail* v. *Ellis*, 16 B. 350; *Stuart* v. *Ferguson*, Hayes, 452; *Re Albert L. A. Co.*, 11 Eq., p. 178; *Jersey* v. *Briton Ferry, etc., Co.*, 7 Eq. 409.

(*n*) 4 Ch. D. 562. Cf. *Re Durrow Brick Co.*, [1904] 1 Ir. R. 530; *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell*, [1908] 2 Ch. 127.

(*o*) See *Re Patent Carriage Co.*, 2 Eq. 349; and the remarks thereon of Baggallay, L.J., in *Re Brentwood Brick, etc., Co.*, 4 Ch. D., pp. 565-6; and of Neville, J., in *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell*, [1908] 2 Ch., p. 136.

(*p*) 1 S. & S., p. 445, *supra*, p. 866.

(*q*) *Ex p. Parkes*, 1 G. & J. 228.

(*r*) 58 L. T. 798.

for instance, a mortgage of a long annuity or of another estate for the unpaid purchase-money, it will then become a case of substitution for the lien, instead of a credit given (*s*). But the mortgage must be given under such circumstances as are laid down in the principal case, namely, that the *intention* of the vendor to give up the lien, can be therefrom *clearly and satisfactorily implied* (*t*). And, where a bond was given for the unpaid purchase-money, and a mortgage *on part* of the purchased estate, the intention, that the lien should not extend over the rest of the estate, was held to be sufficiently clear (*u*).

So where the vendor took a mortgage of the estate for part of the purchase-money, and a note for the remainder, it was held that he had no lien for the money due on the note, "because," as was observed by Lord Redesdale, in commenting on that case (*x*), "it was *manifestly the intention of the parties* that the amount of the note should not be a lien on the lands, else they would have had a mortgage for the whole : the seller took the estate for his debtor for part of the purchase-money, and was content with the note for the remaining part" (*y*).

Loss of Lien as against Third Persons by Conduct, etc.—Where the purchaser with the concurrence of the vendor mortgaged the estate for a sum which the vendor received in part payment of his purchase-money, taking bills, which were ultimately dishonoured, for the remainder, it was held that the vendor had no lien on the purchase-money arising from a second sale, made in pursuance of an agreement between all the parties, in preference to the mortgagee (*z*). And if a vendor who knows the purchase-money is trust-money, suffers one of the trustees to retain part of it, without the knowledge of the co-trustees or the *cestui que trust*, he has no lien on the estate for the part so retained (*a*). Upon the same principle in *Muir* v. *Jolly* (*b*), a trustee having purchased an

(*s*) *Nairn* v. *Prowse*, 6 V. 752; 6 R. R. 37.

(*t*) See *Cowell* v. *Simpson*, 16 V. 278; 10 R. R. 181; a case of solicitor's lien, as to which see *Re Taylor*, [1891] 1 Ch. 590; *Groom* v. *Cheesewright*, [1895] 1 Ch. 730; *Re Morris*, [1908] 1 K. B. 473; and see *Angus* v. *McLachlan*, 23 Ch. D. 330, a case of innkeeper's lien.

(*u*) *Capper* v. *Spottiswoode*, Taml. 21.

(*x*) *Bond* v. *Kent*, 2 Vern. 281.

(*y*) See *Hughes* v. *Kearney*, 1 Sch. & L. 135; 9 R. R. 30; *Eyre* v. *Sadleir*, 14 Ir. Ch. R. 119; 15 Ib. 1. Compare *Grant* v. *Mills*, 2 V. & B. 306; 13 R. R. 101.

(*z*) *Cood* v. *Pollard*, 9 Price, 544.

(*a*) *White* v. *Wakefield*, 7 Si. 401; and see *Price* v. *Blakemore*, 6 B. 507.

(*b*) 26 B. 143.

estate on behalf of the trust, the vendor executed a conveyance to the trustee, which recited the trust, and that the trustee had called in trust-moneys sufficient to pay the purchase-money, and it contained a receipt for the whole purchase-money. In fact, only a part was paid, and the trustee gave his bond and a memorandum of deposit for the deficiency, the latter reciting that the vendor had lent the trustee that sum to enable him to complete. Romilly, M.R., held that the vendor had no lien on the title deeds in his possession for the unpaid purchase-money. And where the vendor, without receiving the purchase-money, executes a conveyance, in pursuance of an arrangement with an intending mortgagee, for the purpose of enabling the purchaser to execute a mortgage, he will lose his lien on the estate against the mortgagee (*c*).

Necessity for Registration as a Land Charge.—The above notes, so far as they relate to the question of priority between the holder of a lien and other parties who have acquired interests in the property and to the question of purchase for value without notice, must be read as modified, very materially, by the Law of Property Act, 1925, and the Land Charges Act, 1925. By section 10 of the Land Charges Act, 1925, provision is made for the registration as land charges of various kinds of interests in land, created or arising after 1925. An ordinary vendor's lien—as also the lien of a vendee, *e.g.*, for his deposit—fall under Class C (iii) of section 10, sub-section 1, which class comprises "any other equitable charge, which is not secured by a deposit of documents relating to the legal estate affected and does not arise or affect an interest arising under a trust for sale or a settlement and is not included in any other class of land charge," in the Act referred to as "a general equitable charge." By section 13, sub-section 2, a land charge of Class C created or arising after the commencement of the Act is to be *void* as against a purchaser of the land charged, unless the land charge is registered in the appropriate register before the completion of the purchase. It will be observed that this provision applies whether or not the purchaser has notice of the charge. As regards any lien existing on the first day of January, 1926, which may be subsequently transferred, section 14, sub-section 2, of the Land Charges Act, 1925, provides that after the expiration of one year from the first conveyance, occurring after the commencement of the Act, of a land charge

(*c*) *Smith* v. *Evans*, 28 B. 59.

of Class C created before such commencement, the person entitled thereto shall not be able to enforce the charge as against a purchaser of the land, unless the charge is registered in the appropriate register before the completion of the purchase. By section 198 of the Law of Property Act, 1925, the registration of an instrument or matter under the Land Charges Act, 1925, or any enactment it replaces, in any register kept at the Land Registry or elsewhere, is to be deemed to constitute actual notice to all persons and for all purposes connected with the land affected, and by section 205, sub-section 3, references to registration under the Land Charges Act, 1925, apply to any registration under any other statute which is by the Land Charges Act, 1925, to have effect as if the registration had been made under that Act.

With respect to registered land, section 23, sub-section 1, of the Land Charges Act, 1925, provides that as regards land charges required to be registered, the Act is not to apply thereto, *if and so far as they affect registered land*, and the same can be protected under the Land Registration Act, 1925, by lodging or registering a caution or other notice.

It will be observed from the terms of section 10 of the Land Charges Act, 1925 (sub-section 1, Class C (iii), relating to a general equitable charge), a lien does not require to be registered where it is protected by the possession of the title deeds (*d*).

5. Enforcement of Lien.

A vendor's lien may be enforced by action for specific performance, claiming a declaration that the vendor is entitled to a lien. This declaration may subsequently be enforced by an order made on motion under the liberty to apply (*e*). Such orders may be for sale, or for rescission of the contract (*f*), and injunction and delivery of possession, or for payment of purchase-money into Court, and in default, delivery of possession (*g*). The person entitled to a vendor's lien is a secured creditor for the amount due (*h*) with

(*d*) And see section 13 of the Law of Property Act, 1925.

(*e*) Seton (7th ed.), pp. 2222—4; *Rome* v. *Young*, 4 Y. & C. Ex. 204; and see *Marshall* v. *Scarborough, etc. Ry. Co.*, [1889] W. N. 73.

(*f*) *Baker* v. *Williams*, 41 W. R. 375.

(*g*) Seton (7th ed.), p. 2221.

(*h*) *Levy* v. *Stogdon*, [1898] 1 Ch. 478.

interest thereon at four per cent. per annum (*i*), and a receiver may be appointed at his instance (*k*).

Where the purchase-money of an estate is payable by instalments, a vendor in an action for specific performance may obtain a declaration that he is entitled to a lien for the entirety of the unpaid purchase-money, and future instalments, with liberty to apply for an order for payment, and also with liberty to apply in respect of future instalments as they become due (*l*). It seems, however, that if the property the subject of the contract were situated abroad, no decree enforcing the lien would be made (*m*).

The declaration should be expressly asked for both in the writ and in the statement of claim, or else, in default of appearance or pleading, a difficulty may arise (*n*). Unless a declaration of lien is made charging the land, no order can be made under the liberty to apply (*o*), except where it is clear that the interests of subsequent incumbrancers and others could not be affected thereby (*p*).

6. Vendee's Lien for Purchase-money.

Sir Thomas Clarke, M.R., in *Burgess* v. *Wheate* (*q*), lays down the rule thus : "Where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor for the personal representative of the purchaser" (*r*).

In *Rose* v. *Watson* (*s*) the vendor sold part of an estate to the plaintiff; part of the purchase-money was paid at the date of the contract, the balance was made payable three years later, with

(*i*) See *Chapman* v. *Turner*, 1 Vern. 267; *Rose* v. *Watson*, 10 H. L. C., at p. 682; *Re Drax*, [1903] 1 Ch. 781.

(*k*) See *per* Vaughan Williams, L.J., in *Re Stucley*, [1906] 1 Ch., at p. 76, and see *Munns* v. *Isle of Wight Ry. Co.*, L. R. 5 Ch. 414; *Williams* v. *Aylesbury, etc., Ry. Co.*, 21 W. R. 819; *Boehm* v. *Wood*, 2 J. & W. 236; *Bishop of Winchester* v. *Mid-Hants Ry. Co.*, 5 Eq. 17.

(*l*) *Nives* v. *N.*, 15 Ch. D. 649; Seton (7th ed.), pp. 2222—4.

(*m*) *Norris* v. *Chambers*, 29 B. 246; see also *Watson* v. *Rose*, 10 W. R. 745; 10 H. L. Cas. 672; Westlake (7th ed.), p. 227.

(*n*) *Tacon* v. *National, etc. Co.*, 56 L. T. 165; *Stone* v. *Smith*, 35 Ch. D. 188; *Farrant* v. *Olver*, [1922] W. N., p. 47; An. Pr. notes to Ord. 20, r. 6, and Ord. 27, r. 11.

(*o*) *Att.-Gen.* v. *Sittingbourne, etc., Ry. Co.*, 1 Eq. 636.

(*p*) *Heriot* v. *L. C. & D. Ry. Co.*, 16 L. T. 473.

(*q*) 1 Eden. 177.

(*r*) And see *Mackreth* v. *Symmons, supra; Cator* v. *Pembroke (Earl of)*, 1 Bro. Ch. 302; *Wythes* v. *Lee*, 3 Drew. 396.

(*s*) 10 H. L. Cas. 672.

interest on that balance in the meantime. The vendor afterwards mortgaged the whole of the estate to X, who gave notice of his mortgage to the plaintiff; after that notice the plaintiff made further payments to the vendor of interest on the balance of purchase-money owing. Ultimately the plaintiff declined to complete on the ground that certain representations on the faith of which he had purchased had not been fulfilled. An action for specific performance was brought against him and failed. He then filed a bill claiming a lien on the property for all sums paid by him under the contract with interest thereon. It was held that since on payment of the purchase-money the vendor becomes trustee for the purchaser, so on payment of a part, to that extent the vendor becomes a trustee for the purchaser (*t*); that a lien arose *under the contract* in respect of each payment of money made under it, whether of principal or interest; that all sums of money so paid formed part of the purchase-money, and were principal sums, and that in consequence of the *subsequent failure* of the vendor, the plaintiff was entitled to claim interest in respect of them. The mortgagee (who, apparently, took with notice of the contract) could only take subject to the rights of the plaintiff, and since he had not required payment to himself the plaintiff was unaffected by the mortgage. This case must now be read in connection with the new law requiring a lien to be registered (*u*).

A purchaser's lien may be lost by his default in carrying out his obligations under the contract. "He has a right to a lien for the repayment of his deposit, which attaches from the moment of payment conditional on this, that the purchase does not go off through his own fault. He has no absolute right to a charge for his lien [*quære* deposit] or to any repayment of the deposit at all. *It is only on his not being in default*" (*x*). The purchaser's lien arises under the contract and not on the vendor's default; that default merely gives rise to the necessity for enforcing the lien. "The purchaser has a lien, both when the contract goes off for want of title and when the contract is rescinded under a condition enabling the purchaser to rescind" (*y*).

(*t*) *Ibid.*, *per* Lord Westbury, at p. 678; *per* Lord Cranworth, at p. 684; *Whitbread & Co., Ltd.* v. *Watt*, [1901] 1 Ch. 911, p. 915; [1902] 1 Ch. 835.

(*u*) See above, p. 871.

(*x*) *Per* Farwell, J., in *Ridout* v. *Fowler*, [1904] 1 Ch. 658, 663; [1904] 2 Ch. 93; and see *Howe* v. *Smith*, 27 Ch. D. 89; *Hall* v. *Burnell*, [1911] 2 Ch. D. 551.

(*y*) *Whitbread & Co., Ltd.* v. *Watt*, [1901] 1 Ch. 911, 915; [1902] 1 Ch. 835; and see *Turner* v. *Marriott*, 3 Eq. 744; *Aberaman Ironworks* v. *Wickens*, L. R. 4 Ch. 101.

Mackreth v. Symmons.

The principle is not confined to a case of simple purchase; in *Middleton* v. *Magnay* (z) A agreed to grant a lease to B, who was to enter at once and expend money in repairs, with a proviso that if A could not within a certain period grant a valid lease he would repay B his outlay, and the agreement should cease. A was unable to grant the lease, and B filed a bill for specific performance, or in the alternative, for repayment of the money expended by him. It was held that B was entitled to a lien on the property to the extent of A's interest therein (z).

(z) 12 W. R. 706.

LAKE *v.* GIBSON.

1729. 1 Eq. Ca. Abr. 294, Pl. 3.

LAKE *v.* CRADDOCK.

(*On an Appeal from the Decree at the Rolls in* LAKE *v.* GIBSON.)
1732. 3 P. W. 158.

Joint Purchasers.

Where several persons make a joint purchase for the purposes of a joint undertaking or partnership, either in trade or any other dealing, although they are joint tenants at law, in equity they will be considered as tenants in common, and the survivors as trustees for those who are dead.

Five persons purchased West Thorock Level from the Commissioners of Sewers, and the purchase was to them as joint tenants in fee; but they contributed rateably to the purchase, which was with an intent to drain the Level; after which several of them died. They were held to be tenants in common in equity; and though one of these five undertakers deserted the partnership for thirty years, yet he was let in afterwards, on terms.

THE case was thus: Great part of the lands in West Thorock, in Essex, having been overflowed by the river Thames near Dagenham, and the landowners not thinking it worth their while to pay the assessments made on them by the Commissioners of Sewers, the Commissioners decreed the lands to be forfeited, and conveyed them to three trustees in trust to sell, and raise money for the draining of these overflowed lands.

The defendant Craddock's father, the plaintiff Lake, and three others, five in all, having entered into an undertaking to drain the level or overflowed banks of West Thorock, the trustees for the sale, by the consent and direction of the Commissioners of Sewers, did by deed, indented and enrolled, dated February 8,

1695, in consideration of £5,145, paid to the Commissioners by the five purchasers, convey this level to the defendant Craddock's father, the plaintiff Lake, the three others, and their heirs; upon which several sums of money were expended in carrying on the undertaking; and in 1699, the defendant Craddock's father paid his last contribution, which, with what he had advanced before, came in all to £1,025.

Afterwards, it seeming to be an enterprise which would prove very expensive, and there being some uncertainty as to the success of it, the defendant Craddock's father wholly deserted it, and never more concerned himself therewith.

The four other undertakers were advised that some neighbouring lands would be of service to their design; upon which, in April, 1703, they purchased the manor of Porretshalls, in West Thorock, of the Lady Smith, for £2,550, and in February following purchased the moiety of the rectory and tithes of West Thorock for £1,400 of Sir Charles Tyrrell; which two purchases were thought useful in the undertaking, and were made in the names of the four undertakers, omitting Craddock; nor did it appear that he was ever consulted therein, or desired to contribute to the purchase. Craddock, the father, died, leaving the defendant Craddock, the son, his *heir* and *executor*.

The plaintiff, Sir Bibye Lake, one of the original partners, brought this bill against the rest of the partners, or their representatives, for an account and division of the partnership estate. And on the first coming on of the cause, at the Rolls, his Honour referred it to the Master to state a case between the parties, for the judgment of the Court. And the Master having made his report, the cause was thereupon heard, when the principal, or rather the only question was, whether these five purchasers having made this purchase jointly, so as to become in law joint tenants, the same should survive in equity?

Jekyll, M.R. (*a*), on debate, decreed that the survivorship should not take place; for that the payment of money created a

(*a*) The judgment of the M.R. is thus reported in 1 Eq. Ca. Abr. 294. Jekyll, M.R., held that they were tenants in common, and not joint tenants, as to the *beneficial interest* or *right* in those lands, and that the survivor should not go away with the whole; for then it might happen that some might have paid or

trust for the parties advancing the same; and an undertaking upon the hazard of profit or loss was in the nature of merchandising, when the *jus accrescendi* is never allowed; that supposing one of the partners had laid out the whole of the money, and had happened to die first, according to the contrary construction, he must have lost all, which would have been most unjust. Wherefore, it was decreed that these five purchasers were tenants in common, not only as to the level lands which were first purchased, but also with respect to the lands bought afterwards by the four undertakers of the Lady Smith and Sir Charles Tyrrell; but that the defendant Craddock ought not to have the benefit of this tenancy in common, *unless* he would pay so much money as would make up what had been already advanced by his father equal to what had been contributed by each of the other partners, together with interest for the same from the respective times that Craddock, the father, ought to have made those payments; and on the defendant Craddock's paying the same, then all the said lands to be divided into five parts, the defendant Craddock to have one-fifth: but, on default of payment, the defendant Craddock to be excluded, and the lands to be divided and distributed into four parts among the four other partners.

Argument for the Appellant.—Craddock appealed, insisting that he ought either to receive back the £1,025, which it was admitted his father expended in this undertaking, or to be allowed to come in for a share of the level only, and not to be bound to contribute towards the two purchases made by the four other undertakers of the Lady Smith and Sir Charles Tyrrell: that the

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laid out their share of the money, and others, who had laid out nothing, go away with the whole estate. And his Honour held, that when two or more purchase lands, and advance the money in *equal* proportions, and take a conveyance to them and their heirs, that this is a joint tenancy; that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other; but where the proportions of the money are *not equal*, and this appears in the deed itself, this makes them *in the nature of partners;* and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others, in proportion to the sums advanced by each of them. So, if two or more make a joint purchase and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and at trust for the representative of him who advanced it; and that in all other cases of a joint undertaking or partnership, either in trade or any other dealing, they were to be considered as tenants in common, or the survivors as trustees for those who were dead.

four other undertakers had chosen to make these two purchases in their own names only, by which they seem to have excluded Craddock from all concern therein, and of which, had it proved never so beneficial, he would have had no means of forcing them to admit him to a share; and therefore, now that it had turned out a losing bargain, there could be no reason to compel him to bear a proportion of the loss. Besides, there was nothing in the articles empowering the partners, or the major part of them, to buy lands; and, by the same reason that they would oblige Craddock to pay his share towards these purchases, they might, if they had fancied buying half the country, have compelled him to contribute to that also. That it was difficult to conceive how the uplands thus purchased, much less the tithes, could be of any use in the undertaking; though, as to the charge of draining the level, exclusive of the two purchases, the defendant Craddock was willing to advance his proportion.

That the decree was unreasonable, on account of its having directed that the defendant Craddock, in order to be admitted to one-fifth, should pay not only his proportion of those two purchases, but also of the interest of the purchase-money, from the time that his father ought to have made these payments: whereas the direction ought to have been, that an account should be taken of the profits of these two purchases, which profits might have amounted to as much as the interest, or, if not quite so much, yet that the defendant Craddock ought to pay no more towards such interest than the deficiency of the *quantum* of the profits would come to.

Argument for the Respondent.—That, as the defendant Craddock's father and himself had for so long a time (near thirty years) relinquished and abandoned the partnership, and in regard that the defendant Craddock had no manner of right thereto but through the indulgence of a Court of equity (it being, by law, a joint tenancy, and as such, belonging to the survivors), it was a favourable decree to let him in upon any terms; and surely the terms now offered him must appear reasonable, *viz.*, that he should upon his contributing to all the expenses that had been contracted and incurred by reason of any purchases or

otherwise, in the prosecution of the undertaking, be admitted to one-fifth of the partnership; that had the defendant Craddock brought his bill for the benefit of such undertaking, he could not have hoped to succeed on any other conditions: that it was still stronger against him, in that he now seemed to decline meddling with the undertaking, so that here was rather great favour shown him than any hardship imposed: that he was not absolutely and at all events bound by this decree to pay his proportion towards the new purchases, but had it in his election whether he would do it or no: that, as to the interest which was required of him previous to his being admitted into the partnership, it was reasonable he should pay it for his default in not having contributed his share of the principal before, which if he had done, he would not have been charged with the interest: and this was some disadvantage to the other four partners, who had been deprived of their arrear of interest for near thirty-five years: that, in truth, the design of the defendant Craddock appeared to be to delay matters, and to defer the bringing in of his money and interest till such time as this long account of the profits should be taken, which would require many years; and that if the defendant's share of the profits of these two purchases should exceed his proportion of the interest, the surplus, on the making up of the accounts, must be paid him.

Lord Chancellor King (*b*) said, that this was plainly a tenancy in common *in equity*, though otherwise *at law*: and the defendant Craddock having only a title in equity, that he must do equity, and that this was equitable in all its branches: for he had his election to drop all claim, or to take it on the same foot with the rest of the partners: and that it was not reasonable that he should be let into the account of the profits or loss of the undertaking until he had made his election.

(*b*) This judgment is from Sugd. V. & P. 903 (11th ed.), and is there stated to have been taken from unprinted MS.

Lake v. Gibson.—Lake v. Craddock.

NOTES.

1. Rule at law and in equity as to joint purchases.
Circumstances pointing to a tenancy in common.
2. Mortgages, p. 882.
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4. Alterations by statute, p. 893.

(The notes below must be read as subject to the provisions of the Law of Property Act, 1925, concerning joint tenancy and tenancy in common, to which reference is made later.)

1. Rule at Law and in Equity as to Joint Purchases.

It was an invariable rule at law that, when purchasers took a conveyance to themselves and their heirs, *simpliciter*, they would be joint tenants : and upon the death of one of them, the estate would go to the survivor (*a*).

The same rule prevails in equity. But if there are any circumstances from which it can be inferred that the *intention* of the parties was that a joint tenancy should not exist beween them, then equity will depart from the letter of the agreement, and decree them to be tenants in common (*b*). The following are some of the principal of such circumstances.

Circumstances pointing to a Tenancy in Common.—Where persons have entered into a joint *contract* for the purchase of an estate to them and their heirs, and have paid or contracted to pay the purchase-money in *equal* proportions, equity will not, upon the death of one of them, decree a conveyance to the survivor and the heirs of the deceased purchaser as tenants in common; for if both parties to the contract contribute *equally* towards the purchase-money, the surviving purchaser will be solely entitled to the benefit of the contract, and to have a conveyance of the estate decreed to himself alone. But equity will give effect to the

(*a*) See Litt. s. 280. As to husband and wife, see *Re March*, 27 Ch. D. 166. *Re Jupp*, 39 Ch. D. 148; *Thornley* v. *T.*, [1893] 2 Ch. 229; *Palmer* v. *Rich*, [1897] 1 Ch. 134; cf. *Re Jeffery*, [1914] 1 Ch. 375; and see now section 37 of the Law of Property Act, 1925.

(*b*) See *Aveling* v. *Knipe*, 19 V. 441; 13 R. R. 240; *Robinson* v. *Preston*, 4 K. & J. 505; *Re Jackson*, 34 Ch. D. 732; *Re Hughes*, 19 W. R. 468; *Re Rowe*, 61 L. T. 581.

intention, although the money may have been advanced in equal proportions (*c*).

In *Lake* v. *Gibson*, Jekyll, M.R., lays it down as a general rule, that, where two or more purchase lands and advance the purchase-money in *unequal* proportions, *and this appears on the deed itself* (this latter qualification is omitted in *Rigden* v. *Vallier* (*d*)), this makes them *in the nature of partners*, and, however the legal estate may survive, yet the survivor will be considered in equity but as a trustee for the other, in proportion to the sums advanced by each of them (*e*). But the inequality in the advance must not be the result of a mere temporary arrangement between the parties at the time of completion (*f*). The soundness of the distinction between *equal* and *unequal* advances is doubted by Mr. Vesey, in a note to *Jackson* v. *J.* (*g*). But it has been supported by Lord St. Leonards (*h*).

And it seems that parol evidence of *facts* as to subsequent dealings and of surrounding circumstances, is admissible on a purchase by two persons contributing equally to the cost of it, to prove an intention to hold in severalty; although such evidence of *statements of intention* is not admissible (*i*); but an affidavit as to intention was admitted in *Devoy* v. *D.* (*k*).

2. Mortgages.

Where money is advanced by two persons, either in *equal* or *unequal* shares, who take a mortgage to themselves jointly, and one dies, although the debt and security will at law belong to the survivor, in equity there will be a tenancy in common, the survivor being a trustee for the personal representatives of the deceased mortgagee in respect of his share and interest in the security (*l*).

(*c*) See *Aveling* v. *Knipe*, 19 V., at p. 443.

(*d*) 3 Atk. 735; and see *Harrison* v. *Barton*, 1 John. & H., p. 293; *Hill* v. *H.*, 8 Ir. R. Eq. 140.

(*e*) See also *Rigden* v. *Vallier*, 3 Atk. 735, 2 Ves. Sen. 252.

(*f*) *Aveling* v. *Knipe*, 19 V. 445, 13 R. R. 240.

(*g*) 9 V. 591, p. 597.

(*h*) See Sugd. V. & P. (14th ed.), 698. Cf. *Harris* v. *Fergusson*, 16 Si. 308; *Robinson* v. *Preston*, 4 K. & J. 515; *Bone* v. *Pollard*, 24 B. 283; *Re Hughes*, 19 W. R. 468; *Re Jackson*, 34 Ch. D. 732.

(*i*) *Davis* v. *Symonds*, 1 Cox, 402, 1 R. R. 63; *Harrison* v. *Barton*, 1 John. & H. 287.

(*k*) 3 Sm. & G. 403; but see *O'Brien* v. *Sheil*, 7 Ir. R. Eq. 255.

(*l*) *Petty* v. *Styward*, 1 Ch. R. 31; Eq. Ca. Abr. 290; *Rigden* v. *Vallier*, 3 Atk. 735, 2 Ves. Sen. 258; *Re Jackson*, 34 Ch. D. 722; *Steeds* v. *S.*, 22 Q. B. D., p. 541.

For "equity says it could *not be the intention* that the interest should survive. Though they take a joint security, each means to lend his own and to take back his own" (*m*). And, although the ground for this distinction between purchases and mortgages is not particularly clear, it is settled (*n*).

The personal representatives of the deceased mortgagee were not merely necessary parties to a bill of foreclosure or redemption (*o*), but also to a reconveyance, in order that they might give a valid discharge for their share of the mortgage-money. Hence it became usual, where trustees advanced money on mortgage, to insert a declaration, that, if one of the mortgagees died before the money was paid off, the receipt of the survivor should be a sufficient discharge; and that the concurrence of the personal representative of the deceased mortgagee should not be requisite. But even the insertion of the joint account clause would not prevent the mortgagees as between themselves being held to be tenants in common if the intention to be so were shown (*p*).

By section 111 of the Law of Property Act, 1925 (which replaces section 61 of the Conveyancing Act, 1881), it is provided that where in a mortgage or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money belonging to them *on a joint account*, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall, as between them and the mortgagor or obligor, be deemed to be and remain money or money's worth belonging to those persons on a joint account; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

The section applies only if and as far as a contrary intention is not expressed in the mortgage, etc., and only to a mortgage, etc., made after December 31, 1881. But it applies either where the

(*m*) *Per* Alvanley, M.R., in *Morley* v. *Bird*, 3 V. 631, 4 R. R., p. 109: *Vickers* v. *Cowell*, 1 B. 529; overruling *Brazier* v. *Hudson*, 9 Si. 1.

(*n*) *Robinson* v. *Preston*, 4 K. & J. 511.

(*o*) *Vickers* v. *Cowell*, 1 B. 529.

(*p*) *Re Jackson*, 34 Ch. D. 733.

advance is expressly stated to be on a joint account, or where the security is not expressly made to persons in shares, so that an expression of the joint account is not necessary, though it is convenient, as a direct statement of the rights of the mortgagees, and the Court will not go behind it as between mortgagees and a purchaser (*q*). As between the mortgagees and the mortgagors the debt is to be deemed due on a joint account, but as between the persons entitled to the money it may be shown to have been their intention to treat the money as belonging to them as tenants in common (*r*).

Although payment of a bond debt to one of two trustees who are joint creditors binds both at law and extinguishes the debt (*s*), yet in case of a mortgage to two jointly a payment to one would not discharge the estate in equity unless that one were wholly entitled to the benefit of the debt (*t*). This equitable rule did not rest upon the ground that the debt was due to creditors entitled in common and not jointly, but upon the principle that the Court only "interferes for the benefit of the mortgagor upon the terms that he does equity." The fact that the debt was extinguished at law did not affect the mortgagor's liability on his asking for equitable relief to perform his contract, and accordingly it was only to the extent to which the person to whom he paid was beneficially entitled that the mortgagor was discharged (*u*). "The proviso for redemption in a mortgage to several is never expressed to take effect on payment to the mortgagees or either of them, but to the mortgagees or the survivor of them; and if a mortgagor pays to one, although such payment may be a good discharge in law, yet the matter is at large when he comes into equity, and the Court takes into consideration all the facts of the case, and ascertains whether the payee was beneficially entitled to the whole or to a part only, or whether he was a trustee with the other mortgagee, and treats the payment as good in whole, or in part, or altogether bad accordingly" (*x*).

Accord and satisfaction made with one of the joint creditors, now extinguishes the debt at law since the Judicature Act, 1873 (*y*),

(*q*) *Re Harman, etc.*, 24 Ch. D. 720; cf. *Re Blaiberg and Abrahams*, [1899] 2 Ch. 340; *Re Balen and Shepherd*, [1924] 2 Ch. 365.

(*r*) *Re Jackson, supra.*

(*s*) *Husband* v. *Davis*, 10 C. B. 645.

(*t*) *Matson* v. *Dennis*, 4 De G. J. & S. 345; *Hall* v. *Franck*, 11 B. 519.

(*u*) *Powell* v. *Brodhurst*, [1901] 2 Ch. 160; *Steeds* v. *S.*, 22 Q. B. D. 537.

(*x*) *Per* Farwell, J., *Powell* v. *Brodhurst*, [1901] 2 Ch. 160, at p. 167.

(*y*) *Steeds* v. *S.*, 22 Q. B. D. 537.

as it did before that Act in equity (*z*). But neither payment to, nor accord and satisfaction with, one of two or more creditors entitled in *common* will extinguish the debt as to the others, for each is entitled in severalty. The equitable rule that certain creditors, though in form joint creditors, are to be presumed to be entitled in common now applies at law as in equity, and so a conflict of presumptions may arise, and it is then for the Court to ascertain whether the debt is to be deemed joint or common and apply the appropriate rule (*a*).

3. Joint Undertaking and Partnership.

Another rule laid down by the Master of the Rolls in *Lake* v. *Gibson* is, that, in all cases of a joint undertaking or partnership, either in trade or *in any other dealing*, two or more persons who make a joint purchase would be considered in equity as tenants in common, and the survivors would be deemed trustees for the representatives of those who are dead. For the ground of the decision in the principal case was that a joint speculation in improving land, on a hazard of profit and loss, is treated in equity as in the *nature of merchandise*, and the *jus accrescendi* is not allowed (*b*). In favour of merchandise, the rule is that *jus accrescendi inter mercatores pro beneficio commercii locum non habet* (*c*). But the doctrine of non-survivorship does not extend to societies not having gain for their object, and the members of which are merely joint tenants of the property they hold (*d*).

It has been held that if two persons took a lease of land for the purpose of farming it in partnership, at any rate where the lease is merely accessory to the partnership, the partners would be considered in equity as tenants in common not only of the stock of the farm but of the lease, and the survivor of the two would consequently be trustee for the personal represenatives of the deceased partner (*e*). In *Elliot* v. *Brown* (*f*) there was a lease of a farm to two partners; one partner dying, the other agreed to a division of stock with the representatives of the deceased partner,

(*z*) *Webb* v. *Hewitt*, 3 K. & J. 438.
(*a*) See *Powell* v. *Brodhurst*, [1901] 2 Ch., p. 164.
(*b*) See *Re Ryan*, 3 Ir. R. Eq. 222, 232.
(*c*) Co. Litt. 182 (a); and see *Nelson* v. *Bealby*, 4 De G. F. & J. 321; *Ambler* v. *Bolton*, 14 Eq. 427; *M'Clean* v. *Kennard*, L. R. 9 Ch. 336.
(*d*) See *Brown* v. *Dale*, 9 Ch. D. 78.
(*e*) *Jeffereys* v. *Small*, 1 Vern. 217; *Jackson* v. *J.*, 9 V. 596.
(*f*) 3 Swans. 489 (n).

but insisted on holding the lease by survivorship; Thurlow, C., however, thought the lease was *accessory* to the trade in which the parties were embarked, and granted an injunction to restrain the surviving partner from proceeding by ejectment to obtain possession of the farm (*g*). So, where two persons took a building lease, and laid out money in erecting houses, Thurlow, C., held them to be partners in respect of this property; and the survivor was decreed to be a trustee of a moiety for the representatives of the deceased partner (*h*). And now by the Partnership Act, 1890, it is enacted :

Section 20, sub-section 1 : " All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise on account of the firm or for the purposes and in the course of the partnership business, are called in this Act partnership property and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement."

Sub-section 2 : " Provided, that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, *but in trust*, so far as necessary, for the persons beneficially interested in the land under this section."

Sub-section 3 : " Where co-owners of an estate or interest in land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase " (*i*).

Section 21 : " Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm."

A deceased partner may, however, have so conducted himself by repudiating a contract, as for instance a lease of ground for a

(*g*) From Lord Colchester's MSS. See also 1 Vern. 217, n. (3).

(*h*) *Lyster* v. *Dolland*, 1 V. 431; *Crawshay* v. *Maule*, 1 Swans. 508; *Re Ryan*, 3 Ir. R. Eq. 222.

(*i*) See *Davis* v. *D.*, [1894] 1 Ch. 393; Lindley, Partnership (9th ed.), pp. 420—422.

building speculation, as to preclude his executors from claiming a share in the lease (*k*).

And though the conveyance of real estate be taken in the name of one of the partners, if it has been purchased with partnership funds it will, in the absence of any agreement to the contrary, be part of the partnership property (*l*).

The question whether property purchased with partnership assets is partnership property or the separate property of the partners depends upon the circumstances under which and the purposes for which is was bought, though under section 21 it is to be deemed partnership property, unless a contrary intention appears. Thus, in the *Bank of England Case* (*m*), one of two partners carrying on the business of leather factors bought lands for the purpose of erecting a residence on part of it, and selling the remainder to a railway company. He offered a share to his partner, who was also desirous of building a house out of town for his residence. The offer was accepted, and the purchase-money paid out of the partnership assets; but the conveyance was to the partners in undivided moieties, to uses to bar dower. The partners at their individual expense built houses upon portions of the land set apart for the purpose, but the other expenses relating to the land were paid out of the partnership assets. It was held that the whole of the land was partnership property. "Questions of this nature," said Turner, L.J., "depend, as I apprehend, generally, if not universally, upon the circumstances. It cannot, I think, be laid down as an universal rule, that when lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate of the partners. There are different purposes for which the lands may have been bought. They may have been bought for the purpose of being used and employed in the trade . . . [or] for the purpose of a mere speculation on account of the partnership, for I know nothing which can prevent partners from speculating in land, if they think proper to do so, as freely as they may speculate in mere articles of commerce, though foreign to their trade. Again, they may have been bought

(*k*) *Reilly* v. *Walsh*, 11 Ir. R. Eq. 22; *Norway* v. *Rowe*, 19 V. 143, 12 R. R. 157; *Clements* v. *Hall*, 24 B. 333; *Rule* v. *Jewell*, 18 Ch. D. 660; Lindley, pp. 575—9.

(*l*) *Smith* v. *S.*, 5 V. 193, 5 R. R. 22; *Clegg* v. *Fishwick*, 1 Mac. & G. 294; *Tibbits* v. *Phillips*, 10 Ha. 355; *Nerot* v. *Burnand*, 4 Russ. 247; *Wedderburn* v. *W.*, 2 B. 208.

(*m*) *Ex p. M'Kenna*, 3 De G. F. & J. 645.

without reference to the purposes of the trade or the benefit of the partnership, with the intention of withdrawing from the trade the amount employed in the purchase, and converting that amount into separate property of the partners, or they may have been bought on account of one or more of the partners, he or they becoming debtors to the partnership for the amount laid out in the purchase. The form of the conveyance in these cases does not settle the question, for in whatever form the conveyance may be, there may be a trust of the land which may follow the money, liable, however, as other trusts are, to be rebutted by evidence. Where land purchased is not merely paid for out of the partnership assets, but is bought for the purpose of being used and employed in the partnership trade, it is scarcely possible to conceive a case in which there could be sufficient evidence to rebut the trust, and accordingly in these cases we find the decisions almost if not entirely uniform —that the purchased land forms part of the joint estate of the partnership; but where the land is not purchased for those purposes, the question becomes more open, and we have to consider whether the circumstances attending the purchase show that it was made on account of the partnership, or of any one or more of them individually, in whose name the land may have been bought. . . . I am of opinion that, looking at the case with reference to the whole of the estate, this purchase must be taken to have been made by way of speculation on account of the partnership" (*n*).

Where property is *not purchased* by persons for partnership purposes, but is *devised* to them as joint tenants although they make use of it for partnership purposes, they would not be held tenants in common in equity of the land (or, since the Law of Property Act, 1925, of the proceeds of sale), unless by express agreement, or by their course of dealing with it for a long period, it might be inferred that they meant to sever the joint tenancy (*o*). So in *Morris* v. *Barrett* (*p*), a testator *devised and bequeathed* the residue of his real and personal estate to his two sons, their heirs, executors, and administrators. The two sons, after their father's

(*n*) See *Smith* v. *S.*, 5 V. 193; *Walton* v. *Butler*, 29 B. 428. Cf. *Darby* v. *D.*, 3 Drew. 495, and *Re Hulton*, 61 L. T. 467; Lindley, Partnership (9th ed.), pp. 411—412.

(*o*) *Jackson* v. *J.*, 9 V. 591. See also *Brown* v. *Oakshot*, 24 B. 254; *Waterer* v. *W.*, 15 Eq. 402; *Ward* v. *W.*, L. R. 6 Ch. 789; *Davis* v. *D.*, [1894] 1 Ch. 393.

(*p*) 3 Y. & J. Exch. 384.

death, during the period of twenty years carried on the business of farmers with that estate, and kept the moneys arising therefrom in one common stock, and, with part of such moneys, *purchased other estates* in the name of one of them, but never in any manner entered into any agreement respecting the farming business, or ever accounted with each other. One of the brothers died. It was held that the devised farms were not partnership property, but that the purchased farms were.

A partnership agreement between A and B that they should be jointly interested in a speculation for buying, improving for sale, and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the Statute of Frauds (*pp*); and such an agreement being proved, A or B may establish his interest in the land, the subject of the partnership, without such interest being evidenced by any such writing (*q*).

Conversion of Real Estate held by Partners.—Where partners held real estate for partnership purposes, a question arose, which was not decided in *Lake* v. *Gibson*, and *Lake* v. *Craddock* (in which case the defendant Craddock, it will be observed, was both heir-at-law and executor of his father), whether the real estate was not, even in the absence of any expressed intention of the partners, converted into personalty. It was settled that where real estate was purchased *with partnership capital*, for the *purposes of partnership trade*, it would, in the absence of any express agreement, be considered as absolutely converted into personalty; and, upon the death of one of the partners, his share would pass to his personal representatives. " I have for some years," observed Leach, M.R., in *Phillips* v. *P.* (*r*), " notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, *purchased with partnership capital for the purposes of the partnership trade*, continued to be partnership capital, and to have, to every intent, the quality of personal estate " (*s*). And the same rule applies to land acquired with partnership funds for the purpose

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(*pp*) Now section 40 of Law of Property Act, 1925.

(*q*) See *Forster* v. *Hale*, 5 V. 308, 4 R. R. 128; *Dale* v. *Hamilton*, 2 Ph. 266; *Darby* v. *D.*, 3 Drew. 495; *Gray* v. *Smith*, 43 Ch. D., p. 211; *Re De Nicols*, [1900] 2 Ch. 410; *Isaacs* v. *Evans*, 16 T. L. R. 113. Cf. *Caddick* v. *Skidmore*, 2 De G. & J. 52.

(*r*) 1 My. & K. 649.

(*s*) See *Broom* v. *B*, 3 My. & K. 443; *Morris* v. *Kearsley*, 2 Y. & C. Ex. 140; *Bligh* v. *Brent*, 2 Y. & C. Ex. 268; *Houghton* v. *H.*, 11 Si. 491; *Re Ryan*, 3 Ir. R. Eq. 232; *Re Bourne*, [1906] 2 Ch. 427.

of a joint speculation in selling it at a profit (*t*). But if the land has been acquired for the purpose of being held as land, there will be no conversion (*u*); and the rule does not apply to cases of joint ownership, as distinguished from partnership (*x*).

This principle is now embodied in the Partnership Act, 1890, which provides :

Section 2 : " Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner, and his executors, or administrators, as personal, or movable, and not real, or heritable estate."

And it is immaterial, where real property has been *substantially involved* in a business, how it may have been acquired by the partners, whether by descent or devise. Thus, in *Waterer* v. *W.* (*y*), J. Waterer was seised of real estate, upon part of which he carried on the business of a nurseryman, under the name of J. Waterer & Sons. He was assisted by his three sons in his business, but they were not in reality partners. J. Waterer, having contracted for the purchase of a house and farm for the purpose of his business, died on November 2, 1868, having by his will devised his real estate, and his residuary personal estate, to his three sons as tenants in common. After his death, the contract for the purchase of the farm was carried into effect by his three sons, to whom the land was conveyed as tenants in common. For a short time the business was carried on by the three sons under the same style as before. It appears that the residuary real and personal estate of the testator (except invested property) was employed in the business. In April, 1869, Michael, one of the sons, retired from the partnership, and the two others purchased his one-third share in the residuary and real estate, and of the goodwill in the business, for a sum which was paid for partly out of the estate, and partly out of moneys borrowed on the land. The two continuing partners carried on the business of nurserymen under the old style, upon the same land as their father, and also on the purchased land.

(*t*) *Darby* v. *D.*, 3 Drew. 495; *Essex* v. *E.*, 20 B. 450; *Waterer* v. *W.*, 15 Eq. 402; *Steward* v. *Blakeway*, L. R. 4 Ch., p. 609; cp. *Re Wilson*, [1893] 2 Ch. 340.

(*u*) See *Re Hulton*, 61 L. T. 467, 62 L. T. 200.

(*x*) *Steward* v. *Blakeway*, L. R. 4 Ch. 603; *Crawshay* v. *Maule*, 1 Swans. 523; *London Financial, etc.* v. *Kelk*, 26 Ch. D. 107.

(*y*) 15 Eq. 402.

Lake v. Gibson.—Lake v. Craddock.

The share of Michael was purchased only in order to enable the other two brothers to carry on the business. On October 4, 1871, one of the partners died intestate, leaving a widow and children. It was held by James, L.J., that both the devised and the purchased land employed in the business was converted into personalty. "I am of opinion," said his Lordship, "that this case is governed by that class of cases in which Lord Eldon said that where property became *involved in partnership dealings*, it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the two surviving partners, whether by descent or devise, if, in fact, it was substantially involved in the business" (*z*).

The principle upon which cases of this kind proceed appears to be this : that as a general rule, inherent to the contract of partnership, and without any special stipulation, upon the dissolution of partnership all the property of the partnership, whether real, or personal, is subject to an implied trust for sale (*a*), and is therefore personal property, and the proceeds of the sale, after discharging all the partnership debts and liabilities, must be divided among the partners, according to their respective shares in the capital, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his share of it in specie. It follows then that any real property which has become the property of the partnership becomes, by force of the partnership contract, converted into personalty, and that, not merely as between the partners to the extent of discharging the partnership debts, but as between persons claiming under a deceased partner (*b*).

Modification of Rule by Agreement.—The rule of law, and the statutory enactment, may be superseded by agreement. Thus, in *Smith* v. *S.* (*c*), real estate was purchased for the purposes of a partnership, and paid for out of the partnership capital, but there

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(*z*) See *Cooper* v. *C.*, 26 W. R. 785; *Davies* v. *Games*, 12 Ch. D. 813; *Davis* v. *D.*, [1894] 1 Ch. 393; Lindley, Partnership (9th ed.), pp. 420—2.

(*a*) See *Re Bourne*, [1906] 2 Ch. 427, *per* Romer, L.J., at p. 432. The surviving partner has power to sell or *mortgage* partnership property, real or personal, for payment of partnership debts free from the lien of the deceased partner's estate : *ibid.*, applying the principle of *Re Langmead's Trusts*, 20 B. 20, to real estate; and see *Commissioners of Stamp Duties* v. *Salting*, [1907] A. C. 449.

(*b*) See *Darby* v. *D.*, 3 Drew. 495, 503, 506; *Re Wilson*, [1893] 2 Ch. 340; *Att.-Gen.* v. *Hubbuck*, 13 Q. B. D., p. 289.

(*c*) 5 V. 193, 5 R. R. 22.

was an agreement between the partners that it was to be the separate property of one of them, who took a conveyance thereof in his own name : Eldon, C., held he was a debtor to the partnership, and that the property bought was not partnership property, and that his wife was entitled to dower out of the whole. But in the case of partnership property, land can be remitted to its original character only by virtue of such an agreement made between the partners as withdraws the land from the partnership assets, and puts an end to the implied trust for sale; and the agreement must be one which becomes binding before the death, so as to take effect at the death (*d*). In *Re Wilson* (*e*) it was held that, on the agreement between the parties, there was no trust or contract by virtue of which land held for a common object was to be converted.

In *Myers* v. *M.* (*f*), A and B, being tenants in common of certain freeholds, entered into partnership in 1873 as builders for ten years, the freeholds and plant being made partnership property. In 1877 the plant was sold, and the proceeds divided : the freeholds were let to tenants, and no new contracts entered into. In 1888 A died, and it was held that the partnership terminated in 1877; that by the termination of the partnership the right to call for a sale was taken away, and that the property must be considered as realty (*g*).

So also partners may agree between themselves to convert partnership property into the several property of any one or more of the partners, or to convert the several property of any partner into partnership property. If *bona fide*, such conversion is effectual, not only as between the partners, but as between the creditors of the firm and the partners (*h*), *unless* bankruptcy or insolvency occurs before the agreement is completely executed (*i*).

Mortmain.—The interest of a deceased partner in real estate held as partnership property was, so far as it comprised moneys to arise from the sale of such real estate, *an interest in land*. The reason for this was, that though the share of the deceased partner

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(*d*) *Per* Bowen, L.J., *Att.-Gen.* v. *Hubbuck*, 13 Q. B. D., pp. 290, 291; and see *Rowley* v. *Adams*, 7 B. 548; *Steward* v. *Blakeway*, L. R. 4 Ch. 603.

(*e*) [1893] 2 Ch. 340.

(*f*) 61 L. T. 757.

(*g*) But see now section 34 of the Law of Property Act, 1925, cited *infra*.

(*h*) *Campbell* v. *Mullett*, 2 Swans., pp. 575, 584; Lindley, Partnership (9th ed.), p. 422.

(*i*) See Lindley, Partnership (9th ed.), p. 858.

was not a share in any specific part of any specific lands held by the partnership, yet the amount due to him was a charge or lien on the lands comprised in the partnership assets. Under the so-called Mortmain Act (*k*), the bequest of such moneys to a charity was accordingly void (*l*). By the Mortmain and Charitable Uses Act, 1891, s. 3, "land" is not to include "money secured on land; or other personal estate arising from or connected with land." A bequest of such moneys is therefore not now a bequest of land.

Legacy Duty, etc.—The share of a deceased partner in real estate purchased with partnership capital and used for partnership purposes in trade is held to be converted into personalty, also for fiscal purposes, and the Crown can claim legacy and formerly could claim probate duty (*m*) in respect of the property which at the death of the partner was existing as real estate: *Forbes* v. *Steven* (*n*), where it was held by James, V.-C. (overruling the law supposed to have been established in *Custance* v. *Bradshaw* (*o*)), that legacy duty was payable upon a share of a deceased partner—a domiciled Englishman, in the proceeds of freehold property in Bombay used for the purposes of the partnership, and forming a partnership asset, and the reasoning upon which the decision proceeded is equally applicable to show that it was liable to probate duty (*p*). And the time when the death takes place is the moment at which it has to be decided whether the property in question is realty or personalty (*q*).

4. Alterations Made by Statute.

Since 1925, the legal estate in land cannot be vested in persons as tenants in common. By the Law of Property Act, 1925, s. 34, sub-s. 1, "an undivided share in land shall not be capable of being created," except as provided by the Settled Land Act, 1925, or as

(*k*) 9 Geo. 2, c. 36, repealed. See 51 & 52 Vict. c. 42; 54 & 55 Vict. c. 73; 55 Vict. c. 11.

(*l*) *Ashworth* v. *Munn*, 15 Ch. D. 363; see as to the nature of this lien or charge, *Re Bourne*, [1906] 2 Ch. 427.

(*m*) No longer payable where death occurred on or after August 1, 1894; see Finance Act, 1894, ss. 1 and 24, and First Schedule to the Act. See as to death duties in relation to conversion, notes to *Fletcher* v. *Ashburner*, Vol. 1.

(*n*) 10 Eq. 178, 189.

(*o*) 4 Ha. 315.

(*p*) See also *Att.-Gen.* v. *Brunning*, 8 H. L. Cas. 243; *Att.-Gen.* v. *Lomas*, L. R. 9 Ex. 29, 34; *Commissioner of Stamp Duties* v. *Salting*, [1907] A. C. 449.

(*q*) See judgment of Bowen, L.J., in *Att.-Gen.* v. *Hubbuck*, 13 Q. B. D. 275 (C. A.), in which *Custance* v. *Bradshaw*, 4 Ha. 315, and *Matson* v. *Swift*, 8 B. 368, are discussed.

thereinafter mentioned. By sub-section 2, where, after the commencement of the Act, land is expressed to be conveyed to persons as tenants in common, the deed is to operate as if the conveyance had been to the grantees (or if more than four to the four first named) as joint tenants upon " the statutory trusts," and " so as to give effect to the rights of the persons who would have been entitled to the shares had the conveyance operated to create those shares." But where the conveyance is by way of mortgage the land is to vest in the grantees (or the four first named) for a term of years as joint tenants subject to cesser on redemption " in like manner as if the mortgage money had belonged to them on a joint account, but without prejudice to the beneficial interests in the mortgage money and interest." By sub-section 3, a devise, bequest, or testamentary appointment, coming into operation after the commencement of the Act, of land to two or more persons in undivided shares is to operate as a devise, bequest, or appointment of the land to the trustees (if any) of the will for the purposes of the Settled Land Act, 1925, or, if there are no such trustees, to the personal representatives of the testator, and in each case (but without prejudice to the rights and powers of the personal representatives for purposes of administration) upon the statutory trusts. And by sub-section 4 any disposition purporting to make a settlement of an undivided share in land is to operate as a settlement of a corresponding share of the net proceeds of sale and of the rents and profits until sale of the entirety of the land. Section 35 defines the expression " statutory trusts." The land is to be held upon trust for sale and the net proceeds of sale, after payment of costs, etc., are to be held " upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land " (*r*).

By the Settled Land Act, 1925, s. 36, sub-s. 1, where, after the commencement of the Act, settled land is held in trust for persons entitled in possession in undivided shares, the trustees of the settlement (if the settled land is not already vested in them) may require the estate owner in whom the settled land is vested (but in the case of a personal representative subject to his powers for purposes of administration) to convey the land to, or consent

(*r*) A minor amendment to this section is made by the Law of Property (Amendment) Act, 1926, Sched.

to the same vesting in them as joint tenants, and in the meantime the land is to be held upon the same trusts as would have been applicable if it had been so conveyed to or vested in the trustees. And by sub-section 2, if and when the settled land so held in trust in undivided shares is or becomes vested in the trustees of the settlement, the land is to be held by them (subject to any incumbrances affecting the settled land which are secured by a legal mortgage, but freed from any incumbrances affecting the undivided shares or not secured as aforesaid, and from any interests, powers and charges subsisting under the trust instrument which have priority to the trust for the persons entitled to the undivided shares) upon the statutory trusts (*s*). In the event of refusal or neglect on the part of the estate owner, sub-section 3 gives power to the trustees of the settlement to obtain a vesting order.

By the Law of Property Act, 1925, s. 36, sub-s. 1, where a legal estate (not being settled land) is beneficially limited to or held in trust for persons as joint tenants, the same is to be held upon trust for sale, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever the joint tenancy in equity. By sub-section 2 no severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, is permissible. Where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he is to give to the other joint tenants notice in writing of such desire or do such other acts as would, in the case of personal estate, have been effectual to sever the joint tenancy in equity; and thereupon under the trust for sale affecting the land the net proceeds of sale, and the net rents and profits until sale, are to be held upon the trusts which would have been requisite for giving effect to the beneficial interests if there had been an actual severance. This section is amended by the Act of 1926 by providing that nothing in the Law of Property Act, 1925, affects the right of a survivor of joint tenants, who is solely and beneficially interested, to deal with his legal estate as if it were not held on trust for sale.

(*s*) See *Re Gaul and Houlston's Contract*, [1928] W. N., p. 45.

WASTE.

GARTH *v.* SIR JOHN HIND COTTON.

1750. 1 Ves. Sen. 524, 546; Dick. 183 (*a*).

Equitable Waste.

A, tenant for ninety-nine years, if he should so long live, without impeachment of waste, voluntary waste excepted; remainder to trustees during his life, to preserve contingent remainders; remainder to his first and other sons in tail; remainder to B in fee. A (before a son born) and B, according to agreement, cut down timber, and divided the profits between them. A afterwards had a son, who was held entitled to recover from the representatives of B what he had so received as his share of the money arising from the sale of the timber.

Rights, powers, and duties of trustees to preserve contingent remainders.

Mr. Garth (*a*), tenant for ninety-nine years, if he should so long live, *without impeachment of waste, excepting voluntary waste;* remainder *to trustees during his life, to preserve contingent remainder;* remainder to his first and every other son in tail; remainder to the defendant, Sir John Hind Cotton, in fee.

Garth having been long married without having children, enters into an agreement with the defendant, to cut down timber on the estate, and divide the profits between them.

He has afterwards a son by another wife, who, after his father's death, when of age, and having suffered a recovery, brings this bill to oblige the defendant, Sir John Hind Cotton, to refund £1,000 received by him as his share of the money arising from sale of the timber, with interest.

(*a*) S. C. 3 Atk. 751; Reg. Lib. 1752, A., fol. 240. The statement of the case and Lord Hardwicke's first opinion, August, 1750, are taken from 1 Ves. Sen. 524, 546. The judgment, p. 994, given after further argument in December, 1750, is here given complete. It is taken from Dick. 183, where it is stated to have been copied from Lord Hardwicke's MS.: and the decree is taken from 3 Atk. 758.

Garth v. Sir John Hind Cotton.

The arguments, for which see 1 Ves. Sen. 524, are omitted.

Lord Chancellor Hardwicke.—Although I have taken a great deal of pains, I cannot yet form an opinion, from an apprehension of breaking in upon the rules of law, or establishing a dangerous precedent in a Court of equity. The case is admitted to be entirely new. The strength of the arguments for the plaintiff is on the authority of *Pye* v. *George* (*b*) and *Mansell* v. *M.* (*c*), where the Court has considered trustees to preserve contingent remainders as trustees to all other purposes, so as to be affected by breach of trust and all the consequences: and therefore, if they have been negligent in not bringing a bill to restrain the waste, it should not turn to the prejudice of the remainders, when *in esse*. But it deserves to be considered, whether they have any trust to preserve the timber, because their legal estate is not at all for that purpose, being only an estate *pour autre vie*; by which there is no interest in or power over the timber, and which is at an end as soon as the first tenant for life dies. It is said, they might bring a bill for an injunction to stay waste, before the contingent remainders vested: and I am of that opinion: but I do not know that arises out of their trust for the timber. It is a bill by *amicus curiæ*; as in a bill on behalf of an infant in *ventre sa mère*, to stay waste. Till the estate attaches in possession they have nothing to do with the timber. If, indeed, there is a forfeiture by the first tenant for life, they would have a right to the shade, etc., but nothing to do with it during the life of the tenant for life. This is no opinion, but only my doubts from the breaking in on the rules of law on the one hand, and on the other the laying down a precedent in equity which might be dangerous. Let it, therefore, be spoke to again next term. I can find no case where the Court has preserved the timber, though cut down by wrong, for the benefit of the contingent remainders. In *Whitfield* v. *Bewit* (*d*) it was not by accident, but by wrong; and though Peere Williams has not mentioned whether there were trustees to preserve, etc., I have looked into it, and find there were.

(*b*) 2 Salk. 680.
(*c*) 2 P. W. 678; *sed vide Birch-Wolfe* v. *Birch*, 9 Eq. 683.
(*d*) 2 P. W. 240.

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Michaelmas Term, 1750, it was argued again.

Lord Chancellor Hardwicke took further time to consider of it: and Sir John Hind Cotton having died pending the suit, and the cause revived against his representatives, his Lordship gave judgment February 5, 1753.

Lord Chancellor Hardwicke.—The end of the bill is, that the defendant may account, and make satisfaction to the plaintiff, for all such sums of money as he hath received by a fall of timber upon the estate in question, in the year 1714, with interest.

The case is this: Richard Garth, Esq., being seised in fee, by will devised to Richard Bovey, father of the plaintiff, for ninety-nine years, if he should so long live, *without impeachment of waste, voluntary waste excepted*, on condition he took upon himself the surname of Garth; and from and after the forfeiture or determination of that estate, *to the use of trustees during the life of the said Richard Bovey in trust to preserve contingent estates*, but, nevertheless, to permit the said Richard Bovey, at and after his full age of twenty-one years, to receive the rents, issues, and profits thereof during his life, with remainder to his first and other sons in tail male. After this there are remainders to Avery Garth and his sons in like manner (all which determined soon after the testator's death), with the ultimate remainder to Sir John Hind Cotton, the defendant's grandfather, in fee simple.

Of this will the testator made Catherine, his wife, executrix.

On July 18, 1700, the testator died.

On his death the plaintiff's father entered upon the estate, and performed the condition of taking on himself the surname of Garth.

Sir John Hind Cotton, the defendant's grandfather, died, whereby the remainder in fee descended to the last Sir John Hind Cotton, his son and heir, and in whom the remainder of inheritance was become vested.

On February 12, 1713, the plaintiff's father executed a letter of attorney to Reginald Marriot, authorising him to come to an

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agreement with Sir John Hind Cotton, the remainderman in fee, for a fall of timber on the estate.

On July 16, 1714, articles were entered into between the plaintiff's father, by Mr. Marriot his attorney, on the one part, and Sir John Hind Cotton, the defendant's father, on the other part, reciting that the plaintiff's father was seised for life (which is not true, for his estate was only for ninety-nine years, determinable on his life), with remainder to all his sons in tail male, with remainder to Sir John Hind Cotton in fee; that the plaintiff's father had then no issue male; that he had desired Sir John Hind Cotton to consent to the cutting down and selling part of the timber then standing and growing upon the premises.

Upon these recitals it is agreed that some person authorised by the plaintiff's father, and some person authorised by Sir John Hind Cotton, should view, and mark what timber trees were then fit to be cut down; that then the parties should agree, and appoint by writing under their hands, how many of the trees so marked should be cut down, and sold for the best prices that could be got.

That Sir John Hind Cotton should not take any advantage of the cutting of the timber, nor should it be esteemed waste, nor any advantage taken thereof on pretence of its being waste.

The first trust of the money to arise by sale of the timber is, that it shall be applied to pay all such debts as were owing by the testator at his death, together with the legacies by him given, which have not been nor shall be paid out of the personal estate (although it is admitted, by the answer of the original defendant, Sir John Hind Cotton, the defendant's father, that the estate devised was not subject to the payment of the testator's debts); that the residue of the money arising by the sale of the timber should be divided into moieties between the plaintiff's father and the late Sir John Hind Cotton.

The articles then take notice, that there was a sum of £1,787 5s. 6d. then in the hands of one of the Masters of this Court, being the produce of timber sold off the estate by Sir John Hind Cotton, the defendant's grandfather, which was claimed by both parties; and it is agreed that the money shall be paid out of Court, and applied to the same purposes as the money to arise by the timber then to be felled.

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It is further agreed that the death of the plaintiff's father without issue male, or, his having issue male, on the death of Sir John Hind Cotton, should make no alteration in the terms thereby agreed on; but that the parties, their executors or administrators, should, notwithstanding any death or alteration, have the like share and benefit of the wood and timber to be felled and cut down as if all such wood and timber had been felled and cut down, and the money divided and paid between the plaintiff's father and Sir John Hind Cotton, before such death or alteration.

Then follows a clause for applying the testator's personal estate, in the first place to the payment of his debts and legacies.

Sir John Hind Cotton, the original defendant, admits, by his first answer (which is not replied to), that he received about the sum of £1,000 for his share of the money for which the timber was sold.

At the time of entering into these articles, and when the timber was felled and disposed of, *the plaintiff was not born*, but his father was then married to Mary Pullen, his first wife; and it is sworn by the first answer, that he had been married to her for several years without having any issue, and was not then likely to have any by her.

In September, 1716, she died without ever having had any issue; and some time after, the plaintiff's father intermarried with Elizabeth Emerson.

On May 26, 1724, the plaintiff was born, which was about ten years after entering into the articles.

On January 11, 1727, the plaintiff's father died, leaving the plaintiff, his only son, an infant, who then became entitled to the estate as tenant in tail in possession.

On May 26, 1745, the plaintiff attained his age of twenty-one years, and in Trinity term following suffered a recovery of the estate to the use of himself and his heirs.

On May 20, 1748, the original bill was brought by the plaintiff against Sir John Hind Cotton, who dying before a determination, the suit hath been revived against the defendants, his executors, and the same relief is prayed out of his assets, and assets are admitted.

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Upon this case the general question is, whether the plaintiff is entitled to satisfaction for so much as Sir John Hind Cotton, the father, received out of the inheritance by the fall and sale of timber, before the plaintiff came *in esse*, and consequently before he had any estate in him in the land, and whilst the remainder, which vested in him afterwards, rested in mere contingency or possibility.

This hath been admitted at the bar, on all sides, to be entirely a new question, upon which there is no precedent, and which hath never been brought into judgment before.

It hath been admitted, also, that the plaintiff can have no remedy at law, either in his own name or in the names of the trustees to preserve contingent remainders, but that his only possible remedy is in a Court of equity.

This made it necessary for the Court to proceed with great deliberation before a decision was made, which would be the first precedent after the invention of trustees to preserve contingent remainders, now about a hundred years since, and which may have extensive consequences as to other cases that may arise.

In order to determine whether the plaintiff is entitled to the relief he prays, it will be necessary to take several matters into consideration—to lay down some that are plain, and to clear and establish others that appear more doubtful.

First, that the stripping of this estate of the timber was a wrongful act, is clear from the nature of the limitations.

The *plaintiff's father was only tenant for years, punishable for wilful waste, and had no present right to or interest in the timber, other than the mast, and shade, and necessary botes.*

The defendant's father had no *present* right to cut it down, but in his turn, according to the order of limitation. It is true, the inheritance was vested in him, subject to open and let in the contingent remainder, when a son should come *in esse*; and in that quality the timber part of the inheritance was vested in him, but he had no present right to take and use it. The trustees, who were seised of the freehold, might have restrained him in this Court by injunction, and the plaintiff might have brought an action of trespass against him for his entry and tortious act.

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Further, it was the duty of the plaintiff's father so to have done, not only in respect of the trespass upon himself, which he might have waived, but in respect of the privity which was in expectancy between the tenant for years and the contingent remainderman, when he should come *in esse*; for between the tenant for years and the lessor, or the remainderman of the inheritance, there is a privity; and before the statute of *Quia emptores terrarum* a tenure arose: and this makes a tenant for years a kind of fiduciary for the lessor, or the remainderman, who stands in his place.

As this act was wrongful, both in Mr. Garth, the plaintiff's father, and the late Sir John Hind Cotton, so this wrong was committed collusively between them: when I say collusively, I do not mean an injurious intention, for they might mistake their right; but that will not vary the case in respect of the right of others. This appears by the whole frame of the articles, which are an agreement to do what neither of them alone, nor both together, had a right to do. In order to do this, the plaintiff's father is recited to have the freehold, which he had not. A colour is given to the transaction, as if it were for payment of the debts of the father, to which it is admitted the estate was not liable; and it is expressly stipulated that, even in case the plaintiff's father should die, leaving issue male, before all the timber should be felled and the money divided, the parties to these articles (*i.e.*, the tenant for years, and the remote remainderman) should have the same shares as if all the timber had been felled and the money divided before such death or alteration had happened.

Can there be a stronger proof of collusion than this? The tenant for years enters into an agreement, not only contrary to his general privity and trust (if I may so speak), but both the parties bind themselves in plain terms to injure the remainderman, even after his estate should become vested, if that event should happen before this destruction was completed.

The *next* thing which is plain and self-evident is, that this wrongful collusive transaction hath turned to the damage and loss of the plaintiff.

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The next inquiry is, whether the plaintiff is entitled to any remedy in this Court upon the principles of equity.

At law, it is admitted, as I said before, that he can have none; and it must be admitted further, that if the limitation to trustees to preserve contingent remainders had been out of the case, he would have had none in equity.

Indeed, as the plaintiff's father was made only tenant for years, if there had not been such a limitation to the trustees, all the contingent remainders would have been void, for want of an estate of freehold to support them; and Sir John Hind Cotton would have had the immediate freehold as well as the inheritance in him, which would have given him a clear right. But if the plaintiff's father had been tenant for life, and there had been no such limitation to the trustees, the plaintiff could even then have been entitled to no remedy, because his whole use in the land, whilst it remained in contingency, would have been in the power of the tenant for life to bar by fine, feoffment, or surrender to the remainderman vested; and there could have been no pretence for this Court to interpose to preserve or restore to him part of that inheritance, the whole of which was in the power of the tenant for life.

Therefore, the stress and foundation of the *plaintiff's equity depends entirely upon the estate limited to the trustees to preserve the contingent uses*, and the consequences from thence.

In order to determine concerning the force and operation of this in the present case, I will consider—

First, what is the intention and use of creating limitations to trustees for preserving contingent remainders.

Secondly, what estate such trustees take in point of law, and what actions they may maintain at common law.

Thirdly, what is the nature and extent of this trust in equity, and what remedy they may pursue in this Court.

Fourthly, how far, and in what cases, such trustees may be charged in equity for a breach of trust, or any other person be affected by their acts, or *laches*, in breach of their trust.

First, the intention of limitation to trustees to preserve contingent uses took its rise from the determination of two great cases, reported by Lord Coke, in his first volume—*Chudleigh's*

Case (*e*), Hil., 31 Eliz., and *Archer's Case* (*f*), Mich., 39 Eliz.; though it was several years after those resolutions before that light was struck out, and it was not brought into practice amongst conveyancers till the time of the usurpation, when, probably, the providing against forfeitures for what was then called treason and delinquency was an additional motive to it.

Let us see, then, what were the claims and defects which wanted to be filled up and remedied in consequence of those two judgments.

The grand dispute in *Chudleigh's Case* was concerning the power of feoffees to uses, created since the Statute of Uses (*g*), to destroy contingent uses by fine or feoffment before the contingent use came into being.

In order to determine this, the Judges entered into very refined and speculative reasonings, some of which (I speak it with reverence) are not very easy to comprehend.

They all agreed, that where there is a conveyance to uses, to the use of the father for life, remainder to his first and every other son in tail, with remainders over—in all those cases no estate at all is left in the feoffees, but the whole estate is divested and drawn out of them by the Statute of Uses.

But then came the question respecting the contingent uses to the sons not *in esse*. On the one side, though they admitted there was no estate left in the feoffees, yet they said there was a *scintilla juris*, a power of entry to preserve the contingent uses, if, by reason of *disseisin* or disturbance of the estate, there should be occasion; for, say they, no use can be executed by the statute unless there be a person seised to the use, and also a *cestui que use*. And, if any *disseisin* or disturbance of the estate should happen, the right to the use cannot be executed within the statute: therefore, lest these contingent uses should be destroyed and not executed, there must, by construction of the statute, be such a power of entry left in the feoffees and their heirs.

This was the opinion of the greatest part of the Judges.

(*e*) 1 Co. 120, Poph. 70, and 1 And. 309, where it is best reported.
(*f*) 1 Co. 63.
(*g*) 27 Hen. 8, c. 10.

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Others of the Judges were of opinion that there was not only no estate left in the feoffees, but no power or right to enter, nor anything to do with the land; but that they were at first only conduit-pipes, and the estate that was in them was by the statute wholly transferred to serve the uses which were *in esse*, with a pregnancy and prospect to the contingent remainders, if they should arise in their due time.

It must be observed, that one thing which weighed much with the majority of the Judges, to be of opinion for leaving a right of entry in the feoffees to preserve the contingent uses, was their fear of perpetuities, and of having contingent estates by way of use in persons not *in esse*, if they should not be destroyable by the feoffees; for this doctrine, as it left it in the power of the feoffees to preserve the contingent uses, so it put it into their power to destroy them, if they pleased.

The reason of which was, that at that time the law was not settled that the destruction of the particular estate by the feoffment or conveyance of the *cestui que use* for life, before the contingent remainders became vested, was a destruction of the contingent remainders: but afterwards came *Archer's Case*, in which case this point was solemnly settled, and they were relieved from their apprehensions; for, though *Archer's Case* is placed in the reports before *Chudleigh's Case*, it was not determined until some years afterwards.

The clearest summary of the reasoning in those cases is stated by Mr. Pollexfen, in his argument of the case of *Hales* v. *Risley*, in Pollexfen, 385, from whence I have taken it.

From this deduction you will see what were the chasms and defects to be supplied.

Here was, then, understood to be a power in the general feoffees to uses, either to preserve or destroy those uses *ad libitum*, and here was a power in the *cestui que use* for life to destroy them.

How were those defects to be supplied and filled up? By vesting a limitation in certain trustees *eo nomine*, upon an express trust to support them. But how to support them? By preserving the whole inheritance to come entire to the *cestui que use* in contingency, in like manner as trustees to uses ought to do

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before the Statute of Uses, when they were but trusts to be executed in this Court. And, as things stood, such trustees, having the whole legal estate, might and ought to preserve the entire inheritance, whether consisting of the lands, mines, or timber, for the benefit of all the *cestui que trusts* in remainder, either vested or contingent.

Secondly. Consider, in the next place, what such trustees take in point of law, and what actions they may maintain at common law.

It hath formerly been attempted to be brought in question, whether, upon such a limitation to trustees, after a prior limitation for life, they took any estate at all in the land, or only a right of entry on the forfeiture or surrender of the first tenant for life, by reason that the limitation, being only during his life, could not commence or take effect after his death.

But this was soon settled on the authority of *Cholmondeley's Case* (*h*), where it is held, that, if there is a lease to A for life, remainder to another during the life of A, this is a good remainder; for by possibility the remainder may take effect in case a tenant for life makes a feoffment in fee, or commits any other forfeiture; and so in the book, 41 Edw. 3, Fitzh., tit. "Waste," 83; and this is followed by the late case of *Duncomb* v. *D.* (*i*), which was one of the first cases wherein the operation of such limitation to trustees to preserve contingent uses came into question.

If this be so upon such a limitation, after a prior estate for life, it holds much more strongly when limited after a prior estate for years only, determinable on the life of the first tenant: because in the last case it comes (the first estate of freehold) to the trustees, as was rightly reasoned by Lee, L.C.J., in the case of *Smith* v. *Dormer*, and *Packhurst* (*k*).

It is plain, therefore, that these trustees had the immediate freehold in them—an estate *pur autre vie*; and at law they alone could maintain or defend any action concerning the freehold.

If a *disseisin* was committed they must bring the assize, and

(*h*) 2 Co. 50 a.
(*i*) Hil., 7 Will. 3, C. B., 3 Lev. 437.
(*k*) Mich., 14 Geo. 2, B. R., 8 Vin. Ab. 417; Willes' Rep. 327, 3 Atk. 135. 6 Bro. P. C. 351.

they must defend in all *præcipes*: for the possession of the tenant for years was, in law, their possession: for this reason they had in law an interest in the timber, not, indeed, to cut down or destroy, but in respect of the enjoyment by their tenant for years, and of the expectancy of its coming into their actual possession, by the determination of his estate, as part of their freehold.

Notwithstanding all this, it is certain that they could maintain no action of waste; the reason of which is, that the common law gave the prohibition of waste only to an owner of the inheritance, and the Statute of Gloucester gave the writ of waste to the same persons. But in this respect such trustees are in no other condition than all other remaindermen for life.

Thirdly. Consider, in the next place, what is the nature and extent of their trust in equity, and what remedies they may pursue in this Court.

And I hold it to be agreeable to natural justice, and in support of right, to construe their trust in the most liberal manner. In the case of *Mansell* v. *M.* (*l*) (which must be more particularly mentioned by and by) it was expressly laid down by Lord Raymond as I took it from his own mouth—"It is only positive law that tenant for life may destroy contingent remainders, and therefore it was a very considerable invention to create these trusts to preserve them; they are the creatures of the Court, and properly under its direction and control."

The first trust is declared to preserve the contingent estates thereinafter limited. How to preserve them? To preserve the inheritance as entire as possible—to go according to the succession established by the testator, which inheritance consists of the land, timber, and mines, and cannot be preserved entire without preserving all three. In many estates the timber is the most valuable part—in more, the mines; and the destruction of the one, or the exhaustion of the other, might take away, or be an alienation of, the best part of the inheritance.

But it hath been objected, that this relates only to the preservation of the legal estate of the use, and not to the timber

(*l*) 2 P. W. 678; Ca. t. Talb. 252.

or mines, because the estate of the trustees cannot support any action of waste.

This might, in many instances, be to preserve the shell without the kernel, and brings it to the question, what remedies they may, in virtue of this trust, pursue in this Court.

These trusts are equally declared to make entries and bring actions, as the case shall require. Here it is expressly to do all and every such lawful act and acts, by entry or otherwise, as shall be requisite for that purpose and end.

But whether the expression be the one or the other, it comes to the same thing, and comprehends all remedies both in law and equity.

For the course of equity is a part of the constitution of the law and judicial proceedings in this kingdom. Therefore, if, after a forfeiture committed, and an entry made for that forfeiture, such trustees wanted any assistance of a Court of equity in support of their trust, and not to break in upon the right of the tenant for life to receive the rents and profits, they might undoubtedly, by force of this trust, have their remedy here. As they may do this, I am clearly of opinion, that they may bring a bill for an injunction to stay waste, although no precedent in point is produced for it.

In the present case they were remaindermen *pur autre vie*, and immediate owners of the freehold in law. In the case of *Dayrell* v. *Champneys* (*m*), a remainderman for life was admitted to maintain such a bill without making the owner of the inheritance a party; and although it was observed upon that case by Mr. Clarke, that it appears by the state of it in the book that the plaintiff had the first remainder in tail vested, yet that doth not appear by the recital of this decretal order; and if it had, the objection could not have been made.

If the trustees could do this as remaindermen of the legal estate *pur autre vie*, surely their trust, which affects their conscience, and, according to Lord Raymond's opinion, makes them creatures of this Court, would not make their case the weaker here.

But the books go further, and say a bill may be brought

(*m*) 1 Eq. Ca. Abr. 400, Trin., 1700.

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for an injunction to stay waste on behalf of an infant *en ventre sa mère* (*n*). And so is *Musgrave* v. *Parry* (*o*), which is liable to much more difficulty, for that must be as *amicus curiæ* on the unborn child's behalf.

I, therefore, hold most clearly, that the trustees might have brought such a bill, and obtained an injunction to stay this waste, both against the plaintiff's father and the late Sir John Hind Cotton.

Pursue this, then, into its necessary consequences.

Suppose, after such an injunction granted, the timber had been felled: this had been a contempt of the Court, and the contemnor must have stood committed.

Then arises the question which Mr. Solicitor-General (*p*) very properly put in his argument—on what terms should they be discharged? This Court could not have fined them: therefore, certainly, only on the terms of making satisfaction. That satisfaction could not have been made by setting up the trees again, and therefore it must have been by paying the value. Who must have had that value? Not the tenant for years, for he had no pretence to it; nor the remote remainderman in fee, for he had no right to take it: and this would have been to reward them both for their contempt and collusion. The consequence is, it must have been laid up, and secured to attend the contingent uses. Without this, justice could not have been done.

Fourthly. It comes next to be considered, how far and in what cases such trustees may be charged in equity for a breach of trust, or any other person may be affected by their act, or *laches*, in breach of trust.

Notwithstanding the saying of Mr. Pollexfen, *arguendo* at the bar (*q*), "that trustees to preserve contingent remainders were never punished in equity, when they broke their trust" (which, by the way, is a kind of contradiction in terms), that is now exploded, and settled to the satisfaction of mankind to be otherwise.

(*n*) See *Lutterell's Case*, cited Pr. Ch. 50; *Scatterwood* v. *Edge*, 1 Salk. 229.
(*o*) 2 Vern. 710.
(*p*) Murray, afterwards Lord Mansfield.
(*q*) Pollex. 250.

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It was first broken in upon by Lord Harcourt, in the case of *Pye* v. *George* (*r*), Mich., 1710, where he declared that "when such trustees were appointed, whether by marriage settlement or will, and they, before the birth of a son, joined in a conveyance to destroy the contingent remainders, this was a plain breach of trust, and the persons taking under such a conveyance, if voluntary, or having notice, should be liable to the same trusts": and he said, if there was no precedent in the case, he would make one.

Then came *Tipping* v. *Pigot* (*s*), in Mich., 1711, before the same Lord Chancellor, and he adhered to the same doctrine, and said it would be dangerous for such trustees themselves to make the experiment. Thus it stood till the great case of *Mansell* v. *M.*, which was first decreed by Sir Joseph Jekyll, at the Rolls, in January, 1731, and afterwards by Lord King, assisted by Lord Raymond and Lord Chief Baron Reynolds, December 12, 1732 (*t*).

Here it was first solemnly settled, by the concurrent opinion of all those great men, that the trustees themselves shall be liable in equity to make satisfaction for such a breach of trust; and also, that a voluntary alienee, or a purchaser for a valuable consideration, with notice of the trust, shall be decreed in equity to restore the estate; and in that case it was decreed accordingly.

Thus it stands determined, that for a breach of trust in aliening the inheritance the trustees are liable, and other persons are affected by their act done in breach of this trust.

On this I build: suppose these trustees had consented to the felling and sale of the timber—had joined with Mr. Garth and Sir John Hind Cotton in the articles, and expressly covenanted that they would bring no bill for an injunction—would the trustees in that case have been liable? Clearly so; for it was agreeing to alien part of the inheritance; and it plainly shows from the principle on which the Court founded itself in *Mansell* v. *M.* Lord Raymond said, "It was strange in natural reason to say, that where a man hath created a trust to preserve his

(*r*) Pr. Ch. 308; 1 P. W. 128; 2 Salk. 680; 7 Bro. P. C. 221.
(*s*) 1 Eq. Ca. Abr. 385; Gilb. Eq. R. 34.
(*t*) 2 P. W. 678; Ca. t. Talb. 252; 2 Eq. Ca. Abr. 747.

estate, the trustees may break that trust, and give away the estate with impunity; and that there wanted no particular precedent for it, because it is founded on all the general rules of trust."

If the trustees had joined in the articles thus to break their trust, would Mr. Garth, the father, or the late Sir John Hind Cotton, have been affected by this express act, done in breach of their trust? This, to me, is also as clear; for then they would have had notice of this breach of trust, and have reaped the benefits of it; which is expressly within the rules of *Mansell* v. *M.* And here I cannot help repeating some remarkable words of Lord King, who was not disposed to amplify the jurisdiction of this Court. "If it is," said his Lordship, "a breach of trust, and the trustees convey the estate over, a Court of equity is not to sit still and let others profit by the spoil."

This position is very apposite to the present case; all the difference is, that here is no positive act of the trustees, but only a *laches* or neglect in not performing their trust, and bringing a bill for an injunction to stop this waste.

This may excuse the trustees, if they had no notice of the scheme or attempt to strip the estate of the timber; but how will it excuse the others, who, as Lord King expressed it, have profited by the spoil? By no means.

In all cases of alienation the alienees are not affected merely by the act of the trustees, but by notice of the trust: and here all parties had actual notice of the will, claim under it, and have expressly recited it in their articles. Therefore, in this case the actual notice of the trust operates to make the *laches* of the trustees affect them as much as their express act would have done in the other: and it would be strange to say that the plaintiff's and defendant's father would have been liable for the timber if the trustees had concurred in the destruction and sale of it, but shall be in a better condition because they did not. What is the justice that results from hence, but restitution? Just as in the case of an alienation with notice, the justice would have been a re-conveyance: indeed, it plainly follows by analogy from thence. Suppose an estate with valuable mines in it, unopened, settled in this manner, and the

trustees to preserve contingent remainders had joined in an alienation, with notice. Afterwards such a purchaser, with notice, opens the mines, and exhausts them, putting a great sum of money into his pocket. Then a son is born, who is tenant in tail: the tenant for life dies, and the son brings a bill for a re-conveyance: if, according to the authority of *Mansell* v. *M.*, the Court had decreed a re-conveyance, would the justice have been complete without decreeing satisfaction for so much of the inheritance as was carried off by exhausting the mines? Clearly not. It would be a necessary, unavoidable consequence of equity, that satisfaction must be made to the owner of the inheritance. And yet this is liable to the same objections as have been made in the present case at the bar. It was done at a time when the contingent remainderman had neither *jus in re* nor *jus ad rem*, before he was *in rerum natura*; and no wrong can be done to a person non-existent. But these are colourable objections only: for, if equity ought to wait, and expect the vesting of the estate for his benefit and restore him that estate, it ought to do it completely.

I have chosen to go through the general reasoning (which hath, upon the maturest consideration, convinced me that the plaintiff ought to be relieved in this Court), before I state the objections made on the part of the defendant, the rather because the clearest answer to these objections will arise from the right application of that reasoning.

First Objection.—That the interposition and allowance of trustees to preserve contingent remainders was not intended, nor has been suffered, to alter the legal rights of the tenants for life and the first remainderman of the inheritance vested, either in respect of the timber or other property of, or powers over, the estate.

Answer.—This objection assumes too much; for I have already proved, and it is demonstrable, that the very intention of interposing this new invented limitation was to alter and abridge the legal rights both of the tenant for life and the first remainderman vested, to abridge the legal right of the former, to defeat and destroy the contingent use of the inheritance whilst it remains contingent and eventual, to abridge the legal right of

the latter, to destroy it by accepting a surrender of the estate for life: all which are as much legal powers as the cutting down of timber or the opening or digging of mines.

I admit the instance which was put, that if (where there is tenant for life or for years, subject to waste) timber is blown down by accident, or cut down by the tort of a stranger or of the tenant for life alone, the owner of the first remainder of inheritance vested shall have the benefit of it. So was the case of the timber blown down on the late Duke of Newcastle's estate, and the case of *Whitfield* v. *Bewit* (*u*); but the ascertaining of the ground of these resolutions is sufficient to distinguish them from the present case.

The common law doth not, nor can, consider the contingent uses as having existence till they happen: therefore, according to *Lewis Bowles' Case* (*x*) and *Udall* v. *U.* (*y*), an estate in contingency is as no estate till the contingency happens. And when the trees are severed the property must vest immediately in somebody, and that can only be in the first remainderman of inheritance vested; and on the foundation of that property he may maintain trover for them.

This is his right at law; and there is in the cases put of trees fallen by accident, or merely by the wrongful act of a stranger or of the tenant for life, no ground of equity to take it from him.

But here comes in the force and operation of *the collusion* in this case. The destruction being made *by contrivance and collusion with the remainderman, and affecting his conscience,* obliges this Court to pursue its known maxims in laying hold of it either by restraining the act before it be completed, or decreeing satisfaction for it afterwards: for, *in all cases where a legal right is acquired or exercised by fraud or collusion, contrary to conscience, it is the office of this Court to enjoin it, or decree a compensation.*

Second Objection.—That the relief sought by the bill is contrary to all the rules of law, which allows no remedy for waste to any person who hath not an immediate reversion or

(*u*) 2 P. W. 240; 2 Eq. Ca. Abr. 589.
(*x*) 11 Co. 79.
(*y*) Aleyn, 81.

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remainder of inheritance vested at the time of the waste committed.

Answer.—This is true in general, though it admits of some exceptions even at common law. But, if it were true at common law in the latitude with which it was laid down, it would not govern this case, which depends *upon principles of equity arising from the collusion and covin between the tenant for years and the remote remainderman*, which is an established ground of relief in this Court, even beyond, and sometimes contrary to, the rules of law.

However, as I always incline to adhere, as near as justice will admit, to the rule *equitas sequitur legem*, I will endeavour to show how far the opinion I have given coincides with, and is supported by, the reason of some cases concerning waste.

It is clear, that when there is a tenant for life (*z*), with remainder over in fee or tail, and tenant for life commits waste, the remainderman in fee, or in tail, can have no action of waste. The reason is, because the plaintiff in the action must recover the place wasted, and that would be an injustice to the remainder for life, which is not forfeited; and, if it should be recovered by the owner of the inheritance (being under a limitation of the party), it would never go back again.

But, notwithstanding that, he may have another action of trover for the trees, and therein recover satisfaction for the wrong done to the inheritance; nay, in case the remainderman for life dies, living the remainderman of the inheritance, he may then bring an action of waste for the waste done during the continuance of the remainder for life.

Further, if there be a tenant for life, with an immediate remainder or reversion in fee, and the remainderman, or reversioner in fee, grants over his remainder, or reversion, to A for the life of A; then the tenant for life commits waste, and afterwards, the grantor (*a*) of the remainder, or reversion for life, dies, this remainderman, or reversioner in fee, may maintain an action of waste, though he had parted with his remainder, or reversion for that time, by his own voluntary act.

(*z*) "With remainder to another tenant for life." Evidently omitted.
(*a*) Query grantee.

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All this appears by *Paget's Case* (*b*), and the case of *Udall* v. *U.*; and I shall make a further use of it by and by.

But such is the abhorrence of the common law to waste and destruction, that it hath extended its remedies, in some special cases, beyond the strict principles on which they were originally founded; and, therefore, though it be requisite in general, that the inheritance should be vested in the plaintiff at the time of the waste done, else he cannot lay it to his disherison; yet, if the estate were out of him by wrong, and then come into him again, he shall maintain the action of waste. Thus, if lessee for life make a feoffment in fee upon condition, the feoffee does waste, and afterwards breaks the condition, and the lessee for life enters for the breach, though the reversioner had nothing in the reversion at the time of the waste done: yet, as it was out of him by tort, when it is revested, he shall have this remedy (*c*).

But there is another case at law, the reason of which seems to me to be more analogous to the present case; as that of a bishop, after the restitution of temporalities to him and his successors, in right of his church. When he dies, during the vacancy the right is in the king; and when a new bishop is invested in the temporalities, the fee is in him. Suppose, then, a tenant for life, or for years, by demise of the predecessor, commits waste during the vacancy, the successor shall have the action for this waste, though he had nothing at all in the land at the time the waste was done (*d*).

I shall be told, perhaps, that that is by particular statute, and therefore is no proof of the reason of the common law; and that the Statute of Marlebridge (*e*), against depredations upon the possessions of ecclesiastical persons, gave this remedy; and for this some countenance may be drawn from what Fitzherbert says, in the place cited.

But I beg leave to deny this to be law, and to hold, that that statute does not include bishops or their possessions; and of this

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(*b*) 5 Co. 76 b.
(*c*) Co. Litt. 356 a.
(*d*) Co. Litt. 356; Fitzh. N. B. 112.
(*e*) 52 Hen. 3, c. 29. Repealed as to E. Stat. Law Rev. Act, 1863; as to I. Stat. Law (I.) Rev. Act, 1872.

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opinion is Lord Coke, in his reading of the Statute of Marlebridge (*f*). His words are: "This Act extendeth only to abbots, priors, and other prelates, that be religious and regular, and not to bishops and other ecclesiastical persons, being secular; for in the second clause of this Act, *hujus modi religiosorum* is mentioned for the distinction between religious and secular; and the reason of this diversity is, that the abbots and priors, and other religious persons, are dead persons in law, and have capacity to have lands and goods only for the use and benefit of the house, and cannot make any testament; and therefore, the church, or religious house, is holden always one; in respect whereof, the succeeding abbot shall have an assize for disseisin done in the lifetime of his predecessor, and an action of waste for waste done in his predecessor's time; but so shall not a bishop, dean, archdeacon, or the like, who are ecclesiastical persons secular, because the church, by their death, hath an alteration, and is not always one."

That the opinion of Lord Coke was, that the action is not founded on the Statute of Marlebridge (*g*), is clear by other cases; for if bishops were within the statute, then they as well as abbots might have an action of waste for waste done, not in time of vacancy, but in their predecessor's time, which, as to ecclesiastical persons regular, is clearly within the statute; but it hath been settled that they cannot (*h*). From hence I infer, that this remedy was given, not by particular statute, but by the policy of the law, which would not permit an estate, which it allowed to be created, and whilst it was in *gremio legis*, as it were, to be destroyed or stript without giving a remedy to punish it, though by an extension of its common principles.

But still I must resort back to this, that if there was not so much countenance from the reason of some cases at the common law for this opinion, yet that would not govern this case, which depends on principles of equity; and equity hath always gone further to restrain waste and destruction than the common law hath done.

(*f*) 52 Hen. 3; 2 Inst. 151.
(*g*) 52 Hen. 3, c. 29.
(*h*) 39 Edw. 3, 15; 2 Hen. 4, 2; 2 Roll. Abr. 8, 24; Pla. 3, 4, 5, 6, 7.

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Therefore, the case already put, of an intermediate remainder for life, though the law allows no action of waste, this Court sustains a bill for an injunction, and this *ab antiquo*, according to the case in Moore, 554; where Lord Ellesmere says, he had seen a precedent for it so long ago as in the reign of Richard II (*i*), and many cases in practice.

And although the tenant in tail, after possibility of issue extinct, is at law dispunishable for waste, by reason of the inheritance, which was once in him, yet Lord Chancellor Nottingham was clearly of opinion, to grant an injunction to restrain a tenant in tail from committing waste in timber, which grew for the ornament of a mansion-house (*k*). In the same book there is the like case, before Sir John Trevor, M.R. (*l*); and this hath been followed since, by several cases of tenants for life *without impeachment of waste generally*, who have attempted to pull down a mansion-house, or to cut down timber growing for shelter or ornament of the mansion-house.

But this Court hath gone still further, and in the case of *Abraham* v. *Bubb*, Lord Nottingham cites the case of a Lady Evelyn, where there was tenant for life, remainder to the first son for life without impeachment of waste, with remainders over; and the first son, by leave of the lessee of the tenant for life, came upon the land and felled timber, which was not under the description of trees growing for shelter or ornament; and this Court granted an injunction against him, though no action whatsoever could be maintained at law: and upon the same ground I did the like in the case of *Fleming* against the late *Bishop of Carlisle and others*. There the bishop was tenant for life, remainder to his eldest son for life, *without impeachment of waste*, with remainder over in fee; the eldest son, by permission of the bishop, entered and began to cut down the timber, and the reversioner in fee brought a bill for an injunction, and I granted it, because he was not to be allowed to exercise his power of doing waste by anticipation, and before the estate to which this privilege was annexed came into possession;

(*i*) 1 Roll. Abr. 377; *Tracy* v. *T.*, 1 Vern. 23.
(*k*) *Abraham* v. *Bubb*, 2 Freem. 53; 2 Show. 69; S. C. 2 Eq. Ca. Abr. 757.
(*l*) 2 Freem. 278, Hil. 1704.

and this in reason comes near to the case of the late Sir John Hind Cotton's bringing himself, by collusion, into possession of the timber before his time.

The case of *Robinson* v. *Litton* (*m*) went still further than the common law: that cause was heard in this Court, December 12, 1744. There was a devise to the defendant and his heirs; and if he should die before the age of twenty-one years, leaving no issue, then to the testator's first, etc., daughters in tail, remainder to the testator's own right heirs; but if the defendant should live to attain the age of twenty-one years, then the estate should be sold and the money to be applied for the benefit of the testator's daughters. The defendant being under the age of twenty-one years, began to commit waste, and the daughters brought their bill in this case; and though the defendant had the inheritance in him in point of law at the time, yet by reason of the contingent executory limitation, the Court granted an injunction, and at the hearing of the cause, after its being fully argued, made that injunction perpetual.

Third Objection.—That, suppose a bill might have been maintained by the trustees to support the contingent remainders, to stay this waste before it was committed, yet it will not follow from thence, that after that is over, a bill may now be brought for an account, and that the jurisdiction of this Court to decree an account of the value of the timber, is only incident and concomitant to the jurisdiction of granting an injunction.

Answer.—It is true that the general run of the cases is of bills for an injunction, because that is a preventive suit, and the most remedial to the party: but that affords no conclusive argument that a bill for such an account cannot be maintained without praying an injunction.

In support of this notion, only one case was cited—*Jesus College* v. *Bloome* (*n*), which was before me November 13, 1745. The lessee of the college had, during his lease, cut down some trees, and taken away some stones and materials of the premises, and converted them to his own use; the term was expired, and

(*m*) 3 Atk. 209; 2 Eq. Ca. Abr. 528.

(*n*) 3 Atk. 262; Amb. 54, where the reports of the case differ from the account of it given here by Lord Hardwicke, and the bill was, it seems, dismissed with costs.

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a new lease granted to a stranger, and the college brought their bill for an account and satisfaction of the waste. At the hearing of the cause, I doubted (amongst other things) whether such a bill in equity was maintainable, without praying an injunction to stay the waste, and it stood over to another day, to produce precedents; none were produced, and the bill was dismissed, without costs; but the point was not absolutely determined, nor was that the only ground of the dismission: but I was of opinion, that, at the utmost, it was in the discretion of the Court, and if the college had a right, they might clearly bring an action of trover at common law; and it being a matter of small value, I did not think fit to countenance such bills in this Court, after the lease expired. This is widely different from the present case in all its circumstances, and particularly that it is admitted that *the plaintiff here, though greatly damnified, can have no remedy at law*, which is a substantial difference.

Fourth Objection.—But it was objected further, that if such a bill for an account, not incident to an injunction, can be maintained, yet there is no precedent of decreeing the value of the timber to be secured and laid out in land for the benefit of the contingent remainderman; and this could not be done, even upon a bill by trustees to preserve contingent remainders before the waste completed; and for this the case of *Whitfield* v. *Bewit* (*o*) was relied on.

Answer.—This objection hath been already answered in the course of my argument, and to that I will refer without repeating it. The sound distinction between this case and that of *Whitfield* v. *Bewit* is *the collusion and covin between the tenant for years and the remote remainderman in fee*; whereas in that case, the remainderman in fee was entirely innocent, and had done nothing contrary to conscience to come at his legal property in the timber when severed: but it was solely the tortious act of the tenant for life; and I think I have proved that in some cases of destruction of contingent remainders, or alienations of part of the inheritance, to the prejudice of the contingent

(*o*) 2 P. W. 240.

remainderman, such an account and compensation must be decreed, in order to attain adequate justice.

On this I rely for an answer to that objection.

Fifth Objection.—That the demand is made after a great length of time, and that ought to be allowed as a bar in this Court.

Answer.—But though there is a length of time in the case, no statute of limitations stands in the way, nor is there any *laches* to be imputed to the plaintiff.

It is true the articles were entered into in 1714, and the timber was felled soon after; but the plaintiff was not born till May, 1724: his father lived till 1727, and he did not attain the age of twenty-one years till May, 1745; and this bill was brought in May, 1748, within three years after his coming of age.

As to the inconvenience objected to arise from this length of time, how is that inconvenience greater than the common law's allowing an action of waste to be brought by a remainderman in fee, after the death of a mesne remainderman for life, for waste done in his lifetime? That life may have lasted forty, fifty, or sixty years afterwards, and yet this the law allows. Besides, in this case the plaintiff submits to accept the value on the foot of the defendant's answer, which avoids the difficulty of an account.

Sixth Objection.—Another objection hath occurred to me in considering this case, which was not mentioned at the bar, and that is, that by suffering a recovery in 1745, the plaintiff hath altered the state of the remainder, which was in him by the will, and gained a new use; that this might have been a bar to a proper action of waste at law, for waste done precedent, and, by parity of reason, ought to take away his remedy in this Court.

Answer.—This objection, though it may strike at first, yet receives a clear answer.

I admit that in Co. Litt. 53 b, Lord Coke lays it down, that, after waste done, there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for, if after the waste done,

the reversioner granteth it over, though he taketh back the whole estate, yet is the waste dispunishable. So, if A grant the reversion to the use of himself and his wife, and of his heirs, yet the waste is dispunishable; and so of the like, because the estate of the reversion continueth not, but is altered, and, consequently, the action of waste, for waste done before, which consists in privity, is gone.

This is undoubtedly law; but the difference is, here is no use or new estate created. The use of this recovery is declared only to the plaintiff himself and his heirs, whereby his estate tail is turned into an estate in fee, which, in *Lord Derwentwater's Case*, before the Judges and delegates, Hil., 6 Geo. 1, was solemnly determined to be the same use, and the same fee, only delivered from the fetters and restraint laid upon it by the Statute de Donis; and this was agreeable to the resolution of the case of *Abbot* v. *Burton* (*p*), and to the case of *Martin* ex dem. *Tregonwell* v. *Strachan*, adjudged in B. R. (*q*), and affirmed in the House of Lords in February, 1743 (*r*).

But I go further still, and hold that, even in cases where the state of the reversion would be so altered by the act of the reversioner as to preclude his proper action of waste, yet still his property, in the timber severed before, would remain, and he might maintain trover for it, which is sufficient to take off the force of this objection as applied to the present case.

Seventh Objection.—I shall mention but one objection more, and that arises recently from the present state of the cause, as it comes before the Court upon a bill of revivor against the representative of Sir John Hind Cotton, the original defendant: that an action of waste dies with the person; and, if the plaintiff had in other respects been in a condition to maintain waste against Sir John Hind Cotton, the party to the articles, it had been gone by his death; that the law is the same as to the action of trover: *pari ratione* he hath lost his equitable remedy for the waste.

Answer.—I admit the law to be clear, that an action of waste

(*p*) 2 Salk. 590; 11 Mod. 181; Com. Rep. 160. Trin., 7 Anne, C. B.
(*q*) Hil., 16 Geo. 2.
(*r*) 2 Stra. 1179; 4 Bro. P. C. 486.

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dies with the person; and I also admit, that I cannot find any authority or precedent for maintaining an action of trover against an executor upon a conversion by the testator in his lifetime: though, as to this point I give no opinion; for thus much is certain, that an action of trover will lie for an executor, upon a conversion by the defendant in the lifetime of the plaintiff's testator, for which there are many authorities; and it seems difficult to be reconciled to reason and justice, that these remedies should not be mutual, even at the common law.

However, I will admit, for argument's sake, that the action of trover for the timber was, as well as the strict action of waste would have been, gone, at the common law; but, notwithstanding that, I am of opinion that the plaintiff is entitled to the same relief in this Court.

There have been several determinations in this Court, where, by force of the rule, *actio personalis moritur cum persona*, the remedy at law hath been extinguished (*s*): yet equity hath given the like satisfaction.

It is well known that, at common law, before the statute of 30 Car. 2, c. 7 (*t*), and 4 & 5 Will. & Mary, c. 24, s. 12 (*u*), no action or remedy could be had against the executor of an executor for a devastavit committed by the first executor of the goods of the original testator. But, notwithstanding this, equity did not scruple to get the better of this artificial maxim, and decreed an account and satisfaction against the representatives of such a wasting executor out of his assets.

This is laid down as a rule in equity by Nottingham, L.C., in the case of *Price* v. *Morgan* (*x*). His words are, "Although by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here, and the common law will come to it at last; and, therefore, whatever estate of the original testator is come to the wasting executor's representative, or to the hands of the wasting executor, which the latter wasted, the personal estate of such wasting executor, in the hands of his executor, shall answer."

(*s*) See now 3 & 4 Will. 4, c. 42, s. 2.
(*t*) Rep. in part, Stat. Law Rev. Act, 1863.
(*u*) Rep. Stat. Law Rev. Act, 1867.
(*x*) 2 Ch. Cas. 215.

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When Lord Nottingham said the common law would come to it at last, he was a true prophet; for this case was decided in the 28th of Car. 2; and the law was altered by Act of Parliament in the 30th of Car. 2.

In 1 Ch. Cas. 121, *Eton College* v. *Beauchamp and Biggs* (*y*), the provost and fellows of Eton were possessed of a rent or pension of £1 14s. per annum, granted by King Henry VI to that college, issuing out of the lands. The defendant, Biggs, was executor of the tenant, and the bill was brought for a satisfaction of the arrears of rent incurred in his testator's lifetime, and suggested that the college did not know the lands out of which the rents were issuable, and so could not distrain; and, though the person of the terre-tenant was not chargeable with the rent at law, but only the land by way of distress; yet, forasmuch as the testatrix held the land, and did not pay the rent, it was said, that thereby the testatrix's personal estate was augmented, and therefore the Master of the Rolls, Sir Harbottle Grimstone, decreed the executor to pay the arrears, as far as he had assets of the testatrix.

In 2 Mod. 293, *Anon. Error* (*z*), in the Exchequer Chamber, before the Lord Chancellor and Lord Treasurer, assisted by the two Chief Justices, the case was, the plaintiff had declared against the defendant as executor of Edward Nicholls, who was executor of the debtor. The defendant pleaded, that the said debtor died intestate, and administration of his goods was granted to a stranger, *absque hoc* that Edward Nicholls was ever executor; but did not say by his plea, "or ever administered as executor"; for, in truth, he was executor *de son tort*. The plaintiff replied, that before the administration granted to the stranger, Edward Nicholls possessed himself of divers goods of the debtor, and made the defendant executor, and died; and to this replication the defendant demurred. Judgment was given for the plaintiff, in the Court of Exchequer, but reversed in the Exchequer Chamber: for an executor of an executor *de son tort* is not liable at law; though Nottingham, L.C., said he would help the plaintiff in equity.

(*y*) S. C. 1 Eq. Ca. Abr. 32.
(*z*) Hil., 29 Car. 2.

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These authorities would be sufficient to establish the point I am now upon. But I go further, and hold, *that in all cases of fraud the remedy doth not die with the person*; but the same relief shall be had against an executor out of the assets of his testator, as ought to have been given against the testator himself. For, as *equity disclaims the maxim, that a personal remedy dies with the person wherever the demand is proper for that jurisdiction*, this Court will follow the estate of the party liable to that demand, and out of that decree satisfaction (*a*). Now, collusion between two persons, to the prejudice and loss of a third, is, in the eye of the Court, the same as a fraud; and you have observed, that one principal ground of the judgment of the Court in this case is collusion appearing upon the face of the articles set forth in the answer.

I have now gone through the arguments and objections arising upon the particular case, and the authorities of law and equity.

One general argument remains, of which the counsel on both sides did in their turns endeavour to avail themselves—I mean the argument *ab inconvenienti*, which undoubtedly is of weight, especially in a new case.

On the side of the defendants were urged the inconveniences that would arise from making such a precedent, which would tend to lock up the timber of the kingdom from coming to market; would create questions between possessors of estates and contingent remaindermen, springing up at a great length of time; and there would be no knowing where to stop.

But let these inconveniences be compared with the inconveniences that must follow, on the other hand, from laying it down that a contingent remainderman cannot possibly have any remedy in such a case—I say, let them be compared, and the former will weigh nothing, in the opposite scale, against the latter.

Thus far the law allows settlements of estates to go, and no further; and it hath been found to be a convenient medium between perpetuities and too flux and unstable a condition of things. Most of the family estates in this kingdom are under

(*a*) See *Phillips* v. *Homfray*, 24 Ch. D. 439, 473.

such settlements; and it frequently happens that the first remainderman of the inheritance vested is a remote relation—remote in blood, and remote in the prospect of succession, perhaps after fifty years' contingent limitation of that inheritance.

If what has been done in this case should be determined to be done impunè, without any possible recompense in a Court of equity, what havock would it make, and what a licence would be proclaimed! Every remainderman in fee, though after ever so many contingent limitations, might, by collusion with the tenant for life, or years in possession, or perhaps of his under-tenant, strip the estate, and convert the value of it to their own use. Suppose an estate in the great timber counties of England, in the north, or in Cornwall, where the principal value may consist in timber or mines, all that value may be exhausted and dissipated before a first son is born; and when he is born, he may find nothing but the shell of what was intended for a lasting support of a family of honour.

It will be no answer to this, to say the trustees to preserve contingent remainders may bring a bill for an injunction to stop this mischief; the mischief may be completely executed before they know of it, nay, possibly before they can know whether they are trustees or not; for it most frequently happens, that trustees to preserve contingent uses are inserted in settlements and wills without their being made acquainted with it.

From hence it is evident that this will be but a shadow of a remedy, unless the Court goes further, and builds a more adequate relief upon the same principles.

And here I cannot help adding, that this becomes of the greater importance, from the practice and abuses of the times into which we are fallen, when so many new inventions and contrivances daily show themselves in Courts of justice, to supply or to tempt, or to impose upon the extravagance and necessities of tenants for life, to the destruction of their families.

These considerations bring to my mind the last reasoning of the Judges in *Fermor's Case* (*b*), and with that I will conclude.

That resolution was quite new, and of the first impression, and was contrary to the letter of the Statute of Fines (*c*); but

(*b*) 3 Co. 79 a.

(*c*) 4 Hen. 7, c. 24.

the book says: "Lastly, the judges in this resolution did greatly respect the general mischief which would ensue if such fines, levied by practice and covin of persons who had particular interests, should bar those who had the inheritance" (*d*).

The result of the whole is, I must decree satisfaction to the plaintiff for what the late Sir John Hind Cotton received out of his assets; and if the original limitations had been still subsisting, I must have directed this money to have been laid out in lands to the same uses; but as these are now barred, and the plaintiff is tenant in fee, the money is his own.

In this, the question of interest is material, and I have considered it: the principal money is reckoned by the answer at £1,000; the cause being heard on bill and answer, and the plaintiff having at the bar prayed interest from the time it was received, in respect of the possible growth of timber.

But there being no proof, it does not appear what was the condition of the timber: whether, by the time the plaintiff's father died, in 1727, it might not have been decayed, and of little value; what might have been exhausted in repairs, or destroyed by tempests or accidents; or what young timber may have grown up in its place in the meantime; from these considerations, and as this is a new case, I do not think fit to give interest further back than the filing of the bill.

"His Lordship declared, that, on all the circumstances of the case, the plaintiff is entitled to recover satisfaction in this Court for so much value of his inheritance as the defendant's testator exhausted and received by virtue or colour of the articles entered into between him and the plaintiff's late father, who was tenant only for the term of ninety-nine years, if he should so long live; and ordered that the Master, to whom he referred it, should compute interest on the sum of £1,000, admitted by the answer of Sir John Hind Cotton, deceased, to have been received by him, from the time of filing the plaintiff's bill, after the rate of four per cent. per annum, and tax the plaintiff his costs; and that what shall be so found due to the plaintiff for the £1,000, interest and costs, be considered as a demand by simple contract on the estate of Sir John Hind Cotton, deceased, and be answered

(*d*) See 3 Co. 79 a.

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and paid to the plaintiff, by the defendants, the executors, they having admitted assets of their testator, Sir John Hind Cotton, by their answer to the bill of revivor."

NOTES (*e*).

1. Generally, p. 927.
2. Waste as regards particular persons, p. 934.
Ecclesiastical waste, p. 944.
3. " Without impeachment of waste, p. 946.
4. Equitable waste, p. 948.
5. To whom the proceeds of waste belong, p. 956.
6. Remedies in respect of waste, p. 962.

1. Generally.

The common law recognised two species of waste, Voluntary and Permissive, the former consisting in some positive act of commission, such as the cutting of timber, the latter being the omission to do something, such as the not doing of repairs whereby a house is suffered to fall into decay (*f*). The question of waste at common law can only arise as between some person entitled to a limited interest in land, not being an estate of inheritance, such as a tenant for life or years, and the person entitled to the next vested estate of inheritance.

Voluntary Waste.—The essential element in an act of voluntary waste is that it alters the nature of the thing, to the injury or destruction of the inheritance (*g*). The law of waste presents many analogies to the rules restricting the user of property by the usufructuary in the Roman law, and is to a great extent based upon the Roman law of usufruct (*h*). Usufruct is thus defined by Paulus: Ususfructus est jus alienis rebus utendi fruendi *salva rerum substantia* (*i*). No exhaustive enumeration of the acts which would constitute a violation of the condition "salva rerum substantia"

(*e*) The editor of the last edition of this work expressed his indebtedness to Mr. Bewes for his valuable book on "Waste," and also for a note of further cases furnished by Mr. Bewes on the same subject.

(*f*) See Co. Litt. 53 a; 2 Inst. 145; and see judgment of Lush, J., in *Woodhouse* v. *Walker*, 5 Q. B. D. pp. 406-7.

(*g*) *West Ham Central Charity Board* v. *East London Waterworks Co.*, [1900] 1 Ch. 624, 635. Cf. *Hyman* v. *Rose*, [1912] A. C. 623, 632.

(*h*) *Per* Bowen, L.J., in *Dashwood* v. *Magniac*, [1891] 3 Ch., at p. 362.

(*i*) Dig. vii, i, 1.

was possible in the Roman law of usufruct, nor is any such enumeration possible in our law of waste. In regard to certain well-marked classes of acts, such as the cutting of growing wood, and the working of mines and minerals, some of such acts by a limited owner have been held to be waste, and others not to be waste, with the result that certain general rules of law applicable to certain specific forms of waste have been established. The question of waste or no waste in any particular case is not, however, an abstract question depending simply upon the applicability of some general rule of law; it depends (subject to the statutory provisions mentioned later), in the case of a lease, upon the intention of those who created the relation of landlord and tenant, and, in the case of a settlement, upon the intention of the settlor. Further, in ascertaining that intention proof of local usage is admissible as illuminating an instrument, whether contract, will, or settlement *inter vivos* (*k*). Thus, though by the ordinary law as to timber, a tenant for life is not prevented from cutting beech trees, by local custom timber may include beech, but such local custom may in turn be governed by another local usage under which beech is grown and cut systematically, with the result that a tenant for life may cut according to the recognised system (*l*).

In order that an act may amount to waste there must be a real injury to the inheritance. "Those acts are not waste which are not prejudicial to the inheritance" (*m*). "The law of waste regards substance rather than technicality, and requires an act to be appreciably injurious to the inheritance before it condemns it as waste" (*n*). From very early times it was established that no action of waste lay where the damage caused by the acts complained of was trivial (*o*). The law of waste was, however, until the eighteenth century, strictly applied in the common law Courts; thus the fact that an act of a limited owner, plainly one of waste in itself, was followed by further acts by him which improved the value of the inheritance did not relieve him from liability at law for his first act (*p*).

(*k*) See *Dashwood* v. *Magniac*, [1891] 3 Ch., at pp. 352 and 366; and see *Tucker* v. *Linger*, 8 A. C. 508; *Re Trevor-Batye's Settlement*, [1912] 2 Ch. 339; and cf. *Horlick* v. *Scully*, [1927] 2 Ch. 150.

(*l*) *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

(*m*) *Per* Richardson, C.J., in *Barret* v. *B.*, Hetley, 36.

(*n*) *Per* Bowen, L.J., in *Dashwood* v. *Magniac*, *supra*, at p. 360.

(*o*) See, *e.g.*, *per* Lord Blackburn in *Doherty* v. *Allman*, 3 A. C., at p. 733; *Doe* v. *Burlington*, 5 B. & Ad. 507.

(*p*) See, *e.g.*, *Greene* v. *Cole* (1663), 2 Wm. Saunders, 644, where the pulling

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In the present law it would appear that the destruction of old buildings, followed by the erection of new buildings, would not be waste at law or in equity, unless the value of the property were diminished, or the evidence of title to it impaired by the acts which had been done (*q*). In any case of this character the question whether waste had or had not been committed would turn on whether in fact injury had been done to the inheritance. Thus the erection of dwellings on land let for agricultural purposes may amount to waste (*r*), or the alteration of premises let for the purposes of one business into premises designed for another business (*s*), or alterations in a building which entirely change its character (*t*). In cases of waste by rebuilding or alteration, the question is usually complicated by the operation of covenants, and an act, though it may lose its character of waste through its ameliorating character, may nevertheless be unlawful as a breach of covenant.

In *Doherty* v. *Allman* (*u*), the leading authority on the subject of ameliorating waste, the lessor of certain lands with buildings on them, comprised in two leases, the one granted in 1798 for 999 years, and the other granted in 1824 for 988 years, sought in 1876 to restrain the lessee from converting the buildings, which had for many years been used as corn stores, into dwelling-houses. There was no negative covenant preventing the lessee from changing the use of the premises, but there was a covenant to maintain and support the premises and improvements made in them. The alterations proposed would have much increased the value of the buildings. The Court of Appeal (Ireland) refused the injunction asked for. The House of Lords held that the Court below had made a proper exercise of its discretionary authority in refusing to grant the injunction. It is clear from the speeches of the

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down of an old brew-house, though followed by the erection of new houses bearing a greatly increased rent, was held waste; and see Coke's statement, Co. Litt. 53 a, that if a tenant build a new house it is waste.

(*q*) *Jones* v. *Chappell*, 20 Eq. 539, pp. 541, 542; *Doe* v. *Earl of Burlington*, 5 B. & Ad. 507; *Meux* v. *Cobley*, [1892] 2 Ch. 253; *Edmund* v. *Martell*, 24 T. L. R. 25.

(*r*) *Brooke* v. *Mernagh*, 23 L. R. Ir. 86 (erection of Land League huts); *Brooke* v. *Kavanagh*, 23 L. R. Ir. 97 (erection of Plan of Campaign huts); cf. *Kehoe* v. *Lansdowne*, [1893] A. C. 451.

(*s*) *Maunsell* v. *Hort*, 11 Ir. R. Eq. 478; but see *Grand Canal Co.* v. *M'Namee*, 29 L. R. Ir. 131.

(*t*) *Hyman* v. *Rose*, [1912] A. C. 623.

(*u*) 3 A. C. 709; and see *Re Macintosh and Pontypridd, etc.*, 61 L. J. Q. B. 164; *Sharp* v. *Harrison*, [1922] 1 Ch. 502.

learned lords (*x*) who took part in the decision, that they all held no legal liability for waste could be established, but their decision turned upon the fact that the case was plainly not one in which the Court should grant an injunction. The lease contained no negative covenant preventing the lessee from changing the user of the premises. Had the lease contained such a covenant, it would not have been in the discretion of the Court to refuse the injunction *on considerations of the convenience or inconvenience* of the parties, though all other considerations governing the grant of injunctions would have been operative (*y*).

If the use of a tenement is reasonable and proper, having regard to the class to which it belongs, and damage or destruction ensues from such user, it will not be waste. As for instance, where the lessee of a warehouse, built for the storage of grain, entered and erected machinery, and stored grain therein with the result that the external walls sank and bulged outwards, the Court held that the user having been reasonable and proper there was no waste (*z*).

Instances of Voluntary Waste.—It is waste to cut down trees which are timber by the common law, *e.g.*, oak, ash, and elm, or trees which are such by the custom of the country (*a*). And the cutting down of willows, beech, birch, whitethorns, etc., standing in the defence and safeguard of the house, or upholding a bank, is waste (*b*). So if the tenant convert ancient meadow (*c*) into arable, or arable into meadow or into wood, it is waste, " for it changeth not only the course of his husbandry, but the proof of his evidence " (*d*). Here, however, questions of amelioration arise and in the modern law the Court shows a reluctance to hold a beneficial change to be waste (*e*). If a lessee plough land stored

(*x*) Cairns, C., and Lords O'Hagan and Blackburn.

(*y*) See *per* Cairns, C., *Doherty* v. *Allman*, 3 A. C. 709, at p. 720; *McEacharn* v. *Colton*, [1902] A. C. 104; *Osborne* v. *Bradley*, [1903] 2 Ch. 446, 450; *Formby* v. *Barker*, [1903] 2 Ch. 539, at p. 553; *Hyman* v. *Rose*, [1912] A. C. pp. 631-2; *Achilli* v. *Tovell*, [1927] 2 Ch. 243. See now the Landlord and Tenant Act, 1927, referred to *infra*.

(*z*) *Saner* v. *Bilton*, 7 Ch. D. 815; *Manchester Bonded Warehouse Co.* v. *Carr*, 5 C. P. D. 507. Bewes, Waste, pp. 10, 11.

(*a*) *Honywood* v. *H.*, 18 Eq. p. 310; see as to timber, *infra*, in note 2.

(*b*) Co. Litt. 53 a; cf. *Hampton* v. *Hodges*, 8 V. 105; *Phillipps* v. *Smith*, 14 M. & W. 589.

(*c*) See *Goring* v. *G.*, 3 Swans. 661; *Rush* v. *Lucas*, [1910] 1 Ch. 437.

(*d*) 2 Rolle's Abr. 814; Kerr, Injunctions (6th ed.), p. 54.

(*e*) See *Meux* v. *Cobley*, [1892] 2 Ch. 253; Bewes, 135 *et seq.*; Kerr, Injunctions (6th ed.), p. 56. See now the Landlord and Tenant Act, 1927, referred to *infra*.

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with cunicles, this is not waste, unless it be a warren by charter or prescription (*f*); but if a lease be made of a warren as a rabbit warren, not as land, the lessee is perhaps precluded from ploughing or destroying it (*g*). So, also, it is waste to remove dovecotes if affixed to the freehold (*h*); to cause the pale of a lawful deer-park to become decayed whereby the deer are dispersed (*i*), or to break the banks of a fishpond so that the water and fish run out, or to break the banks of a weir (*k*).

Digging for gravel, lime, clay, brick-earth, stone or the like, or for mines of metal, coal or the like, hidden in the earth, and not open when the tenant came in, is waste, but the tenant may dig for gravel or clay for the reparation of the house (*l*).

Permissive Waste.—This is waste "by reason of omission or not doing" (*m*), as if a man permits a room to be in decay for want of plastering, so that the timber becomes putrid. And it seems that Lord Coke included in this description of waste, destruction caused by a stranger through the sufferance of the tenant (*n*). A tenant is not in general responsible for permissive waste where not followed by actual substantial damage to the premises (*o*).

Tenants at will and tenants from year to year are not responsible for such waste (*p*). Lord Coke expresses the opinion that a lessee for a term of years is liable for permissive waste (*q*), but if this ever were the law it seems that it is so no longer (*r*). A tenant for life is not liable for permissive waste (*s*). Against tenants

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(*f*) See *Moyle* v. *M.*, Owen, 66.

(*g*) *Lurting* v. *Conn*, 1 Ir. Ch. R. 273.

(*h*) *Kimpton* v. *Eve*, 2 V. & B. 349.

(*i*) Co. Litt. 53 b, and as to a lawful park, 3 Inst. 199; case of Monopolies, 11 Coke, 87 b; *Morgan* v. *Abergavenny*, 8 C. B. 768; *Ford* v. *Tynte*, 2 J. & H. 150.

(*k*) *Moyle* v. *M.*, Owen, 66.

(*l*) Co. Litt. 53 b; 2 Roll. Abr. 815, 816.

(*m*) 2 Inst. 145.

(*n*) See Bewes, Waste, pp. 214, 215.

(*o*) *Ibid.*, p. 213.

(*p*) *Countess of Shrewsbury's Case*, 5 Co. 13 a; *Torriano* v. *Young*, 6 C. & P. 8; *Leach* v. *Thomas*, 7 C. & P. 327.

(*q*) 2 Inst., p. 145; and see *per* Lush, J., in *Woodhouse* v. *Walker*, 5 Q. B. D., at pp. 406-7.

(*r*) *Gibson* v. *Wells*, 1 B. & P. N. R. 290; *Herne* v. *Benbow*, 4 Taunt. 764; *Re Cartwright*, 41 Ch. D. 532; *Woodhouse* v. *Walker*, 5 Q. B. D. p. 407; Kerr, Injunctions (6th ed.), p. 57.

(*s*) *Re Cartwright*, 41 Ch. D. 532; *secus* when the grantor or devisor imposes the liability of keeping the premises in repair upon the life tenant: *Re Cartwright* (*supra*); *Woodhouse* v. *Walker*, 5 Q. B. D. 404; *Jay* v. *J.*, [1924] 1 K. B. 826; and see *Blackmore* v. *White*, [1899] 1 Q. B. 293; *Galbraith* v. *Poynton*, [1905] 2 K. B. 258.

for life, Courts of equity have always declined to interfere with respect to permissive waste, either to prohibit or to give satisfaction (*t*). But such a tenant will not be assisted in recovering moneys expended in repairs, as it is his duty, as between himself and the remaindermen, to keep up buildings (*u*).

Liability for Waste at Law and in Equity.—Lord Coke says that before the Statute of Marlbridge (1267), 52 Hen. 3, no prohibition of waste lay against lessees for life or years, at the common law, for they come in by the act of the lessors, who might have provided, upon the making of the lease, against waste to be done (*x*). Against the tenant in dower, the tenant by curtesy, and the guardian, writs of waste lay at the common law. The Statute of Marlbridge, c. 24, made lessees (*firmarii*) liable in damages for waste, and this was followed by the Statute of Gloucester (1278), 6 Edw. 1, c. 5, which provided that a statutory writ of waste should lie against the tenant by curtesy, *or a person holding otherwise for term of life*, or for term of years, or a woman in dower (*y*). The person attainted of waste was to lose the thing which he had wasted, and was, moreover, to recompense thrice so much as the waste should be taxed at. The Statute of Marlbridge excepted from liability lessees having special licence by writing of covenant, making mention that they might commit waste. From this special licence arose the distinction between the tenant for life *sine impetitione vasti*—without impeachment of waste, and the tenant for life impeachable for waste. The tenant without impeachment was free from all legal liability for acts of waste done by him, however improvident and malicious those acts might be, and was entitled to all things severed by him (*z*). This led in the seventeenth century to the intervention of equity, which interfered to prevent the tenant without impeachment making a wanton or unconscionable exercise of his legal powers, or profiting by such acts when done by him. Through this interference there grew up the body of rules dealing in the main with the cutting of ornamental

(*t*) *Powys* v. *Blagrave*, 4 De G. M. & G. 448; *Barnes* v. *Dowling*, 44 L. T. 809; *Re Cartwright*, 41 Ch. D. 532. *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

(*u*) *Re Leigh*, L. R. 6 Ch. 887. As to the apportionment of necessary repairs between equitable tenant for life and those entitled in remainder, see *Re Hotckys*, 32 Ch. D. 408, and notes on *Ashburner* v. *Macquire*, vol. 1, *ante*.

(*x*) As to this, which became the orthodox view, see Pollock and Maitland, "History of English Law" (2nd ed.), vol. 2, p. 9.

(*y*) But see *supra*, p. 931.

(*z*) See note No. 3, *infra*, "Without Impeachment of Waste."

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timber, known as equitable waste (*a*). Apart from this interference with the legal right, equity profoundly modified the law of waste in several particulars. *First*, as to persons who could bring an action in respect of waste. The common law action could only be brought by a person entitled to a vested estate of inheritance immediately expectant on the estate or interest of the person committing waste. If an estate of freehold were interposed between the estate for life of the person committing waste and the next vested remainder in fee, the action of waste was suspended until the interposed estate determined. If the tenant for life died during the continuance of the interposed estate, the action of waste never arose. In equity, however, the remainderman in fee in such case could obtain an injunction (*b*), as could likewise a tenant for life in remainder limited after preceding limitations in tail in favour of the children of a tenant for life in possession who was committing waste (*c*). So also in the leading case waste was restrained at the instance of trustees to preserve contingent remainders. Again, equity interfered between mortgagor and mortgagee. The mortgagee in an ordinary legal mortgage has a clear legal right to commit waste, but equity, at the instance of the mortgagor, would restrain him from so doing unless his security were insufficient. On the other hand, the mortgagee could restrain the mortgagor from committing waste to the prejudice of the mortgagee (*d*). *Secondly*, as to the right to the proceeds of acts of waste. These, at common law, vested, on severance by a limited owner impeachable for waste, in the owner of the next vested estate of inheritance, who could maintain trover for them, though he might not be able to bring the action of waste owing to the interposition of some estate (*e*). In equity, however, where the waste was done with the collusion of the owner of the next vested estate, the proceeds of the wrongful acts were held subject to the limitations and trusts of the settlement as in the leading case. Equity, again, prevented the legal owner unimpeachable for waste from retaining for his own advantage the proceeds of equitable waste. *Thirdly*, equity recognised the right of an equitable tenant for life made unimpeachable

(*a*) See note No. 4, *infra*, "Equitable Waste."

(*b*) See 1 Rolle's Abr., 377, pl. 13, citing *Roswell's Case* (1618); Kerr, Injunctions (6th ed.), p. 45.

(*c*) *Perrot* v. *P.*, 3 Atk. 94.

(*d*) See note 2, *infra*.

(*e*) See *Lewis Bowles' Case*, 11 Co. 79 b.

for waste to commit waste (*f*), and also secured the rights of equitable remaindermen (*g*). *Fourthly*, equity remedied the imperfection of the common law remedies. The writ of waste, which was abolished after June 1, 1835, by 3 & 4 Will. 4, c. 27, s. 36, had long fallen into disuse, and in practice an action on the case for simple damages had become the almost invariable remedy at common law. This action could be brought by a remainderman, or reversioner for life or years, as well as by a remainderman or reversioner in fee. In equity, however, apprehended waste could be restrained by injunction, and an account could be directed (*h*).

2. Waste as Regards Particular Persons.

Tenant for Life impeachable for Waste.—A tenant for life is impeachable for waste, unless the instrument creating his estate provides to the contrary (*i*). "Whenever a settlor has not stated that a tenant for life is not impeachable for waste he is impeachable" (*k*). In this note it is proposed to consider the position of the tenant for life as to the cutting of timber and the working of mines and minerals. The questions as to what persons are entitled to the proceeds of timber cut and minerals worked are considered below in note 5.

Timber.—The question as to what is timber is determined *prima facie* by the general rule of the common law, according to which oak, ash, and elm of twenty years' standing are timber, but other trees, such as beech, birch, and maple, may be timber by force of local custom and usage. Custom may, again, modify the age at which trees become timber, or may substitute for age some other test, *e.g.*, girth. "Once arrive at the fact of what is timber, the tenant for life impeachable for waste cannot cut it down," and, on the other hand, he can cut all that is not timber (*l*). Each of the rules, (1) that the tenant cannot cut down timber, and (2) that he

(*f*) *Re Barrington*, 33 Ch. D. 523; and see *Re Lacon's Settlement*, [1911] 2 Ch. 17; and *Re Williams' Settlement*, [1922] 2 Ch. 750 (cases of legal tenant for life unimpeachable for waste) the tenant for life's right to retain damages paid in respect of waste committed by third parties.

(*g*) *Dare* v. *Hopkins*, 2 Cox, 110.

(*h*) Kerr, Injunctions (6th ed.), p. 45 *et seq.*

(*i*) *Pardoe* v. *P.*, 82 L. T. 547.

(*k*) *Per* Fry, L.J., in *Re Ridge*, 31 Ch. D. 504, at p. 507.

(*l*) See *per* Jessel, M.R., in *Honywood* v. *H.*, 18 Eq. 306, at pp. 309 and 310.

can cut down trees which are not timber, is subject to certain exceptions.

Exceptions to the First Rule.—(1) The rights of the life tenant depend upon the intention of the testator, or settlor, who created his life estate. In construing the devise or grant, local custom and the practice observed by the grantor and his predecessors in the management of the estate must be taken into consideration, and a life tenant impeachable for waste may accordingly be entitled to cut timber, provided he observe the course of cultivation and cutting (*m*). (2) Tenants for life and for years are entitled by law, as incident to their estates, unless restrained by special covenant to the contrary, to three kinds of estovers, namely, housebote of two kinds, that is, for reparation of house and for fire, ploughbote, for repair of agricultural implements, and haybote, for repair of fences. For these botes he can cut timber, but he can only cut for use and not for sale (*n*), and in cutting timber he must act reasonably. (3) Under section 89 of the Settled Land Act, 1925 (replacing section 29 of the Settled Land Act, 1882), a tenant for life may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, execute any improvement authorised by the Act, or inspect, maintain, and repair the same, and for such purposes may (*inter alia*) cut down and use timber and other trees not planted or left standing for shelter or ornament (*o*). (4) Under section 41 of the Settled Land Act, 1925 (replacing section 6 of the Settled Land Act, 1882), a tenant for life is given very wide powers of granting leases whether involving waste or not. And by section 66 of the Settled Land Act, 1925 (replacing section 35 of the Settled Land Act, 1882), where there is on the settled land timber ripe and fit for cutting, the tenant for life, though impeachable for waste, may cut the same on obtaining the consent of the trustees or an order of the Court.

Exceptions to the Second Rule.—(1) *Thinnings.* The tenant, "must not cut those trees which, being under the age of twenty years, are not timber, but which would be timber if they were over twenty years of age," for by cutting them down he commits waste,

(*m*) *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, and see *Pardoe* v. *P.*, 82 L. T. 547. The *dicta* of Sir G. Jessel, M.R., in *Honywood* v. *H.*, 18 Eq. pp. 309-310, as to "timber estates" must not be construed too widely; see the observations of Lindley, M.R., in *Dashwood* v. *Magniac*, [1891] 3 Ch. p. 357. As to "*silva cædua*," or seasonable wood, see *ib.*, judgment of Bowen, L.J., p. 363.

(*n*) See Bewes, Waste, p. 43; Kerr, Injunctions (6th ed.), pp. 50-51.

(*o*) As to the meaning of the words "planted or left standing for shelter or ornament," see *Weld-Blundell* v. *Wolseley*, [1903] 2 Ch. 664.

as he prevents the growth of the timber. He may, however, cut down timber trees under twenty years of age for the purpose of allowing the proper development and growth of other timber in the same wood or plantation, for that is not waste, but is in fact for the improvement of the estate, and not for its destruction (*p*). (2) He may not destroy germins, springs, or stools of underwood (*q*), or stub up and destroy hedges (*r*), but he is entitled to cut underwood in due course (*s*); and willows, leaving the stools or butts (*t*), and he may fell fir trees under twenty years of age for the purpose of thinning them (*u*). (3) He may not cut down trees planted or left standing for ornament or shelter (*x*). (4) By section 88, subsection 2 of the Settled Land Act, 1925 (replacing section 28, subsection 2 of the Settled Land Act, 1882), the tenant for life, or any of his successors, are not to cut down, except in proper thinning, any trees planted as an improvement under the Act.

Mines and Minerals (*y*).—Minerals, like timber, are a part of the inheritance, and (apart from statute) the tenant for life impeachable for waste has *prima facie* no right to get or work the same (*z*). Lord Coke says (*a*), " digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of metal, coal, or the like, hidden in the earth and *not open* when the tenant came in, is waste (*b*); but the tenant may dig for gravel or clay for the reparation of the house, as well as he may take convenient timber trees. The law has long recognised the distinction between the ' open ' and ' unopened ' mine, and in so doing has acted on the well-known principle of construction in virtue of which grants of mineral land

(*p*) *Honywood* v. *H.*, 18 Eq. 306; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306; and see *Gordon* v. *Woodford*, 27 B. 603; *Bateman* v. *Hotchkin*, 31 B. 486; *Cowley* v. *Wellesley*, 1 Eq. 656.

(*q*) See for definition of underwood, *R.* v. *Ferrybridge*, 1 B. & C. 375; and see as to cutting of underwood, *Brydges* v. *Stephens*, 6 Madd. 279; *Hole* v. *Thomas*, 7 V. 589.

(*r*) See Co. Litt. 53 a.

(*s*) *Hampton* v. *Hodges*, 8 V. 105; *Humphreys* v. *Harrison*, 1 J. & W. 581; *Cowley* v. *Wellesley*, 1 Eq. 656.

(*t*) *Phillipps* v. *Smith*, 14 M. & W. 589.

(*u*) *Pidgeley* v. *Rawling*, 2 Coll. 275; and see *Re Harrison*, 28 Ch. D. 220.

(*x*) See note 4 on " Equitable Waste," *infra*.

(*y*) On the question as to what are minerals, see *Hext* v. *Gill*, L. R. 7 Ch. 761; *Tucker* v. *Linger*, 8 A. C. 508; *Caledonian Ry.* v. *Glenboig Union Fireclay Co.*, [1911] A. C. p. 299.

(*z*) See, *Re Ridge*, 31 Ch. D. 504, 510; *Re Daniels*, [1912] 2 Ch. 90; Kerr, Injunctions (6th ed.), p. 51.

(*a*) Co. Litt. 53 b.

(*b*) See *Whitfield* v. *Bewitt*, 2 P. W. 240; *Plymouth* v. *Archer*, 1 Bro. Ch. 159; *Viner* v. *Vaughan*, 2 B. 466.

are given such force and effect as is reasonably necessary to carry out the obvious intentions of the grantor " (*c*).

The tenant for life has accordingly the right to continue the working of pits or mines previously opened (*d*), though not, perhaps, where they are old and abandoned, or where nothing more than preparations had been made for working them (*e*); or, perhaps, where the minerals had only been worked for some definite and restricted purpose, *e.g.*, for the purpose of fuel, or repair to some particular house (*f*); *secus*, where the use had been general, for use as well as sale is a perception of profits (*g*). It seems that the tenant for life could make new pits or shafts in working a mine already *open*, in order to pursue the same (*h*), or even a new vein (*i*).

So, where gravel pits had been opened in the waste of a manor, it was held that a tenant for life could open and work new pits, the whole of the gravel being deemed one mine (*k*).

So to enable a termor to work mines, where he is not given power to work mines, or to commit waste, it must be shown that the reversioner had commenced working the mines with a view to making a profit, and there is no difference in this respect between a mine and a quarry (*l*).

Under the Settled Land Act, 1925 (*m*), power is given to the tenant for life to grant mining leases for any term not exceeding one hundred years, whether involving waste or not, subject to the regulations mentioned in sections 42, 45 and 46.

By section 47 of the Settled Land Act, 1925 (re-enacting section 11 of the Settled Land Act, 1882), " Under a mining lease,

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(*c*) See judgment of Bowen, L.J., *Dashwood* v. *Magniac*, [1891] 3 Ch. p. 360.

(*d*) *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, at p. 360; *Clavering* v. *C.*, 2 P. W. 389; *Viner* v. *Vaughan*, 2 B. 466; *Campbell* v. *Wardlaw*, 8 A. C. 641; *Re Hall*, [1916] 2 Ch. p. 493.

(*e*) *Viner* v. *Vaughan*, *supra*; *Re Morgan*, [1914] 1 Ch. 910; Kerr, Injunctions (6th ed.), p. 52.

(*f*) *Elias* v. *Snowdon*, *etc.*, 4 A. C. 454, 465.

(*g*) *Ibid.*

(*h*) *Clavering* v. *C.*, 2 P. W. 388; *Elias* v. *Snowdon*, *supra*; *Chaytor* v. *Trotter*, 87 L. T. 33; and see *Re Chaytor*, [1900] 2 Ch. 804; *Re Maynard's Settled Estate*, [1899] 2 Ch. 347.

(*i*) *Spencer* v. *Scurr*, 31 B. 334; *Bagot* v. *B.*, 32 B. 509.

(*k*) *Cowley* v. *Wellesley*, 1 Eq. 656, at p. 659; and see as to a brickfield, *Miller* v. *M.*, 13 Eq. 263; cf. *Re North*, [1909] 1 Ch. 625.

(*l*) *Elias* v. *Griffith*, 8 Ch. D. 521; affirmed *sub nom. Elias* v. *Snowdon Slate Quarry Co.*, 4 A. C. 454, 463.

(*m*) Section 41. Under the Settled Land Act, 1882, s. 6, a mining lease could not be granted for longer than sixty years.

whether the mines or minerals leased are already opened or in work or not, unless a contrary intention (*n*) is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely, —*where the tenant for life is impeachable for waste* in respect of minerals (*o*), three fourth parts of the rent, *and otherwise* one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits." But where the owner of an estate agreed to lease coal to be worked by instroke from adjoining mines, and died before the leases were granted, and the same were granted, in pursuance of such agreement, by the tenant for life under his will, it was held that the tenant for life, though impeachable for waste, was entitled to the rents and royalties, this section not being applicable (*p*).

Under the Settled Land Act, 1925, a tenant for life, or a person having the powers of a tenant for life, is entitled to have the legal estate of the settled property vested in him (*q*); but this (*semble*) may not apply where by the settlement the management of the estate is given to trustees and the surplus rents are directed to be paid to a person for life (*r*). In such a case, although the person entitled to the surplus rents is not, it seems, entitled to possession of the property as of right, he may be given possession by the Court in its discretion (*s*).

Tenants in Tail.—Tenants in tail are unimpeachable for waste of any kind both at law and in equity (*t*); and equity will not interfere with an ordinary tenant in tail, who may, at his pleasure, cut down all timber for whatever purpose planted, or pull down all buildings upon his estate (*u*).

Whether an infant tenant in tail can commit equitable waste does not appear to have been actually determined. It would seem,

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(*n*) See *Re Newcastle*, 24 Ch. D. 129; *Re Rayer*, [1913] 2 Ch. 210; *Re Hanbury's Settled Estates*, [1913] 2 Ch. 357.

(*o*) *Re Ridge*, 31 Ch. D. 504.

(*p*) *Re Kemeys-Tynte*, [1892] 2 Ch. 211.

(*q*) Settled Land Act, 1925, s. 4, sub-s. 2, and s. 7, sub-s. 1, and 2nd Sched., para. 1 (2).

(*r*) Wolst. and Cherry, vol. 2, p. 85, *sed quære.*

(*s*) See *Re Atkinson*, 31 Ch. D. 577; *Re Sumner's Settled Estate*, [1911] 1 Ch. 315; *Re Wythes*, [1893] 2 Ch. 369; *Re Estate of Stamford and Warrington*, [1925] Ch. 162, 568; *Re Frewen*, [1926] Ch. 580.

(*t*) *Wyld* v. *Lewis*, 1 Atk. 432; *Jervis* v. *Bruton*, 2 Vern. 251; Bewes, p. 158; Kerr, Injunctions (6th ed.), pp. 63-4.

(*u*) See the observations of Leach, V.-C., in *Att.-Gen.* v. *Marlborough*, 3 Madd. 532.

however, that he has just as much power to do so as tenants in tail prohibited by statute from barring the entail. He has clearly, as against the remainderman, the same right to open mines (*x*), and fell timber (*y*), as a tenant in tail of full age. In *Saville* v. *S.* (*z*), an infant tenant in tail in possession, was in a very bad state of health, and not likely to live to full age, when his guardian cut down a great quantity of timber just before his death, to a very great value. The remainderman applied for an injunction, but could not prevail.

Tenants in tail, restrained by statute from barring their issue, or those in remainder with reversion to the Crown, are not, on that account, within the principle of equitable waste. "They have," said Leach, V.-C., in *Att.-Gen.* v. *Duke of Marlborough* (*a*), "all the legal rights and incidents which belong to an estate of this character, *except* where such rights and incidents are specially qualified by the provisions of the statute, and there being no qualification with respect to the right of cutting timber, they are as much the legal owners of the timber as if they were tenants in fee simple * * * No instance can be stated in which a Court of equity has ever interfered against such a tenant in tail, upon the principle of equitable waste" (*a*). In this case it was held on demurrer, that the Duke of Marlborough for the time being is, under the Act 5 Anne, c. 3, bound to maintain Blenheim House for the future residence of those to whom the succession was limited, and that the Court was bound to interfere to prevent the destruction of the house, and of the ornamental timber about it.

Tenant in Tail after Possibility of Issue Extinct.—A tenant in tail after possibility of issue extinct, although unimpeachable of waste at law (*b*), is within the principle of equitable waste, and will be restrained from committing malicious or extravagant waste, such as cutting down ornamental timber, and pulling down houses. "In a Court of law," observes Sir John Leach, "a tenant in tail after possibility of issue extinct, is, in effect, *a tenant for life without impeachment of waste*; and Courts of equity have, in the question of equitable waste, confounded him with other tenants for life without impeachment of waste, and have not entered into the distinction that he is unimpeachable of waste, not by the provision

(*x*) *Lyddal* v. *Clavering*, Amb. 371, cited in notes, Blunt's ed.
(*y*) *Saville* v. *S.*, cited in Ambler, p. 371; and see 2 Atk. 458.
(*z*) *Supra*; and see Kerr, Injunctions (6th ed.), p. 64.
(*a*) 3 Madd. pp. 536-7 and 539.
(*b*) *Lewis Bowles' Case*, 11 Rep. 79; *Williams* v. *W.*, 15 V. 419.

of the grantor, but as a legal incident to his estate " (*c*). If, however, he conveys his estate away, it is said that the grantee will be considered as a mere tenant for life (*d*).

Joint Tenants (*e*).—As each joint tenant has a right (as had each of several tenants in common, when that estate in land existed) to " enjoy as he pleases," short of actually " ousting " the others (*f*), the Court will not in general grant an injunction to restrain any of them from committing either ordinary (*g*) or equitable (*h*) waste, or from working coal mines (*i*), but it will interfere between them to prevent malicious or destructive waste; as, for instance, " against cutting saplings and any timber trees or underwood at unseasonable times " (*k*).

Under special circumstances, however, the Court has restrained a tenant in common from committing ordinary waste. Thus, in *Smallman* v. *Onions* (*l*), the parties interested were *equitable tenants* in common, and the tenant in common who was committing the waste not only was not entitled to the possession, as the legal estate was vested in a trustee, but was also insolvent and unable to pay to his co-tenants their shares of the money to be produced by the sale; Thurlow, C., granted an injunction restraining waste. So in *Twort* v. *T.* (*m*), where one of two tenants in common was in occupation of the land as tenant to the other, Eldon, C., granted an injunction restraining him from committing waste, stating expressly in the order that he was occupying as tenant to the plaintiff; and restraining him from committing any waste upon the premises, which he held as such occupying tenant. See also *Jacobs* v. *Seward* (*n*), where the lessee of one co-tenant reaped the whole crop of hay.

(*c*) *Att.-Gen.* v. *Marlborough*, 3 Madd. 538. See also, *Abrahall* v. *Bubb*, 2 Show. 69; *Anon.*, 2 Freem. 278; *Cooke* v. *Whaley*, or *Winford*, 1 Eq. Ca. Abr. 400; Settled Land Act, 1925, s. 20, sub-s. 1 (i); Goodeve, Real Property (5th ed.), p. 80.

(*d*) Co. Litt. 28 a; *Rice's Case*, 3 Leon. 241.

(*e*) The legal estate in land cannot, since 1925, be held by persons as tenants in common: Law of Property Act, 1925, s. 1, sub-s. 6.

(*f*) See *Jacobs* v. *Seward*, L. R. 5 H. L. 464, 472; *Glyn* v. *Howell*, [1909] 1 Ch. 666.

(*g*) *Goodwyn* v. *Spray*, Dick. 667; cf. *Wilkinson* v. *Haygarth*, 12 Q. B. 837; *Arthur* v. *Lamb*, 2 Dr. & Sm. 428; *Griffies* v. *G.*, 8 L. T. 758.

(*h*) *Hole* v. *Thomas*, 7 V. 589; *Twort* v. *T.*, 16 V. 132.

(*i*) *Job.* v. *Potton*, 20 Eq. 84; and see *Glyn* v. *Howell*, [1909] 1 Ch. 666.

(*k*) *Hole* v. *Thomas*, 7 V. 589, 590; 6 R. R. 195; see also *Clegg* v. *C.*, 3 Gif. 322, 336; *Martyn* v. *Knowllys*, 8 T. R. 145; Kerr, Injunctions (6th ed.), p. 63.

(*l*) 3 Bro. Ch. 621.

(*m*) 16 V. 132.

(*n*) L. R. 4 C. P. 328, affirmed, L. R. 5 H. L. 464.

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Landlord and Tenant.—Generally speaking, and in the absence of any exception or agreement to the contrary, the lessee has the fruit, mast, shade and loppings of trees, and the inheritance is in the lessor (*o*).

No user of a tenement which is reasonable and proper, having regard to the class to which it belongs, is waste; the tenant is entitled to assume that it is fit to be used for the purposes for which it is let, and, in the *absence of agreement* to that effect, a tenant is not liable for the destruction of the property, if such destruction is due to a business-like user of it for the purpose for which it was intended (*p*). Nor is a tenant liable as for waste for fair wear and tear (*q*), or for accidental damage not resulting from negligence (*r*). But if he maliciously injure a building, or sever fixtures from the freehold, he will be guilty of a misdemeanour (*s*).

Liberty to a tenant to build, with a proviso that he shall repair and maintain present and future erections, does not prevent him, in the absence of a negative covenant, from pulling down and rebuilding (*t*).

A ground landlord may have an injunction to stay waste against an under-lessee who holds by lease from the original lessee (*u*).

As to the proper mode of estimating damages where a tenant has covenanted not to commit waste, see *Whitham* v. *Kershaw* (*x*).

In *Meux* v. *Cobley* (*y*), under an agricultural lease of a farm near London, the tenant covenanted to yield up the premises at the end of the term, together with all fixtures and "improvements" fixed, etc., during the term, and cultivate "in a good, proper, and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood." The tenant put up glass-houses for the production of hothouse produce. The lessor claimed an injunction restraining the lessee from converting the

(*o*) *Liford's Case*, 11 Co. 46 b.

(*p*) Cf. *Saner* v. *Bilton*, 7 Ch. D. 815; *Manchester Bonded, etc.* v. *Carr*, 5 C. P. D. 507; *Doherty* v. *Allman*, 3 A. C. 709.

(*q*) *Torriano* v. *Young*, 6 C. & P. 8; but see *Davies* v. *D.*, 38 Ch. D. 499.

(*r*) *White* v. *McCann*, 1 Ir. C. L. R. 205; *Nugent* v. *Cuthbert*, Sugden, Real Property, p. 475.

(*s*) Malicious Injuries to Property Act, 1861 (24 & 25 Vict. c. 97), s. 13; see Bewes, 258.

(*t*) *Re McIntosh*, 61 L. J. Q. B. 164.

(*u*) *Farrant* v. *Lovel*, 3 Atk. 723.

(*x*) 16 Q. B. D. 613; and see *Conquest* v. *Ebbetts*, [1896] A. C. 490.

(*y*) [1892] 2 Ch. 253.

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farm into a market garden, alleging breach of covenant and waste. It was proved that the inheritance was not damaged, but benefited by what the lessee had done, and the action was dismissed by Kekewich, J., with costs (*z*); and the learned Judge expressed an opinion that the Agricultural Holdings Act, 1883, goes a long way towards getting rid of some of the old common law doctrines as to waste (*a*). The Agricultural Holdings Act, 1883, has been long since repealed, and by later statutes the rights of tenants of agricultural holdings have been greatly enlarged, with the result that acts which at common law would be waste are authorised by statute. Section 30 of the Agricultural Holdings Act, 1923 (which is a consolidating Act), gives the tenant of such a holding complete freedom as to the system of cropping of arable land, notwithstanding any contract or any custom of the country. Moreover, the Act gives a tenant the right not merely to make improvements on his holding, but to claim compensation in respect of the same. It must also be borne in mind that by the Landlord and Tenant Act, 1927, a tenant of a holding used for trade or business purposes (not being an agricultural holding and not being premises comprised in a mining lease) is entitled (subject as in the Act mentioned) to make alterations in the nature of improvements to his holding and to claim compensation therefor.

Infants.—An injunction to protect the estate of an infant *en ventre sa mère* may be granted (*b*). By the Settled Land Act, 1925, s. 1, sub-s. 1 (ii) (d), where, under any instrument, land stands limited to an infant for an estate in fee simple or for a term of years absolute, it is settled land within the meaning of the Act; and by section 102 provision is made for the management of land by trustees, during the minority of a person for the time being entitled in possession, with power for the trustees to fell timber and open mines; but so that where the infant is impeachable for waste the trustees are not to commit waste, and are to cut timber subject to the same restrictions as those subject to which the infant, if of full age, could cut the same.

Lunatics.—The committee of the estate of the lunatic is the proper person to take any proceedings that may be necessary to protect the estate, but he should obtain, before doing so, the

(*z*) Following *Jones* v. *Chappell*, 20 Eq. 539; *Doherty* v. *Allman*, 3 A. C. 709; *Hyman* v. *Rose*, [1912] A. C. 623.

(*a*) [1892] 2 Ch. p. 264. And see Agricultural Holdings Act, 1906, s. 3.

(*b*) *Lutterell's Case*, cited Pr. Ch. 50; *Robinson* v. *Litton*, 3 Atk. 209.

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sanction of a Judge in lunacy (*c*). And the Court will do what is fit and proper for the management of the estate, as regards timber, mines, repairs, etc. (*d*).

Mortgagor and Mortgagee.—In interfering to restrain acts in the nature of waste (*e*) committed by a mortgagor or mortgagee, equity did not act upon the principles governing the common law of waste. It interfered in order that the contract between the mortgagor and mortgagee might be fairly carried out (*f*), not in order that the inheritance might be protected against the wrongful acts of a limited owner. Thus in *Usborne* v. *U.* (*g*), a tenant in fee simple, who, after mortgaging land by way of demise had remained in possession and had cut timber, was restrained by injunction from cutting more. Equity only interfered against the mortgagor, when the security by his acts might be so reduced as to render it inadequate (*h*).

If it be proved that by the cutting of timber or the opening and working of mines the security is or would be made insufficient, a mortgagor may be restrained from these acts (*i*), for he will not be allowed to prejudice the incumbrance. There is no abstract right in the mortgagee to restrain the mortgagor from cutting timber or working mines. "It must be shown to the Court that the acts complained of substantially impair the value which was the basis of the contract between the parties at the time it was entered into" (*k*).

A mortgagee in possession is not allowed to commit waste, unless it appears that his security is insufficient (*l*). In that case he is allowed to make the most of the property, but at his own risk (*m*). Under section 101, sub-s. 1 (iv) of the Law of Property Act, 1925 (re-enacting section 19, sub-section 1 (iv) of the Conveyancing Act, 1881), a mortgagee in possession has power to cut and sell timber and other trees ripe for cutting and not planted

(*c*) Daniell, Ch. Pr. (8th ed.), pp. 118, 119.

(*d*) The Lunacy Act, 1890, ss. 117, 118, 120, 123. The Settled Land Act, 1925, s. 28.

(*e*) See *per* Romilly, M.R., in *Millett* v. *Davey*, 31 B. 470, at p. 475; Kerr, Injunctions (6th ed.), p. 66.

(*f*) See, *e.g.*, *Farrant* v. *Lovel*, 3 Atk. 723; *King* v. *Smith*, 2 Ha. 239.

(*g*) Dick. 75.

(*h*) See note to *Hampton* v. *Hodges*, 8 V. 105; Kerr, Injunctions, *supra*.

(*i*) *Harper* v. *Aplin*, 54 L. T. 383; and see *Blaney* v. *Mahon*, 2 Eq. Cas. Abr. 758; *Usborne* v. *U.*, *supra*; *Farrant* v. *Lovel*, *supra*; *Hampton* v. *Hodges*, *supra*; *Humphreys* v. *Harrison*, 1 J. & W. 581; *King* v. *Smith*, 2 Ha. 239.

(*k*) *Per* Wigram, V.-C., in *King* v. *Smith*, 2 Ha. p. 244.

(*l*) *Withrington* v. *Banks*, Select Cas. 30, fol. ed.

(*m*) *Millett* v. *Davey*, 31 B. 470; and see *Harper* v. *Aplin*, 54 L. T. 383.

or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the date of the contract.

Rent-charge.—In *Sandeman* v. *Rushden* (*n*) it was held that the owner of a rent-charge was not in the position of a mortgagee, and therefore could not obtain an injunction restraining waste by the owner of the land out of which the rent-charge issued. In that case the rent-charge was not in arrear, but the owner threatened to sell certain machinery, erected on the land in pursuance of covenants contained in the deed creating the rent-charge, which the grantor of the charge was bound to maintain. It is submitted that, though the decision may have been correct, yet the grounds assigned for it are not very satisfactory. They were in effect that the owner of a rent-charge had no common law remedy for waste, and that he was not a mortgagee. The common law of waste has, however, as above pointed out, no application in determining the action of equity in its interference with either mortgagor or mortgagee—equity acted independently of the position of the parties at common law. In interfering in favour of the mortgagee equity was merely applying a general principle, under which it had safeguarded the interests in land of many persons who received no protection at common law (*o*). It is difficult to see why this principle, applicable where a mortgage security is imperilled, should not be applied in favour of the owner of a rent-charge, under circumstances in which his charge is endangered.

Executory Devise.—It seems now to be settled that a tenant in fee, subject to an executory devise over, is in the same position in equity as a tenant for life, without impeachment for waste, *i.e.*, he is dispunishable of legal, but impeachable of equitable waste (*p*).

Ecclesiastical Waste.—A rector or vicar is in the same position as an ordinary tenant for life (*q*) and has no right to fell timber except for necessary repairs to the vicarage-house, buildings, and premises (*r*), neither can he commit waste for the purpose of making

(*n*) 61 L. J. Ch. 136.

(*o*) See, *e.g.*, Lord Hardwicke's judgment in *Farrant* v. *Lovel*, 3 Atk. 723.

(*p*) *Turner* v. *Wright* 2 De G. F. & J. 234, 246; *Re Hanbury's Settled Estates*, [1913] 2 Ch. 357.

(*q*) See, *e.g.*, *Huntley* v. *Russell*, 13 Q. B. 572, at p. 588. Cf. *St. Albans* (*Duke of*) v. *Skipwith*, *infra*; and see as to the effect of the statutes of Elizabeth, 13 Eliz. c. 10; 13 Eliz. c. 20; 14 Eliz. c. 11; 14 Eliz. c. 14; *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552, at p. 562.

(*r*) *Strachy* v. *Francis*, 2 Atk. 217; *Marlborough* (*Duke of*) v. *St. John*, 5 De G. & Sm. 174.

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a general repairing fund (*s*). He may, however, perhaps, have a right to dispose of timber, and apply the proceeds in getting some other timber for repairs at a more convenient place (*t*).

And it seems that not only may the patron of a living proceed against a rector or vicar for an injunction to restrain the improper felling of timber, but notwithstanding the remarks in *Knight* v. *Mosely* (*u*) and *Holden* v. *Weekes* (*x*), he may proceed against either of them for an account of the receipts from timber improperly felled, in order that the profits may be invested for the benefit of the advowson (*y*); at any rate, it is clear that where the timber has been improperly felled, but not sold, by the rector or vicar, the patron may obtain an order from the Court that the timber may be sold, and the proceeds brought into Court (*z*).

And the ordinary may take proceedings to prevent waste by collusion between the patron and the incumbent (*a*).

Dilapidations.—An incumbent is bound to maintain the parsonage and chancel in good and substantial repair, but is not bound to do merely ornamental repairs, and each incumbent has a remedy against the prior incumbent or his representatives for default in this respect (*b*).

Mines, etc.—An incumbent cannot open and work mines (*c*), even with the consent of patron and ordinary; the consent of the Ecclesiastical Commissioners is necessary (*d*). Further, an incumbent cannot lawfully continue or authorise a tenant to work mines in the glebe land which have been unlawfully opened (*e*), but he may work mines already lawfully open (*f*).

Cultivation of Glebe.—The parson or vicar is not entitled to use his glebe as an absolute owner might do, but it has been suggested that he is in a somewhat better position than a tenant for life or a

(*s*) *Sowerby* v. *Fryer*, 8 Eq. 417, 422.

(*t*) *Ibid.* And see *Wither* v. *Dean of Winchester*, 3 Mer. 421, 426; *Knight* v. *Mosely*, Amb. 176.

(*u*) Amb. 176.

(*x*) 1 John. & H. 278.

(*y*) *Sowerby* v. *Fryer*, 8 Eq. 423.

(*z*) *Ibid.*

(*a*) *Holden* v. *Weekes*, 1 John. & H. 278.

(*b*) *Wise* v. *Metcalfe*, 10 B. & C. 299; *Bunbury* v. *Hewson*, 3 Exch. 558; *Percival* v. *Cooke*, 2 C. & P. 460; Bewes, Waste, 323, 324.

(*c*) *Knight* v. *Mosely*, *supra.*

(*d*) *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552; Kerr, Injunctions (6th ed.), p. 70.

(*e*) *Ibid.*, following *Huntley* v. *Russell*, 13 Q. B. 572, 591; *Bartlett* v. *Phillips*, 4 De G. & J. 421.

(*f*) *Knight* v. *Mosely*, *supra; Bewes*, p. 329.

lessee for years (*g*). The Court will, at the instance of the patron, restrain him from waste (*g*).

Injunction.—The bishop or patron, the Ecclesiastical Commissioners (*h*) or churchwardens, may obtain an injunction against waste by the incumbent or others (*i*). Possibly where the Ecclesiastical Courts have full jurisdiction, the High Court may decline to interfere; it will, at all events, decline to grant a mandatory injunction in cases in which a faculty might be obtained confirming the very act which the Court is asked to restrain (*k*).

Account.—It is laid down in *Knight* v. *Mosely*, *supra*, and *Holden* v. *Weekes*, *supra*, that a patron cannot file a bill for an account, but James, V.-C., in *Sowerby* v. *Fryer*, *supra*, said that doctrine always seemed to him unintelligible; and it is probable that such relief would now be granted (*l*).

3. "Without Impeachment of Waste."

The "special licence" mentioned in the Statute of Marlbridge (*m*) is commonly expressed by this phrase (*n*). The use of these words not only exempts a tenant for life from the penalties of the statutes of Marlbridge and Gloucester (*nn*); but also, as was determined in *Lewis Bowles' Case* (*o*), gives such a tenant as great a power to do waste and to convert it at his pleasure as a tenant in tail has. But he must execute this power during the privity of his estate and when his estate is in possession (*p*). In general, therefore, except under particular circumstances, as, for instance, where the exemption from liability to waste was made subordinate to a discretionary power in trustees to fell timber (*q*), a tenant for life

(*g*) *Per* Lord Langdale, in *St. Albans* (*Duke of*) v. *Skipwith*, 8 B. 354; Bewes, 328, where, however, the acts complained of were apparently ameliorating waste.

(*h*) *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552.

(*i*) *Marriott* v. *Tarpley*, 9 Sim. 209; *Hoskyns* v. *Featherstone*, 2 Bro. Ch. 552; *Fitzwilliam* v. *Moore*, 3 Ir. Eq. R. 615; *Cardinall* v. *Molyneux*, 4 De G. F. & J. 117; Kerr, Injunctions (6th ed.), p. 71.

(*k*) *Batten* v. *Gedye*, 41 Ch. D. 507, 517.

(*l*) See further on this subject, Phillimore's Ecclesiastical Law (ed. 1895), vol. 2, Part. 5, ch. 5.

(*m*) 52 Hen. 3, c. 24.

(*n*) *Woodhouse* v. *Walker*, 5 Q. B. D. p. 407.

(*nn*) 6 Edw. 1, st. 1, c. 5.

(*o*) 11 Rep. 79 b; Tudor's Real Property Cases.

(*p*) *Lewis Bowles' Case*, 11 Rep. 79 b; *Lady Evelyn's Case*, cited 2 Swans. 172; *Fleming* v. *F.*, cited in the principal case, 3 Atk. 756.

(*q*) *Kekewich* v. *Marker*, 3 Mac. & G. 311; and see *Briggs* v. *Oxford*, 5 De G. & Sm. 156; but cf. *Lovat* v. *Leeds*, 2 Dr. & Sm. 75; *Saville* v. *S.*, 2 Atk. 458; *Aspinwall* v. *Leigh*, 2 Vern. 218; *Bennett* v. *Wyndham*, 23 B. 251.

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without impeachment of waste could not be restrained in equity from committing ordinary waste; for that would be to determine that he should not make use of the property which the law allowed him. But, after the decision in *Lewis Bowles' Case*, several instances were considered, in which this very large power might be exercised contrary to conscience, and in an unreasonable manner, by a tenant for life; as, where *his act was to the destruction* of the thing settled, and equity interfered (*r*).

A tenant unimpeachable, being in possession, may therefore enjoy the estate to the same extent as a tenant in fee simple, save that he may not commit "equitable waste," as to which see note 4, *infra*. He may, therefore, cut timber (*s*), and even ornamental timber if it be such that the Court would have ordered to be cut (*t*), open and work mines (*u*), plough ancient meadows (*x*), and his own lessees are, as between themselves and the remaindermen, dispunishable also (*y*). The privilege is annexed to the privity of estate, and merger may destroy it; so if a lessee for years, *unimpeachable*, has the lease confirmed to him for life, he becomes chargeable for waste (*z*).

If *trustees* are made *unimpeachable for waste*, although at law they might cut timber in the same manner as a tenant for life without impeachment of waste, equity will require them to act in their trust with the same discretion as the Court itself would act (*a*).

By section 135 of the Law of Property Act, 1925 (which replaces section 25, sub-section 3 of the Judicature Act, 1873), it is provided that an equitable interest for life (*b*) without impeachment of waste, does not confer upon the tenant for life any right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating such equitable interest.

A lease granted by a tenant for life under the Settled Land Act, 1925, must not make the lessee dispunishable for waste (*c*).

(*r*) See *Aston* v. *A.*, 1 Ves. Sen. 265, and note 4, *infra*.
(*s*) *Smythe* v. *S.*, 2 Swans. 251.
(*t*) *Baker* v. *Sebright*, 13 Ch. D. 179.
(*u*) *Piers* v. *P.*, 1 Ves. Sen. 521; Bewes, 147.
(*x*) *Tracey* v. *T.*, 1 Vern. 23; *Piers* v. *P.*, 1 Ves. Sen. 521.
(*y*) *Bray* v. *Tracy*, W. Jones, 51.
(*z*) *Lewis Bowles' Case*, 11 Rep. 79 b.
(*a*) *Downshire* (*Marquis of*) v. *Sandys*, 6 V. 115.
(*b*) An equitable interest for life is here referred to.
(*c*) Section 42, sub-section 5.

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4. Equitable Waste.

As has been stated, a tenant for life without impeachment of waste (see p. 946, *supra*) had such an interest in the estate that he could do waste and convert its proceeds to his use to the same extent as a tenant in tail or in fee (*d*). This power being capable of great abuse, the Court of Chancery, at an early period, granted injunctions restraining tenants for life unimpeachable for waste from committing what is known as equitable waste (*e*). This kind of waste may be defined as an act of wanton spoliation or destruction affecting the individual character and amenities of the estate as originally settled (*f*).

A malicious intent, however, is not necessary to induce the Court to act, for the tenant has no right to alter the property, although he may think the change judicious for the family (*g*). And the Court, in order to prevent what may be an act of irremediable mischief, will restrain a tenant for life from a contemplated act which may result in such injury to the property (*h*).

In some cases there is an " exception " to the clause " without impeachment of waste." For instance, in the principal case the tenant for years was unimpeachable " excepting voluntary waste "; and Lord Hardwicke says, " the plaintiff's father was only tenant for years, punishable for *wilful* waste, and had no present right to or interest in the timber other than the mast and shade and necessary botes," thus rendering the preceding part of the clause, " without impeachment of waste," which, standing alone, would have conferred upon him the power of felling the timber, of no effect.

Lord Romilly refers to the principal case (*Garth* v. *Cotton*) as " a very strong case " (*i*). The facts in the case before Lord Romilly were briefly as follow : Sir F. Vincent, on his marriage,

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(*d*) *Lewis Bowles' Case*, 11 Rep. 79 b.

(*e*) *Abraham* v. *Bubb*, 2 Eq. Ca. Abr. 757, cited in the principal case; *Williams* v. *Day*, 2 Ch. Ca. 32; *Aston* v. *A.*, 1 Ves. Sen. 265; *Marker* v. *M.*, 9 Ha. 1; Bewes, 166; Vaizey, Settlements, 838.

(*f*) See *Aston* v. *A.*, 1 Ves. Sen. 266; *Turner* v. *Wright*, 2 De G. F. & J. 234; *Talbot* v. *Hope-Scott*, 4 K. & J. 96; *Baker* v. *Sebright*, 13 Ch. D. p. 186; Seton (7th ed.), pp. 540-1; Pollock, Torts (12th ed.), pp. 358-9.

(*g*) *Leeds* v. *Amherst*, 2 Ph. 117; Vaizey, 898.

(*h*) *Baker* v. *Sebright*, 13 Ch. D. p. 188; and see *Bubb* v. *Yelverton*, 10 Eq. 465; cf. *Talbot* v. *Hope-Scott*, 4 K. & J. 96.

(*i*) *Vincent* v. *Spicer*, 22 B. 380, 385.

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settled his estate on himself for life, " without impeachment for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses or buildings to go to decay, and in not repairing the same." It was held that Sir F. Vincent was entitled to cut all such timber (except ornamental), as the owner of the estate in fee simple, having due regard to his present interest and to the permanent advantage of his estate, might properly cut, in a due course of management (*k*).

Equity, in cases of equitable waste, interposed to prevent the tenant for life from exercising his legal right, it being considered an unconscionable use of such right. In this instance, therefore, there was a real " conflict " or " variance " between the rules of law and equity.

By section 45 of the Judicature Act, 1925 (re-enacting section 25, sub-section 8 of the Judicature Act, 1873), it is provided that a mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable. The words " just *or* convenient " should apparently be read " just *and* convenient "; or, as put by Jessel, M.R., in *Beddow* v. *B.* (*l*), " in ascertaining what is ' just,' you must have regard to what is convenient." The result is that there is now no right in a tenant for life to commit equitable waste, and that all the Courts will interfere to prevent such waste whenever it may be just and convenient so to do.

Where the act has been done, an account may be ordered and damages given against the wrong-doer (*m*).

(*k*) And see *Higginbotham* v. *Hawkins*, L. R. 7 Ch. 676; Bewes, p. 155; Kerr, Injunctions (6th ed.), p. 78.

(*l*) 9 Ch. D. p. 93.

(*m*) Cairns' Act, 21 & 22 Vict. c. 27, s. 2; St. Law Rev. Act, 1883, ss. 3 and 5; *per* Baggalay, L.J., in *Sayers* v. *Collyer*, 28 Ch. D. 103, p. 107; *Re R.*,

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The particular acts which the Court has restrained, or in respect of which it has given a remedy to the remainderman, are : 1. The destruction of, or injury to, the mansion-house, or other buildings on the estate. 2. Cutting down timber planted or left for ornament or shelter; or cutting timber or other trees in an unhusbandlike manner, or at unseasonable times (*n*).

Buildings.—A leading authority upon this subject is *Vane* v. *Lord Barnard* (*o*). There Lord Barnard, who, under the marriage settlement of his son, was tenant for life *without impeachment of waste* of Raby Castle, with remainder to his son for life, having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stripped the castle of the lead, iron, glass doors, boards, etc., to the value of £3,000. Lord Cowper granted an injunction to stay committing of waste by pulling down the castle, and decreed that the castle should be put into its former condition; and for that purpose a commission was to issue to ascertain what ought to be repaired, and a Master was directed to see it done at the expense of Lord Barnard, and decreed the plaintiff his costs (*p*).

But where a tenant for life *without impeachment of waste* has pulled down an old mansion, and used the materials in building a better mansion-house in a more desirable position, his estate has been held not to be liable to account for the value of the materials of the old house (*q*).

Upon a similar principle Lord Hardwicke said, that if tenant for life without impeachment of waste pulled down farmhouses in general, he would no more scruple restraining him than he would from pulling down the mansion-house (unless he pulled down two to make into one, in order to bear the burthen but of one) it tending equally to the destruction of the thing settled; or if he should grub up a wood settled, so as to destroy the wood absolutely, he should restrain him, as it would be what is termed in *Abrahall* v. *Bubb* (*r*) *extravagant and humorsome waste* (*s*).

[1906] 1 Ch. 731 (C. A.); *Cowper* v. *Laidler*, [1903] 2 Ch. 337; *Elmore* v. *Pirrie*, 57 L. T. 333; cf. *Doherty* v. *Allman*, 3 A. C. 709.

(*n*) Vaizey, p. 1889; Seton (7th ed.), p. 541.

(*o*) 2 Vern. 738.

(*p*) See *S. C.*, 1 Eq. Ca. Abr. 399; 1 Salk. 161; and see *Leeds* v. *Amherst*, 20 B. 239; *Aston* v. *A.*, *infra; Cooke* v. *Whaley*, or *Winford*, 1 Eq. Cas. Abr. 221, 400; *Williams* v. *Day*, 2 Ch. Cas. 32.

(*q*) *Morris* v. *M.*, 3 De G. & J. 323; Kerr, Injunctions (6th ed.), p. 83.

(*r*) 2 Freem. 54.

(*s*) *Aston* v. *A.*, 1 Ves. Sen. p. 265; *Dunn* v. *Ryan*, 7 Ir. R. Eq. 143; *Kerr*, Injunctions (6th ed.), pp. 73 and 78.

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In *Rolt* v. *Somerville* (*t*), Hardwicke, C., decreed reinstatement by the defendant, husband of a tenant for life unimpeachable, of houses and outbuildings pulled down and sold.

If between a lessor and his tenant there be an affirmative covenant, *e.g.*, to maintain buildings in their present condition and deliver them up in such condition at the end of the term, the Court, if asked to grant an injunction, will consider, before it exercises its discretion, whether by so interposing it will do more harm than good; whether the injury it is asked to restrain is an injury which, if done, cannot be remedied; whether it can be sufficiently atoned for by damages; whether the right to damages can be decided once and finally, or whether there must be a repetition of actions to recover damages from time to time; whether the effect of granting an injunction will damage the defendant more than it will benefit the plaintiff; and if it decides against the plaintiff, it may leave him to his right to damages only. But if in such a case there is a *negative* covenant, *e.g.*, that the lessee shall not turn the buildings to any other than their present use, the Court has no discretion to exercise; all it has to do is to say by way of injunction that which the parties have said by covenant—namely, that the thing shall not be done (*u*).

But, in such a case as the one supposed, the lessor may base his action on waste as well as contract, and the Court will then consider whether there is or is not any substantial damage which would accrue to the lessor from the acts of the lessee. And, although such acts may amount technically to waste, if it thinks them trivial, or that the inheritance is benefited rather than injured by them, it will not interfere. But if they are substantially injurious, then it will interfere by injunction to restrain such acts, and will order an account of the waste done for the purpose of recompensing the sufferer (*x*).

Timber (ornamental).—Although a tenant for life without impeachment of waste, and a tenant in tail after possibility of issue

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(*t*) 2 Eq. Ca. Abr. 759; Bewes, 168.

(*u*) *Doherty* v. *Allman*, 3 A. C., *per* Cairns, C., pp. 720, 721, followed in *Re McIntosh, etc., Co.*, 61 L. J. Q. B. 164; *McEacharn* v. *Colton*, [1902] A. C. 104; *Osborne* v. *Bradley*, [1903] 2 Ch. 446, 450; *Formby* v. *Barker*, [1903] 2 Ch. 539, 553; *Achilli* v. *Tovell*, [1927] 2 Ch. 243; and see section 19, sub-section 2 of the Landlord and Tenant Act, 1927.

(*x*) *Doherty* v. *Allman*, 3 A. C. pp. 722, 724; see *Coppinger* v. *Gubbins*, 3 Jo. & Lat. 411; *Jones* v. *Chappell*, 20 Eq. 539; *Tucker* v. *Linger*, 21 Ch. D. p. 28; *Hyman* v. *Rose*, [1912] A. C. 623.

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extinct, may fell all the ordinary timber upon the estate, it has long been established that a Court of equity will restrain them from committing *equitable waste*, by felling timber planted or left standing for the shelter or ornament of a mansion-house or grounds (*y*).

The form of the injunction generally is against cutting " timber or other trees planted or growing, etc.," " for the ornament, protection, or shelter, etc." (*z*).

The principle upon which the Court has gone, seems to be, that if the testator, or the author of the interest by deed, had gratified his own taste by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and, upon a competition between those parties, the Court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them; and it is not competent to them to substitute another species of ornament for that which the testator designed. The question, which is the most fit method of clothing an estate with timber for the purpose of ornament, cannot be safely trusted to the Court (*a*). So, likewise, Sir William Grant has observed, " As the Court cannot determine what is ornamental timber, it being merely a matter of taste, they therefore say, that what was planted for ornament must be considered as ornamental " (*b*). The question is with what intent the timber was planted, or left standing, not whether it is in fact ornamental, or useful for shelter, and so expert evidence founded on inference from the appearance of the estate is admissible to show the intent of the settlor (*c*).

The fact to be determined is, that the timber was planted for ornament, or if not originally planted, was left standing for ornament *by some person having the absolute power of disposition* (*d*). But in *Bedoyère* v. *Greville-Nugent* (*e*), it was said that trees not

(*y*) *Rolt* v. *Somerville*, 2 Eq. Ca. Abr. 759; *Packington's Case*, 3 Atk. 215; *Strathmore* v. *Bowes*, 2 Bro. Ch. 166; *Chamberlyne* v. *Dummer*, 1 Bro. Ch. 166; 3 Bro. Ch. 549; *Bedoyère* v. *Greville-Nugent*, 25 L. R. Ir. 143.

(*z*) See Seton (7th ed.), pp. 535-6, Forms 1 and 2.

(*a*) *Per* Eldon, L.C., in *Downshire* (*Marquis of*) v. *Sandys*, 6 V. 110.

(*b*) *Mahon* v. *Stanhope*, 3 Madd. 523 (n.); and see *Burgess* v. *Lamb*, 16 V. 174; *Coffin* v. *C.*, Jac. 70; *Marker* v. *M.*, 9 Ha. 1, 17.

(*c*) *Weld-Blundell* v. *Wolseley*, [1903] 2 Ch. 664; Kerr, Injunctions (6th ed.), p. 74.

(*d*) *Per* Eldon, L.C., *Wombwell* v. *Belasyse*, *infra*; and see *Mickelthwait* v. *M.*, 1 De G. & J. 504; and cf. *Coffin* v. *C.*, Jac. 70, p. 71.

(*e*) 25 L. R. Ir. 143.

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planted or left standing *exclusively* for ornament are not necessarily excluded from the rule.

The principle has been extended from the ornament of the house to outhouses and grounds, then to plantations, vistas, avenues, and to all the rides about the estate for ten miles round (*f*); but although the protection may be afforded to rides or avenues at a considerable distance from the mansion, it will not necessarily be extended to the woods through which they pass, so as to prevent them being cut for repairs (*g*). In *Downshire* v. *Sandys* (*h*), the injunction was extended to clumps of firs on a common two miles from the house, although land belonging to other persons intervened. "If," observed Lord Eldon, C., "the principle has been rightly applied, it is very difficult in argument to say it cannot be applied to a common as well as in field lands, and that the contiguity or remoteness, *if* de facto *it was planted* (or left standing) *for ornament*, can alter the principle upon which the rule of the Court is to be applied."

In *Day* v. *Merry* (*i*), the principle applicable to equitable waste was extended to trees planted for the purpose of excluding objects from view.

But circumstances may render the felling of ornamental timber justifiable. "For, if a tempest had produced gaps in a piece of ornamental planting, by which unequal and discordant breaks and divisions were occasioned, it would be going too far to hold, that cutting a few trees to produce an uniform and consistent, instead of an unpleasant and disjointed appearance, should be construed waste" (*k*).

So it seems that decaying timber might be cut which injured or impeded the growth of any other ornamental trees adjoining thereto (*l*). But such cutting should generally be done under the supervision of the Court (*m*).

So, likewise, ornamental timber may be felled if it be so near to a house as to be prejudicial to its healthiness, but the onus of proof

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(*f*) *Per* Eldon, L.C., 6 V. 110; and see *Jebb* v. *J.*, *Johnes* v. *J.*, and *Tamworth* v. *Ferrers*, cited 6 V. 110; *Williams* v. *M'Namara*, 8 V. 70.

(*g*) *Wombwell* v. *Belasyse*, 6 V. 110 a. (n.).

(*h*) 6 V. 107.

(*i*) 16 V. 375.

(*k*) *Per* Grant, M.R., in *Mahon* v. *Stanhope*, 3 Madd. 523 (n.).

(*l*) *Lushington* v. *Boldero*, 6 Madd. 149, 150; *Bedoyère* v. *Greville-Nugent*, 25 L. R. Ir. 143; *Ford* v. *Tynte*, 2 De G. J. & S. 127, and the form of inquiry, Seton (7th ed.), p. 536. See also *Baker* v. *Sebright*, 13 Ch. D. 179.

(*m*) See *Baker* v. *Sebright*, *supra*.

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will lie upon the persons felling the timber, who will be restrained from doing so on failure of proof (*n*). Again, the dedication for the purposes of ornament may be limited by an allowance of the use of ornamental timber for repairs to the house (*o*).

Generally, where there is no mansion, there will be no protection to the trees (*p*).

Where, however, it is either proved, or may be inferred, that in demolishing, or after the demolition of, a mansion-house, a testator intended, designed, or wished to rebuild it, or to reside at, or erect, a mansion-house, or place of residence on that estate, or intended, designed, or wished, that any devisee under his will should do so, timber, which was ornamental to the mansion-house while in existence, may be protected by the Court from being felled by a tenant for life without impeachment of waste (*q*). And in two well-known cases the ornamental timber has been protected although the mansion-house had been pulled down : see *Wellesley* v. *W.* (*r*), and *Morris* v. *M.* (*s*).

With reference to *Morris* v. *M.* (*s*), Turner, L.J., observed in *Micklethwait* v. *M.* (*t*), that there seem to be two grounds on which the injunction in that case was granted; that the *tenant for life* could not, by pulling down the mansion-house, entitle himself to the ornamental timber; and that if he was justified in pulling down the mansion-house by reason of the estate in trustees being unimpeachable of waste, there was an intention to be collected from the power to grant building leases, that the mansion-house should be rebuilt; and that it was upon the latter ground, too, and upon the ground of there being villas upon the estate, and the general scope of the settlement, that the case of *Wellesley* v. *W.* (*u*) seems to have proceeded.

In *Ashby* v. *Hincks* (*x*), there was no mansion-house at the date of the settlement, but one was afterwards acquired under a power of exchange. In an action by a tenant in tail in remainder to restrain a tenant, *pur autre vie*, from cutting ornamental or sheltering timber, an inquiry was ordered as in *Marker* v. *M.* (*y*),

(*n*) See *Campbell* v. *Allgood*, 17 B. 623.
(*o*) *Ford* v. *Tynte*, 2 De G. J. & S. 127, 133.
(*p*) *Newdigate* v. *N.*, 2 Cl. & Fin. 601; Bewes, p. 184.
(*q*) See the remarks of Knight-Bruce, L.J., in *Micklethwait* v. *M.*, 1 De G. & J. p. 519.
(*r*) 6 Si. 497.
(*s*) 15 Si. 505; 11 Jur. 196.
(*t*) 1 De G. & J. p. 529.
(*u*) 6 Si. 497.
(*x*) 58 L. T. 557.

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and an injunction granted, plaintiff giving undertaking as to damages.

Saplings and Underwood.—A Court of equity will restrain a tenant for life *without* impeachment of waste, from cutting down saplings not proper to be felled (*z*); and from cutting underwood before it is of sufficient growth (*a*); but not from felling timber, *merely because it is not full grown or proper for building*; for, as observed by Hardwicke, C., the reasoning of the cases of pulling down farm- or mansion-houses, or felling trees planted for ornament or shelter, does not come up to this, and it would be very dangerous for the Court to use such latitude as to extend this to the taking away the profits of the estate by tenant for life to the prejudice of the remainderman, which his estate for life without impeachment for waste gives him liberty to do (*b*).

In equitable as in legal waste, if one act of waste be proved, the Court will restrain equitable waste generally (*c*), and an injunction will be granted without evidence that cutting trees will cause damage (*d*).

There does not appear to be any settled form of inquiry as to what is ornamental timber applicable to all cases, for the question to what extent ornamental timber may be cut, must, it seems, depend upon the circumstances of each particular case, and the proper inquiry to be directed must vary accordingly. For instance, in some cases a wood may have been dedicated by the absolute owner for the purpose of ornament and shelter only; in others it may have been so dedicated, subject to its being used in the first place for the purpose of repairs, or even sale; and the form of inquiry would necessarily differ in each of these cases (*e*).

Trustees.—Where there has been a trust or restriction created for the preservation of ornamental timber, the Court will endeavour to enforce it, as it is not like a trust for purposes of benevolence, as to which the objects are unlimited and no standard can be found (*f*).

(*y*) 9 Ha. 1; Kerr, Injunctions (6th ed.), pp. 76-7.

(*z*) *O'Brien* v. *O'B.*, Amb. 107; *Downshire* v. *Sandys*, 6 V. 108; and see *Coffin* v. *C.*, 6 Madd. 17.

(*a*) *Brydges* v. *Stephens*, 6 Madd. 279; and see *Hole* v. *Thomas*, 7 V. 589.

(*b*) *Aston* v. *A.*, 1 Ves. Sen. 266; and see *Smythe* v. *S.*, 2 Swans. 251; *Coffin* v. *C.*, Jac. 72. But see Bewes, Waste, p. 181.

(*c*) *Coffin* v. *C.*, 6 Madd. 17.

(*d*) Vaizey, 898; *Bubb* v. *Yelverton*, 10 Eq. 465; *Baker* v. *Sebright*, 13 Ch. D. p. 188.

(*e*) See *Ford* v. *Tynte*, 2 De G. J. & S. 127, 134; see also *Halliwell* v. *Phillips*, 4 Jur. (N.S.) 607; *Wombwell* v. *Belasyse*, 6 V. 110 (n.); Seton (7th ed.). pp. 535-7.

(*f*) *Marker* v. *M.*, 9 Ha. 1, 18, 20.

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Where, moreover, trustees have power to fell timber large enough to comprehend ornamental timber, the Court, it seems, would not allow them unnecessarily to execute their power, to fell ornamental timber, but would direct them to leave that and to fell the timber which was not ornamental (*g*).

5. To whom the Proceeds of Waste belong.

A. Proceeds of Legal Waste. B. Proceeds of Equitable Waste.

A. Proceeds of Legal Waste.—By the common law uncontrolled by equity (and independently of the statutory provisions mentioned *infra*), where things are severed from the inheritance *by waste*, or by the act of God, as by tempest, or by a trespasser (*h*), while a tenant for life, *impeachable*, is in possession, whether they are materials of a house, timber, or the produce of mines, they will become at once the property of the owner of the first estate of inheritance *in esse*, whether in fee, or tail (*i*). And in such case an intermediate tenant for life, *unimpeachable*, cannot recover the proceeds in trover, because it seems he has no right to the timber cut before his estate came into possession (*k*).

Timber, therefore, properly so called, that is oak, ash and elm, over twenty years old, and other trees which are timber by custom (*l*) when cut down by a tenant for life, impeachable, or a stranger belongs, at law, to the first owner of the inheritance. Equity followed this rule of law (*m*) : except where either (a) there was collusion between the tenant for life and the next vested remainderman, or (b) timber was felled under an order of the Court or by a tenant for life without an order of the Court, but in proper management of the estate, and in a manner which the Court would have authorised had application been made for its sanction.

Collusion.—Where timber has been cut down by a tenant for

(*g*) *Downshire* v. *Sandys*, 6 V. 109; see *Kekewich* v. *Marker*, 3 Mac. & G. 311; *Aspinwall* v. *Leigh*, 1 Eq. Ca. Abr. 400; *Bennett* v. *Wyndham*, 23 B. 521.

(*h*) *Bewick* v. *Whitfield*, 3 P. W. 267.

(*i*) *Uvedall* v. *U.*, 2 Roll. Abr. 119; *Whitfield* v. *Bewit*, 2 P. W. 240; *Bewick* v. *Whitfield*, 3 P. W. 267; *Lewis Bowles' Case*, 11 Co. 79 b.; Tudor's Real Property Cases; *Seagram* v. *Knight*, L. R. 2 Ch. 628; *Honywood* v. *H.*, 18 Eq. 306.

(*k*) *Per* Kay, J., *Re Barrington*, 33 Ch. D. p. 527, citing *Pigot* v. *Bullock*, 1 V. 479, 484.

(*l*) See *Honywood* v. *H.*, 18 Eq. p. 309; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

(*m*) *Whitfield* v. *Bewit*, 2 P. W. 240; *Garth* v. *Cotton*, *supra*, at p. 913; *Pigot* v. *Bullock*, 1 V. 479; Seton (7th ed.), p. 545.

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years, or life, impeachable for waste, *in collusion* with the first owner of the inheritance, equity, as in the principal case, has interfered and has prevented such owner of the inheritance from getting any benefit by ordering the fund arising from the sale of the timber to be invested so as to follow the uses of the settlement of the land from which the timber was severed, or if, as in the principal case, a prior owner of the inheritance came into existence afterwards, it has ordered the fund to be paid to him.

Where, moreover, the tenant for life of land has in himself the next existent estate of inheritance, subject to intermediate contingent remainders, he will not be allowed to take advantage of his own wrong in cutting down timber, but the Court will preserve it for the benefit of the contingent remaindermen (*n*).

But it seems the Court will not interfere unless it is satisfied that the defendant, in his character of owner of the next existent inheritance, is colluding with himself in his character of tenant for life, in such a manner that if there had been two distinct persons, the Court would have interfered upon the ground of fraud and collusion. See *Birch-Wolfe* v. *Birch* (*o*), where it appeared that the tenant for life, who was also owner of the first vested estate of inheritance, had laid out sums in permanent improvements on the estate at least equal to the value of the amount realised by the acts of waste, which were themselves of a trivial character. The bill was dismissed by James, V.-C., who observed, "It would, in my judgment, be monstrous to say that a tenant in remainder, allowing a tenant for life to cut down timber in consideration and upon condition of the tenant for life doing these things for the benefit of the estate, was guilty of any fraudulent collusion which would induce this Court to extend this somewhat extraordinary jurisdiction to him; and if there would have been no ground for the interference of this Court in the case which I have supposed of tenant for life and tenant in remainder, I cannot put the case higher when it is the same individual who is doing the same thing in his double character with regard to the estate."

In this case the executor of the deceased tenant for life admitted that he had received the proceeds of certain timber cut by his testator, and was allowed, in the account directed to be taken

(*n*) *Williams* v. *Bolton*, 3 P. W. 268, cited in note by Mr. Cox; *Aston* v. *A.*, 1 Ves. Sen. 396; *Powlett* v. *Bolton*, 3 V. 374; Kerr, Injunctions (6th ed.), p. 81.

(*o*) 9 Eq. 683, 691.

against him, to take credit for the sums laid out by his testator in permanent improvements (*p*).

Timber ordered by the Court to be Felled or Cut in Due Course of Management.—Where a tenant for life impeachable for waste is in possession, the Court will order trees in a state of decay, or the standing of which is injurious to other trees (but not such as are merely ripe, unless they were injuring the growth of other timber) to be felled (*q*). This is done upon the ground, that the interest of the succession requires it, and the Court will direct the interest of the proceeds to be paid to the successive owners of the estate until the owner of the first absolute estate of inheritance *or* the first owner for life, unimpeachable for waste, on the determination of the preceding estates for life (*r*), is reached, and the same rule applies when the Court adopts the act of a trustee who has felled timber (*s*). In *Honywood* v. *H.* (*t*), Jessel, M.R., expressed the opinion, that where timber was cut under the orders of the Court, the proceeds followed the trusts of the settlement, so that the capital would vest in the person entitled to the first vested estate of inheritance. Where the cutting has been done without the authorisation of the Court, *but in due course of management*, it appears that the rule before stated is applied in equity, and if a tenancy for life unimpeachable for waste precedes the next vested estate of inheritance, the tenant for life unimpeachable will be entitled (*u*).

Where the timber has been rightly sold under the order of the Court, all the consequences of conversion must follow, and there is no equity for reconversion as between the devisees and the legatees of the owner of the inheritance (*x*).

The Settled Land Act, 1925, contains provisions materially affecting the law regarding waste. By section 66 (replacing section 35 of the Settled Land Act, 1882) it is provided that where a

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(*p*) *Birch-Wolfe* v. *Birch*, 9 Eq. 683.

(*q*) *Seagram* v. *Knight*, L. R. 2 Ch. 628; 3 Eq. 398; *Hussey* v. *H.*, 5 Madd. 44.

(*r*) *Tooker* v. *Annesley*, 5 Si. 235; *Waldo* v. *W.*, 12 Si. 107; *Philips* v. *Barlow*, 14 Si. 263.

(*s*) *Waldo* v. *W.*, *supra*; *Gent* v. *Harrison*, Johns. 517, 523; *Cowley* v. *Wellesley*, 1 Eq. 656; Seton (7th ed.), p. 545.

(*t*) 18 Eq. 300, at p. 311.

(*u*) *Lowndes* v. *Norton*, 6 Ch. D. 139; following *Gent* v. *Harrison*, Johns. 517; but see and compare *Seagram* v. *Knight*, L. R. 2 Ch. 632.

(*x*) *Hartley* v. *Pendarves*, [1901] 2 Ch. 498; and see *Burgess* v. *Booth*, [1908] 2 Ch. 648; *Fauntleroy* v. *Beebe*, [1911] 2 Ch. 257, and the notes to *Fletcher* v. *Ashburner*, vol. 1, *ante*.

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tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber or any part thereof. Three fourth parts of the net proceeds of sale are to be set aside as capital money and the other fourth part to go as rents and profits. By section 88, sub-section 2, the tenant for life, or any of his successors having under the trust instrument a limited estate or interest only in the settled land, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the Act or under enactments replaced by the Act.

By section 102 (which replaces section 42 of the Conveyancing Act, 1881, as amended by section 14 of the Conveyancing Act, 1911) provision is made for the management of land during a minority, and by sub-section 2 the trustees may fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and may erect, pull down, rebuild, and repair houses and other buildings, and continue the working of mines, minerals and quarries which have usually been worked. But this sub-section contains an important proviso—" but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same."

By section 47 (which replaces section 11 of the Settled Land Act, 1882) it is provided that under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under the Act, part of the rent as follows : Where the tenant for life or statutory owner is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rents shall go as rents and profits.

Before the Settled Land Act, 1882, it was necessary for a tenant for life impeachable for waste to commence an action in order to have ripe timber felled under the direction of the Court. The course, as stated above, was to invest the whole proceeds, and give him no part of the capital, but only the income.

" *Fruit and Profit of Soil.*"—It must be remembered in this

connection that it is not waste to consume a portion of the inheritance, when such portion is evidently intended to be enjoyed by each limited owner as profit or income (*y*). Therefore, where an equitable tenant for life under a will, *impeachable for waste*, cut timber, and each year took the proceeds of sale, it was held that the proceeds belonged to her, as it was clearly the intention of the testator that the timber growing on the estate should be enjoyed as fruit and profit of the soil (*z*). So the produce of the sale of underwood-timber cut periodically, and of gravel where the pits had been worked before, ought to be paid by the trustees to the tenant for life, though impeachable for waste, as part of the income of the estate (*a*).

In *Re Lacon's Settlement* (*b*), it was held by the Court of Appeal that where a tenant for life without impeachment of waste, recovers damages from a lessee for dilapidations to the mansion-house, under the repairing covenants in a lease granted by a previous tenant for life under his statutory power, such damages are not capital moneys, but may be retained by the tenant for life for his own use. And in *Re Williams' Settlement* (*c*), where a tenant for life of settled land without impeachment of waste recovered compensation under the Indemnity Act, 1920, for damages to a park by military authorities during the war, it was held that the compensation was a casual profit and might be retained by the tenant for life.

B. Proceeds of Equitable Waste. Ornamental Timber.—Where a tenant for life, unimpeachable for waste, or his assignees in bankruptcy, wrongfully fell ornamental timber, there is a certain conflict of authority as to the manner in which the proceeds should be dealt with. The author of the waste can take no benefit from his wrong, but whether the proceeds (subject to a direction to accumulate during the life of the tenant committing the waste) should be held upon the trusts of the settlement, or belong to the owner of the next vested estate of inheritance, is not free from doubt. In *Butler* v. *Kynnersley* (*d*) Lyndhurst, C., held that the proceeds of ornamental timber belonged to the person who at the time of the

(*y*) See *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.
(*z*) *Ibid.*
(*a*) *Cowley* v. *Wellesley*, 1 Eq. 656; and see *Harris* v. *Evans*, 20 W. R. 999 (cutting of turf).
(*b*) [1911] 2 Ch. 17.
(*c*) [1922] 2 Ch. 750.
(*d*) Otherwise *Ormonde* v. *Kynnersley*, 8 L. J. Ch. 67; 33 R. R. 180.

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wrongful cutting was entitled to the next vested estate of inheritance, considering that in this matter there was no distinction between legal and equitable waste (*e*). On the other hand, in *Honywood* v. *H.* (*f*), Jessel, M.R., after noticing the decision in *Butler* v. *Kynnersley*, said that modern decisions (*g*) had settled the law the other way, and that in the case of the commission of equitable waste the proceeds are invested, and the rule laid down where timber is felled under the order of the Court by a tenant impeachable for waste is followed, so that the income is given to the successive owners of the estate, until you get to the owner of the first absolute estate of inheritance, who can take the money. It seems open to question whether this distinction between legal and equitable waste now holds good (*h*).

An equitable tenant for life, unimpeachable for waste, is entitled to the proceeds of ornamental timber cut by him, where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber (*i*). But it does not follow that the Court will not, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary and proper to cut, and direct that the cutting be done under its supervision (*k*).

Windfalls.—A tenant for life is entitled to have the benefit arising from the sale of all such trees thrown down by the wind *as he would be entitled to cut himself* (*l*). But *timber* goes, as has been stated, to the first owner of the inheritance *in esse* (*m*).

With regard to a windfall of larch trees (which are not timber) the Court appears to dispose of the proceeds arising from the sale thereof in such a manner as will be just and equitable to all parties interested in a settled estate (*n*).

(*e*) See *Rolt* v. *Somerville*, 2 Eq. Cas. Abr. 759; but cf. the form of order in *Wellesley* v. *W.*, 6 Si. 497.

(*f*) 18 Eq. 300, at p. 311.

(*g*) See form of order in *Wellesley* v. *W.*, 6 Si. 497; *Lushington* v. *Boldero*, 15 B. 1; *Leeds* (*Duke of*) v. *Amherst* (*Earl of*), 2 Ph. 117, 125.

(*h*) See section 135 of the Law of Property Act, 1925 (taking the place of section 25, sub-section 3 of the Judicature Act, 1873), and section 44 of the Judicature Act, 1925.

(*i*) *Baker* v. *Sebright*, 13 Ch. D. 179.

(*k*) *Ibid.*

(*l*) *Bateman* v. *Hotchkin*, 31 B. 486; *Bagot* v. *B.*, 32 B. 509, 518.

(*m*) *Honywood* v. *H.*, 18 Eq. 306.

(*n*) See *Re Harrison*, 28 Ch. D. 220; *cf. Re Ainslie*, 30 Ch. D. 485; Bewes, 206.

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6. Remedies in Respect of Waste.

The remedies for waste at law were by the writ of waste (*o*), by an action on the case for damages, by trover, or by an action for money had and received for the produce of the sale (*p*). In *Petre* v. *Ferrers* (*q*), a reversioner recovered in detinue or trover an altar stone and relics removed from a part of the property demised to a tenant by the trustees of a settlement.

In cases of waste, however, resort was generally had to Courts of equity, not only because, previous to 17 & 18 Vict. c. 125, s. 79, they had exclusive jurisdiction by injunction to interfere to prevent the threatened commission of waste, or to forbid its continuance, and had alone full power to take accounts, but also because the law was defective and afforded no remedy in some cases of what was termed legal waste, and took no cognisance whatever of equitable waste.

By R. S. C., 1883, Order XVI, r. 37, it is provided that " In all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest."

We have seen that under the Judicature Act, 1925, s. 45 (*supra*, p. 949), all the Courts can now grant an injunction to prevent *threatened or apprehended waste*, if they think it " just and convenient " so to do (*r*). In *Browne* v. *Duffy* (*s*) an interim order was granted *ex parte*, after writ issued, where serious waste endangering buildings was being committed, and the Courts now have full power to grant an injunction or damages (*t*), or the restoration of the particular thing may be ordered : see *Petre* v. *Ferrers* (*u*). Any person with sufficient estate in reversion or remainder can institute proceedings, *e.g.*, a tenant for life in remainder (*x*), a remainderman although there is an intermediate

(*o*) Abolished by 3 & 4 Will. 4, c. 27, s. 36.

(*p*) *Seagram* v. *Knight*, L. R. 2 Ch. 632.

(*q*) 65 L. T. 568.

(*r*) See for the general principles as to granting injunctions against waste, the judgment of Kindersley, V.-C., in *Lowndes* v. *Bettle*, 33 L. J. Ch. 451; *Doherty* v. *Allman*, 3 A. C. 709; *Kehoe* v. *Lansdowne*, [1893] A. C. 451; Seton (7th ed.), p. 541.

(*s*) 24 L. R. Ir. 13.

(*t*) See *Sayers* v. *Collyer*, 28 Ch. D. p. 108; *Re R.*, [1906] 1 Ch. 730 (C. A.); *Serrao* v. *Noel*, 15 Q. B. D. 549; Jud. Act, 1925, s. 43.

(*u*) 65 L. T. 568.

(*x*) *Birch-Wolfe* v. *Birch*, 9 Eq. 683; Kerr, Injunctions (6th ed.), p. 62.

life estate, a jointress (*y*), a contingent executory devisee (*z*), a ground landlord against an under-lessee (*a*), and probably a receiver, even without waiting for an order giving leave, if the case is urgent (*b*).

But no injunction will be granted when the damage is trivial (*c*) or where the estate and interest of the person wasting has terminated before action (*d*).

The Court has granted an injunction to restrain equitable waste irrespective of the question whether or not any damage would be occasioned to the inheritance by the threatened cutting (*e*), for the remainderman has a right to ask the Court to prevent damage to him which may prove irremediable (*f*).

Account.—Generally speaking, before the Judicature Act, 1873, no account was granted in equity unless the Court could also grant an injunction, except in cases in which there was no legal remedy. But now every remedy necessary for doing complete justice in an action in any Division of the High Court of Justice is provided for by the Judicature Act, 1925 (replacing the Act of 1873), and each Division of that Court may, if it thinks fit, direct an account and grant damages, with or without an injunction (*g*).

Where an account of equitable waste committed by a tenant for life was directed to be taken against his executors, which it was found impossible to take accurately, and the Master had arbitrarily charged the executors, his report was supported upon the general principle that where a wrong had been committed the wrong-doer must suffer from the impossibility of accurately ascertaining the amount of the damage (*h*).

Where ornamental timber has been actually felled by a tenant

(*y*) *Lady Evelyn's Case*, 2 Swans. 172 (n.).

(*z*) *Robinson* v. *Litton*, 3 Atk. 209.

(*a*) *Farrant* v. *Lovel*, 3 Atk. 723.

(*b*) *Nangle* v. *Fingall* (*Lord*), 1 Hog. 142; Kerr on Receivers (8th ed.), p. 237.

(*c*) See the judgment of Cairns, C., in *Doherty* v. *Allman*, 3 A. C. pp. 720, 721.

(*d*) *Birch-Wolfe* v. *Birch*, 9 Eq. 683; *Elias* v. *Griffith*, 8 Ch. D. p. 534, affirmed 4 A. C. 454.

(*e*) *Bubb* v. *Yelverton*, 10 Eq. 465.

(*f*) *Baker* v. *Sebright*, 13 Ch. D. p. 188.

(*g*) See Judicature Act, ss. 36-45 (replacing sections 24 and 25 of the Judicature Act, 1873). See also R. S. C., Order XV, and *Newry* v. *Kilmorey*, 24 L. T. 15, where an account was ordered before the preliminary question as to whether certain trees were ornamental had been tried.

(*h*) *Leeds* v. *Amherst*, 20 B. 239; as to inquiries and accounts in cases of mines, see Seton (7th ed.), p. 539, Form 4.

for life unimpeachable for waste, and the reversioner claims damage for such waste, the amount can only be measured by the damage done to the inheritance (*i*).

Action against Legal Personal Representatives of Waster.—An action of waste does not lie at the *common law* against an executor for waste committed by his testator. No action for waste—permissive or voluntary—as such, lies against the executor of a tenant for life, for "*actio personalis moritur cum persona*" (*k*). The executor was, however, liable at law where the proceeds of the waste had come into the hands of his testator who had committed the waste (*l*), and an account would lie in equity against the executor (*m*). But if there is a duty not to commit waste imposed by the instrument which creates the estate, the right of action which at common law would have died with the person is continued by 3 & 4 Will. 4, c. 42, s. 2, against the executor, "so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executor shall have taken upon himself the administration of the estate and effects of such person" (*n*). Also, where there has been an injury to the plaintiff caused by the breach of an express or implied obligation, then the representative of such person will be liable on an *assumpsit*, and the maxim above cited will not apply (*o*).

Statutes of Limitation.—Where a tenant impeachable for waste fells timber wrongfully, the remainderman having the inheritance might either, as has been stated, have brought an action of trover for the trees, which became his property from the moment they were felled (*p*) (despite the existence of an intermediate estate of freehold (*q*)), or an action for money had and received for the

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(*i*) *Bubb* v. *Yelverton*, 10 Eq. 465; Kerr, Injunctions, p. 84.

(*k*) Williams' Executors (11th ed.), pp. 1342-4, 1352, 1357; *Hambly* v. *Trott*, Cowp. 371; *Turner* v. *Buck*, 22 Vin. Abr. p. 523, pl. 9; *Phillips* v. *Homfray*, 24 Ch. D. 439; *Re Cartwright*, 41 Ch. D. 532.

(*l*) Williams' Executors (11th ed.), pp. 1345, 1358, 1359; *Hambly* v. *Trott*, *supra*; *Powell* v. *Rees*, 7 A. & E. 426; *Phillips* v. *Homfray*, *supra*.

(*m*) *Winchester* (*Bishop of*) v. *Knight*, 1 P. W. 406; *Powell* v. *Aiken*, 4 K. & J. 352; *Lansdowne* v. *L.*, 1 Madd. 116 (equitable waste); *Garth* v. *Cotton*, *supra*.

(*n*) *Woodhouse* v. *Walker*, 5 Q. B. D. 404; Williams' Executors (11th ed.), pp. 613 and 1346.

(*o*) See judgment of Cotton, L.J., *Batthyany* v. *Walford*, 36 Ch. D. 279. Cf. *Blackmore* v. *White*, [1899] 1 Q. B. 293; *Galbraith* v. *Poynton*, [1905] 2 K. B. 258 (cases as to permissive waste by copyhold tenant for life).

(*p*) *Whitfield* v. *Bewit*, 2 P. W. 239.

(*q*) *Pigot* v. *Bullock*, 1 V. 479.

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produce of the sale, or he might have instituted a suit in equity for an injunction and an account. The Statute of Limitations (*r*) would, however, if the owner of the inheritance were not under disability, begin to run from the time when the timber was felled, and after the expiration of six years his remedy would be barred (*s*).

If, however, the owner of the inheritance were an infant, time would only begin to run from the day he attained twenty-one years of age (*t*), and if the tenant for life who had committed waste became his administrator, the running of the statute would be suspended during the administration (*u*).

A claim in equity by a subsequent tenant for life against the estate of a deceased tenant for life who was also owner of the first vested estate of inheritance, for acts of waste committed by him when tenant for life, only arises at his death, because there was nobody before that time entitled to bring an action in respect of the wrong; but the claim will be barred by the Statute of Limitations if not made within six years from that date (*x*).

It has been held that where *equitable waste* had been committed by a tenant for life, time does not begin to run against the tenant in tail in remainder until he comes into possession upon the death of the tenant for life, and that the statutory rule which now gives to him twelve years from the time when his title accrues in possession for bringing an action or suit for the property, is applicable to a claim for compensation for equitable waste as well as to a claim to the land itself (*y*). But this does not apply to legal waste (*z*).

It seems, however, that where a tenant for life impeachable for waste fells timber without authority, and invests the produce of the

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(*r*) 21 Jac. 1, c. 16, 3 & 4 Will. 4, c. 27, 37 & 38 Vict. c. 57; see *Dashwood* v. *Magniac*, [1891] 3 Ch. p. 386.

(*s*) *Seagram* v. *Knight*, L. R. 2 Ch. 628; *Higginbotham* v. *Hawkins*, L. R. 7 Ch. 676; *Dashwood* v. *Magniac*, *supra*; Hewitt on Limitations, pp. 23-5.

(*t*) *Seagram* v. *Knight*, *supra*.

(*u*) *Ibid.*

(*x*) *Birch-Wolfe* v. *Birch*, 9 Eq. 683; *Dashwood* v. *Magniac*, [1891] 3 Ch. p. 386.

(*y*) *Leeds* (*Duke of*) v. *Amherst*, 2 Ph. 117; and see *Harcourt* v. *White*, 28 B. 303, in which Romilly, M.R., appears to have considered that a bill for an account by a tenant for life in remainder could be brought at any time within twenty years after the falling in of the first life estate. The case was actually decided on the ground that the plaintiff was disentitled to relief by his acquiescence and delay. As to whether a bill of this character is sustainable at all by a tenant for life in remainder, see *Birch-Wolfe* v. *Birch*, 9 Eq. 683, and cases there cited; and see Hewitt on Limitations, pp. 24-5.

(*z*) See *Seagram* v. *Knight*, *supra*; *Simpson* v. *S.*, 3 L. R. Ir. 65; *Morris* v. *M.*, 3 De G. & J. 323; *Dashwood* v. *Magniac*, [1891] 3 Ch. p. 387.

timber, and treats it as a trust fund, then a trust will arise; he will have constituted himself a trustee for the persons entitled to the estate, and no time will be a bar to the right of recovery against him (*a*).

After long delay in taking proceedings against a tenant for life for the waste, the Court will endeavour to deal liberally towards him (*b*).

Where no Statute of Limitation applies, directly or by analogy, equity may refuse to act if the demand is stale and the plaintiff has been guilty of laches (*c*).

(*a*) *Seagram* v. *Knight*, 3 Eq. 398, at p. 402.

(*b*) *Bagot* v. *B.*, 32 B. 509.

(*c*) *Harcourt* v. *White*, 28 B. 303; and see further as to acquiescence, *Leeds (Duke of)* v. *Amherst*, 2 Ph. 117, 123, 124, 125; *Gresley* v. *Mousley*, 10 W. R. 222; *Browne* v. *McClintock*, 6 H. L. Cas. 456; *Parrott* v. *Palmer*, 3 My. & K. 643; Bewes, 359

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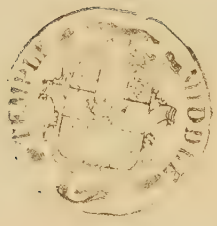

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